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EMUP

Advisory Opinion
Case No. 93015.A, Gifts

Date: May 21, 1993

You are [REDACTED], [REDACTED] in the [REDACTED] Department, and request an advisory opinion from the Board of Ethics about an offer the [REDACTED] Department received from a branch of the [REDACTED] Bank. [REDACTED], Manager of the [REDACTED] Facility of the bank, has offered free checking service at that branch to all [REDACTED] and [REDACTED] Department personnel. You ask if the Governmental Ethics Ordinance prohibits employees in your department from accepting the offer. It is the Board's opinion that this offer is a sales promotional, a part of a broader marketing plan to expand business, rather than a gift, and is not prohibited by the Ordinance. Our analysis follows.

FACTS: Ms. [REDACTED] told staff she made this offer of free checking to [REDACTED] and [REDACTED] personnel first by telephone and then in writing to both the [REDACTED] Department, through you, and the [REDACTED] Department, through [REDACTED] in [REDACTED].

Ms. [REDACTED] said that her bank [REDACTED] offers every customer a free checking account that includes a limit to the number of checks the customer can write per month. For a checking account with an unlimited number of checks a month, a customer normally pays a \$5 per month service fee after the first three months, which are free. The City [REDACTED] and [REDACTED] Department employees are being offered an account on which they can write an unlimited number of checks per month without a service charge. According to Ms. [REDACTED], this offer does not include discounts on any bank service other than checking.

Ms. [REDACTED] told us she initiated this offer; it was not in any way solicited by the City departments. She said she chose these departments for the offer because of the support these workers give the community. She said an offer of free checking is a standard marketing device the bank often uses as a way to gain new accounts and expand its business.



Her branch has made this same offer on a number of occasions, both to the general public and to other business groups. Ms. [REDACTED] estimated that this offer has been extended to the general public about once a year. She said the account is offered free of service charges sometimes for a year and sometimes indefinitely. In this case, the checking account is being offered to the [REDACTED] and [REDACTED] Department employees free of charges for an indefinite period of time; officially, these terms are to be available to them as long as they remain employed by the City.

This offer applies only to accounts opened at the [REDACTED] Facility of [REDACTED] Bank, not at other bank branches. Ms. [REDACTED] said each branch manager makes his or her own decision about what kind of offer a branch will make.

In her letter to the [REDACTED] Department, Ms. [REDACTED] stated that her branch would be open on Sundays to accommodate the personnel who would like to sign up for free checking. She told us that most branches of [REDACTED] Bank are open on Sundays and her branch used to have Sunday hours, but no longer does. She decided the branch could open for the Sunday hours it previously had in order to sign up those interested in the checking account offer; she decided on the Sunday hours partly in response to the [REDACTED] Department's reply that it would be difficult for some of its employees to make it to the [REDACTED] branch during its regular business hours.

The bank [REDACTED] has no City contracts with either the [REDACTED] or [REDACTED] Departments, so none of the employees to whom this offer is being made appear to be in a position to influence City action in which the bank [REDACTED] may be interested.

LAW: The provision of the Ethics Ordinance most relevant to this situation is section 2-156-040(c), under the title of "Offering, Receiving and Soliciting Gifts or Favors," which states:

- (c) No person who has an economic interest in a specific City business, service or regulatory transaction shall give, directly or indirectly, to any City official or employee whose decision or action may substantially affect such transaction, or to the spouse or minor child of such official or employee, and none of them shall accept, any gift of (i) cash or its equivalent regardless of value, or (ii) an item or service other than an occasional one of nominal value (less than \$50) provided, however,

nothing herein shall be construed to prohibit such person from accepting gifts from relatives.

The definition of "gift," set forth in section 2-156-010(m), is:

(m) "Gift" means any thing of value given without consideration or expectation of return.

Section 2-156-040 (b), addressed to the circumstances where an item or service of value is given with an understanding that official action will be affected, should also be considered. It states:

(b) No person shall give or offer to any official, employee, or City contractor, or the spouse or minor child of either of them, and none of them shall accept, anything of value, including, but not limited to, a gift, favor or promise of future employment, based upon any mutual understanding, either explicit or implicit, that the votes, official actions, decisions or judgments of any official, employee or City contractor, concerning the business of the City would be influenced thereby. It shall be presumed that a non-monetary gift having a value of less than \$50 does not involve such an understanding.

Finally, under section 2-156-160(e), each person required to file a Statement of Financial Interests must report the name of any person from whom the individual received within the past year gifts or honoraria with a value of over \$500.

ANALYSIS: Section 2-156-040(c). Subsection (c) prohibits a gift either of cash or of an item or service (except for an occasional nonmonetary gift valued at under \$50), in specified circumstances. In order to be prohibited by subsection (c), the cash, item or service must qualify as a "gift" under the Governmental Ethics Ordinance -- it must be "given without consideration or expectation of return."

The acceptance of an offer that is extended as part of a standard sales promotion is not a gift under the Ordinance. A review of Board of Ethics cases 87118.A and 88039.A, discussed below, indicate that a typical sales promotion is characterized by the following: (1) an offer is extended to the public or a market of similarly situated persons, and (2) the purpose of the offer is to create a sale and/or to expand business, so

that acceptance of the offer is an economic benefit to the offeror either in itself, as an exchange for a particular purchase, or else as an incentive to future business. Because acceptance itself benefits the offeror, the sales promotion is an exchange transaction, not a gift.

A discount, even one not advertised to the public, is a kind of sales promotion if it is generally available, and is offered at a level that is "not significantly above" that offered to others in "similar buying situations" (Case No. 88039.A, involving an automobile purchase).

The characteristics of a sales promotion are present in this case: First, the offer is extended to a market of similarly situated persons. The fact that the offer is directed generally, to all personnel of two departments, and is not focused on those who can affect City decisions relating to the bank, or even on those who are the decision-makers in the two departments, is an indication that the offer is directed to a market and is intended to promote business, not to affect City decisions. The fact that an identical offer is sometimes extended to others similarly situated in private business and is extended to the general public further strengthens this interpretation. Second, acceptance of the offer will provide a business benefit to the offeror. In this instance acceptance involves both an economic benefit in itself, in the form of immediate business, and an inducement to future business. Acceptance entails the customer opening an account and putting funds in the bank, which will provide the bank the benefit of the use of those funds and will generate income for the bank. Acceptance of the offer is also an inducement to future business -- having opened an account, the new customer will be situated to buy further bank services. It follows that the offer in question is part of a sales promotion, and is not a "gift" under the Ordinance.

See Case No. 87118.A, in which the Board found that the \$50 savings bond offered by various Health Maintenance Organizations (HMOs) to City officials and employees who enrolled in their health care plans was not a "gift" under the Ordinance, because it was offered in exchange for enrollment in the plan; the Board found that subsection (c) of the gifts provisions prohibits only "gifts," and therefore did not apply. Also see Case No. 88039.A, in which the Board found that a discount equally available to the public, that is not significantly above that offered to other persons in similar buying situations, was not subject to the gifts provisions of

the Ordinance, unless other factors were present to indicate an attempt to influence the employee or official.

From the language of subsection (c) and the Ordinance definition of "gift" applied to the facts of this case, and an analysis of prior cases, the Board concludes that the [REDACTED] Facility's offer of free checking to the employees of two City departments is a business promotion, and so does not constitute a "gift" under the Ethics Ordinance. Therefore acceptance of the offer is not prohibited by subsection (c), and does not need to be reported, even if its value is greater than \$500, on a Statement of Financial Interests.

Section 2-156-040(b). Subsection (b) of section 2-156-040 prohibits a person from offering and a City employee or official from accepting an offer of anything of value, with the mutual understanding that the recipient's official actions relating to City business will be influenced by the offer or acceptance. Subsection (b) is not limited to "gifts" as defined by the Ordinance. See Case No. 87118.A.

The Board has, on one occasion, relied on 2-156-040(b) to advise against the acceptance of an item of value where the situation permitted the inference that there was an attempt to influence official action, even where there was no direct evidence of an understanding. See Case No. 90064.A (involving prizes at a golf outing). Therefore it is appropriate to ask whether the circumstances of a sales promotion give rise to a relevant inference.

The very factors that indicate that an offer is part of a standard sales promotion, including a promotion in the form of a discount that is generally available and is offered at a level that is not significantly above that offered to others, give rise to an inference that the offer involves no attempt to influence a City decision and that its acceptance does not reflect a mutual understanding that the recipient's official action or decision on a matter of City business would be influenced. This conclusion is consistent with Case Nos. 87118.A and 88039.A, discussed above. The inference that there is no mutual understanding is obvious in the present case, where those to whom the offer is extended appear to have no ability to influence City decisions relating to the bank.

Thus, where the facts indicate that an offer is extended as part of a sales promotion, we would have to find specific evidence indicating a mutual understanding in order to find

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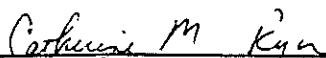
that subsection (b) prevented City employees or officials from accepting the offer.

The Board concludes that, because the facts before the Board indicate that this offer is part of a sales promotion, and there is no specific evidence whatsoever that the offer involves any mutual understanding to influence City business, acceptance of this offer is not prohibited by 2-156-040(b).

CONCLUSION: It is the decision of the Board, based on an analysis of the particular circumstances in this case under the Ethics Ordinance, that the offer of free checking service by the ██████████ Facility of the ██████████ Bank to ██████████ and ██████████ Department personnel is a standard sales promotion; it is therefore not a "gift" under the Ordinance, and does not permit an inference of a mutual understanding that the offer would influence the official action, decision or judgment of departmental personnel with respect to City business. There is no other evidence indicating the existence of such a mutual understanding. For these reasons, the acceptance of the offer of free checking by members of the City's ██████████ and ██████████ Departments is not prohibited by the Governmental Ethics Ordinance.

Our determination in this case is based on the application of the City's Governmental Ethics Ordinance to the facts stated in this opinion. Other rules or laws may be applicable to this situation. If any of the facts presented are incorrect or incomplete, please notify the Board promptly, as a change in the facts may alter the Board's determination.

RELIANCE: This opinion may be relied upon by (1) any person involved in the specific transaction or activity with respect to which this opinion is rendered and (2) any person involved in any specific transaction or activity that is indistinguishable in all its material aspects from the transaction or activity with respect to which the opinion is rendered.



Catherine M. Ryan
Chair

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