

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



Office of Government Ethics

August 6, 2013

Advisory Opinion

Discounts Offered to District Government Employees¹

This Advisory Opinion addresses several questions received by the Board of Ethics and Government Accountability (“BEGA”) regarding discounts offered to District of Columbia government employees by non-governmental entities. Such discounts may be for, but are not limited to: (a) mobile phone service; (b) gym membership; (c) event tickets; (d) sporting events; or (e) hotel rates. This Advisory Opinion serves to provide guidance regarding whether, and in what circumstances, District government employees may accept discount offers.

Authority Governing Gifts

The acceptance of gifts by District government employees is governed by Chapter 18, Title 6B of the D.C. Municipal Regulations,² the Council Code of Conduct, and the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 (“Ethics Act”), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 (2012 Supp.)), and is under the jurisdiction of the Board of Ethics and Government Accountability (“BEGA”). As defined by DPM § 1803.2(b) and Council Code of Conduct § III(f)(1), a discount, because it is a thing of value, is considered a gift.³ The analysis of whether it is permissible for District government employees to accept a gift in the form of a discount begins with a review of the pertinent DPM and Council Code of Conduct gift provisions.

DPM

1803.2 (a) Except as noted in section 1803.3 of this section, a District government employee shall not solicit or accept, either directly or through the intercession of others, any gift from a prohibited source.

1803.2(b) For the purposes of this section, the following terms shall have the meaning ascribed:

Gift - any gratuity, favor, loan, entertainment, or other like thing of value.

Prohibited source - any person or entity that:

¹ The term “District Government Employees” refers to employees and agency heads of the Executive and Legislative branches of District government, including Councilmembers, and council staff, employees and agency heads of independent agencies, and members of Boards and Commissions who receive compensation.

² Hereinafter, Title 6B of the D.C. Municipal Regulations will be referred to as the “District Personnel Manual” or “DPM.”

³ This Advisory Opinion’s analysis of the gift provisions contained in the Council Code of Conduct is limited to Council Code of Conduct § III (Gifts from Outside Sources) and does not include § IV (Conferences, Travel, and Receptions).

- (1) Has or is seeking to obtain contractual or other business or financial relations with the District government;*
- (2) Conducts operations or activities that are subject to regulation by the District government; or*
- (3) Has an interest that may be favorably affected by the performance or non-performance of the employee's official responsibilities.⁴*

Council Code of Conduct

III(a) Except as provided in subsection (c) of this Rule and Rule IV, employees shall not solicit or accept, either directly or indirectly, any gift from a prohibited source.⁵

III(c) Notwithstanding subsection (a) of this Rule, an employee may accept the following gifts:

- (4) Opportunities and benefits, including favorable rates and commercial discounts:

 - (A) Available to the public or to a class consisting of all District employees;*
 - (B) Offered to members of a group or class in which membership is unrelated to District employment; or*
 - (C) Offered to members of an organization, such as an employees' association or agency credit union, in which membership is related to District employment if the same offer is broadly available to large segments of the public through organizations of similar size;**
- (6) Anything that is paid for by the Council or the District or secured by the Council or the District under contract;*
- (10) Reduced membership or other fees for participation in organization activities offered to all District employees by professional organizations if the only restrictions on membership relate to professional qualifications;*

In addition to the DPM and Council Code of Conduct gift provisions, we also must look to DPM § 1803.1 for further guidance on the responsibilities of District government employees.

1803.1 (a) An employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in or create the appearance of the following:

- (1) Using public office for private gain;*

Can District government employees permissibly accept a Discount?

As stated previously, under the definition of a gift as provided in the DPM and the Council Code of Conduct, a discount is a gift because it is a “thing of value.”⁶ If the entity conferring the discount has or is seeking to obtain contractual or other business or financial relations with the District government, conducts operations or activities that are subject to regulation by the District

⁴ In addition, District employees must not accept gifts, whether or not from a prohibited source, if the gift is motivated by an employee's status as a government employee (DPM § 1803.1(a)(1)(using public office for private gain)), an intent to gain preferential treatment (§ 1803.1(a)(2)), or is meant to reward an employee for carrying out official government duties (§ 1803.7 and 18 U.S.C. § 209 (salary supplementation)).

⁵ Council Code of Conduct § III(f)(2) uses the same definition of “prohibited source” as DPM § 1803.2(b).

⁶ See, DPM § 1803.2(b) and Council Code of Conduct, Section III(f)(1).

government, or has an interest that may be favorably affected by the performance or non-performance of a District employee's official responsibilities, the entity would be considered a prohibited source. Therefore, under a plain reading of DPM §§ 1803.2 (a) and (b) and Council Code of Conduct § III(f)(2), District employees are prohibited from accepting a discount offered by a prohibited source. Although this general prohibition applies, this opinion will explore several applicable exceptions.

In addition to addressing the DPM and Council Code of Conduct provisions regarding gifts from prohibited sources, this opinion also will explore whether the acceptance of a discount by a District government employee because of his or her status as a District government employee is permissible. District government employees are prohibited from “using public office for private gain” and may not be rewarded by an outside source for carrying out official functions or duties.⁷ We answer these questions by analyzing various discount scenarios in light of the DPM and Council Code of Conduct, which define the responsibilities of District government employees and Councilmembers and their staffs.⁸

Types of Discounts

1. Discounts offered to the general public

We first address discounts “available to the public.”⁹ If the discount is offered to the general public and not restricted to a particular subgroup of prospective purchasers, it is permissible for a District government employee to accept the same discount. Because it is offered to the general public, District government employees who receive the discount are not using their public office for private gain because the receipt of the discount is not dependent on their status as District government employees. For example, if a supermarket offers pints of strawberries “buy one, get one free” or if a clothing store offers a 50% off clearance sale, District government employees can accept the discount because it is available to the general public. 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.”¹⁰ Taking advantage of discounts that are available to the general public, even if the source of the discount is a prohibited source, does not violate the DPM’s gift provisions and is explicitly permitted by the Council Code of Conduct.¹¹

2. Discounts offered to a class consisting of *all* District government employees

Discounts available to a class consisting of *all* District government employees are intended to cover “commercial discounts that are offered to all . . . employees on the same terms.”¹² District government employees may accept discounts on fees such as gym memberships or hotel rates that are offered to *all* District government employees.

In situations where a discount offer is made to a class as large and diverse as all District government employees, “there is little likelihood that the offeror is seeking to gain influence or to supplement employees’ salaries.”¹³

⁷ See, DPM § 1803.1(a)(1), § 1803.7 and 18 U.S.C. § 209.

⁸ In the absence of an internal District directive on the subject of discounts, we look to the United States Office of Government Ethics (U.S. OGE) for guidance. The U.S. OGE has issued several advisory opinions on the subject of discounts. The U.S. OGE advisory opinions are based on interpretations of the Code of Federal Regulations, which defines the responsibilities of federal employees.

⁹ See, U.S. OGE Informal Advisory Letter 93 x 29.

¹⁰ See, U.S. OGE Informal Advisory Letter 85 x 13.

¹¹ Council Code of Conduct § III(c)(4)(A).

¹² See, U.S. OGE Informal Advisory Letter 92 x 96.

¹³ See, U.S. OGE Informal Advisory Letter 85 x 13.

Instead, the offer most likely is made because of the size of the employer (District government), not because of the employer's status as a governmental entity. Certainly, there is nothing to suggest that the offer is being made to any one individual District government employee because of his or her status as such. There is also little risk that an expectation of favorable or preferential treatment of the offeror will be created, even if the mass discount originates from a prohibited source. As a result, receipt of such a discount is not construed as "using public office for private gain." Discounts that are available to *all* District government employees are permissible, even if they are from a prohibited source.¹⁴

3. Discounts offered to subgroups of District government employees

In contrast to discounts offered to a class consisting of *all* District government employees, discounts offered *only to subgroups* of employees "raise the possibility of an improper motive and create appearance problems."¹⁵ Discounts offered only to subgroups of employees may include discounts offered only to District government employees in specific agencies, discounts offered only to District government agencies with more than a specified number of employees, or discounts offered only to District government agencies that have a contractual relationship with the entity offering the discount. Such discounts bring into question the offeror's motives. There is the possibility that the offeror has singled out the subgroup because of some benefit, beyond increased sales (as discussed above), that the offeror expects to receive from the subgroup. This is especially true where a subgroup such as an agency has a contractual or other type of financial relationship (i.e., a grantee) with the entity offering the discount. For this reason, discounts offered *only to subgroups* of District government employees are generally prohibited.

4. Discounts received as a result of goods or services paid for by the District government or secured by the District government under a District government contract

The DPM does not specifically address receipt of goods and services paid for by the District government or secured under a District government contract. It is our view, then, that anything that is paid for by the District government or secured under a District government contract is excluded from the definition of gift. This is consistent with the Council Code of Conduct, which specifically excludes goods and services paid for by the District government or secured under a District government contract from definition of gift.¹⁶ The rationale for this view is that "items secured under Government contract . . . accrue to the employee from the Government and, thus, are not gifts from an outside source."¹⁷

This means that District government employees may accept discounts on parking fees or concierge services provided for in their agency's lease for building space. Similarly, if a health club opens in the building of a District government agency and that agency provides a discount for its employees as a term of its lease, then the District government employees of that agency could accept the discount without violating the DPM's gift provisions. The exclusion turns on the discount being a term of the agency's lease or contract. In contrast, if a building landlord offers an agency head event tickets because the agency head's agency is a tenant, not because the event tickets were a term of the lease, the event tickets would be considered a gift and the agency head would be prohibited from accepting that gift.

There are two limitations regarding this general rule of which District government employees need to be aware. The first limitation involves the receipt of promotional benefits from a travel provider. Any promotional benefits a District government employee receives, such as frequent

¹⁴ Council Code of Conduct § III(c)(4)(A) expressly permits acceptance of such discounts.

¹⁵ See, U.S. OGE Informal Advisory Letter 85 x 13.

¹⁶ Council Code of Conduct § III(c)(6).

¹⁷ See, U.S. OGE Informal Advisory Letter 85 x 13.

flier miles or hotel points, as a result of official District government travel, are considered the property of the District government and may not be used by the District government employee for personal use.

The second limitation involves the receipt of personal benefits to which the District government is entitled under a District government contract. For example, if a copy machine supplier offers a free iPad with the purchase of a copy machine and that copy machine is purchased using District government funds, the employee who managed the purchase may not accept the free iPad for personal use because it is the property of the District government.

5. Discounts that do not confer a benefit¹⁸

Situations where a selling price is listed as a “discount” price, when in fact the price is not lower than the “market value” price are not considered gifts because they do not confer any benefit to the District government employee who accepts the discount. “Market value” represents the retail cost an employee would incur to purchase an item. Aside from event tickets, where the face value dictates the “market value,” employees can ascertain “market value” by “reference to the retail cost of similar items of like quality.”¹⁹

For example, if a discount clothing store offered District government employees suits for a discounted price of \$500, while a second, comparable discount clothing store offered similar suits of like quality for a non-discounted price of \$500, the discount offered by the first discount clothing store would not be considered a gift because those employees who accepted the “discount” price would be paying “market value.” Therefore, a District government employee who paid the “discount” price would not be using his or her public office for private gain and an analysis as to whether the discount is offered by a prohibited source would be unnecessary.

Due to the vagaries and subjective nature of product valuation, caution should be exercised in ever accepting anything which is advertised as discounted. The safest approach is to assume that an item that is said to be discounted, actually is discounted, and then to proceed accordingly.

6. Discounts based on a negotiated price

In general, District government employees may enter into negotiated business transactions with persons outside the government, but “in certain situations, a negotiated price will reflect a discount and that discount may prove to be a prohibited gift.”²⁰ The question of whether the negotiated price constitutes a gift turns on the objective value of the negotiated item. “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.”²¹ “Fair value” is “a price sufficient to cover the company’s anticipated costs and allow for a fair profit.”²²

In any case involving the negotiation of the selling price of a good or service, as discussed above, District government employees must ensure that they are not using their official title or position to receive a discount, or that the reason the discount is being offered is because of their District government employee status. Where a vendor provides a negotiated discount based on a District government employee’s official title or position, that discount is considered an improper gift. For example, if an apartment building landlord offers the Director of a District government agency a

¹⁸ Although Council Code of Conduct § III(c)(7)(C) makes reference to an exception for “anything for which market value is paid by the employee,” the exception is only applicable to “any donation accepted by the Council under specific authority.”

¹⁹ See, U.S. OGE Informal Advisory Letter 85 x 13.

²⁰ Id.

²¹ Id.

²² Id.

lease for a fraction of the going rental rate, the Director should be aware that the negotiated discount may have been offered as a result of his or her official title or position, and that the discount would likely be considered a gift that the Director is prohibited from accepting.

Summary of Discount Exceptions

1. Certain discounts offered by professional organizations

This exception allows District government employees to accept discounts on memberships or other fees for participation in organization activities offered to all District government employees by professional organizations if the only restrictions on membership relate to professional qualifications.²³ These discounts are permissible because they represent a standard offer that the organization has made broadly available to large segments of the public. For example, if a state Bar offered all members a reduced rate for trial advocacy training, a District government employee who was a member of that Bar permissibly could accept the discount because it was offered to all members and only restricted by membership.

2. Certain discounts offered to a class in which membership is unrelated to District government

This exception allows District government employees to accept discounts offered to organization members in which membership is unrelated to District government employment.²⁴ For example, District government employees may permissibly accept discounts provided by their membership in a national travel club because membership in such an organization is unrelated to their District government employment.

3. Certain discounts related to District government employment but broadly available outside of District government

This exception allows District government employees to accept discounts offered to organization members in which membership is related to District government employment if the same offer is broadly available to large segments of the public through organizations of similar size.²⁵ For example, discounts offered to members of a District government employees' union would be permissible under this exception, provided that they are also broadly available to the public through federal government unions or private sector unions of comparable size.

4. Certain discounts that represent a nominal value (under \$10)²⁶

Discounts that result in District government employees receiving a nominal value (i.e. under \$10) fall under an exception to the gift provisions under the DPM or Council Code of Conduct if the discount is received on a non-recurring occasion.²⁷ If the source of the nominal value discount is not a prohibited source, then acceptance of the gift is permitted. For example, if a sandwich shop that was not a prohibited source was opening a location near a District government agency and they offered a one-time free lunch (under \$10) to all employees of that agency to celebrate the sandwich shop's grand opening, the District government employees would be permitted to accept

²³ Council Code of Conduct § III(c)(11) already expressly permits the acceptance of "reduced membership or other fees for participation in organization activities offered to all District employees by professional organizations if the only restrictions on membership relate to professional qualifications."

²⁴ Council Code of Conduct § III(c)(4)(B) already expressly permits the acceptance of discounts "offered to members of a group or class in which membership is unrelated to District employment."

²⁵ Council Code of Conduct § III(c)(4)(C) already expressly permits the acceptance of discounts "offered to members of an organization, such as an employees' association or agency credit union, in which membership is related to District employment if the same offer is broadly available to large segments of the public through organizations of similar size."

²⁶ Under Council Code of Conduct § III(c)(8)(C), an employee may accept "unsolicited gifts having an aggregate market value of \$20 or less per source per occasion."

²⁷ See, DPM § 1803.3(e)

the one-time free lunch because the sandwich shop is not a prohibited source and the lunch is of nominal value and was offered on a non-recurring occasion.

If, however, the source of the nominal value discount is a prohibited source, acceptance of the gift may still be permitted, but only if there is no improper motive for giving the gift. To use our earlier example, if the sandwich shop is a prohibited source and offered the same discount (lunch of nominal value on a non-recurring occasion), District government employees would be permitted to accept the offer only if the sandwich shop did not expect a benefit in return from the District government employees to whom the sandwich shop offered the discount.

5. Certain discounts restricted to geographic locations

This exception allows District government employees to accept discounts that are restricted to geographical locations as long as geographic location is the only restriction. For example, if a national chain drug store offered a discount to *all* District government employees, but the discount is available only to stores located in the District, and not in Maryland, Virginia, or elsewhere, District government employees would be permitted to accept the discount. This is because the discount was offered to *all* District government employees and the only restriction is the geographic location.

Conclusion

Even though discounts can be considered gifts that are subject to the gift provisions found in the DPM and the Council Code of Conduct, there are a number of applicable exceptions that allow District government employees to accept discount offers. For example, District government employees may take advantage of discounts that are available to the general public, are offered to *all* District government employees, have only a geographic limitation, have a nominal value and are offered on a one-time basis, are part of a District government contract, are offered by professional organizations, or are offered based on membership in an organization and are unrelated to the employee's District government position. District government employees are prohibited from accepting discounts offered based on their District government employment, or offered to certain subgroups of District government employees.

When considering whether accepting a particular discount is permissible, if there is any question as to whether the source is a prohibited source or whether the discount offer has impermissible restrictions, or any other concerns, District government employees should contact this Office for guidance.

Please be advised that this advice is provided pursuant to section 219 of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012, D.C. Law 19-124, D.C. Official Code § 1-1161.01 *et seq.*, which empowers me to issue, on my own initiative, an advisory opinion on any matter I deem of sufficient public importance concerning a provision of the Code of Conduct over which the Ethics Board has primary jurisdiction. (See, D.C. Official Code § 1-1162.19(a-1)).

Sincerely,



DARRIN P. SOBIN
Director of Government Ethics
Board of Ethics and Government Accountability