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B-217909, Sep 22, 1986

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GIFTS - TO OFFICERS AND EMPLOYEES - ACCOUNTABILITY DIGEST: 1. ACCEPTANCE OF DISCOUNTS ON PURCHASES OF FOREIGN CARS OFFERED TO FEDERAL OFFICERS AND EMPLOYEES HOLDING DIPLOMATIC OR OFFICIAL PASSPORTS GENERALLY IS NOT IMPROPER; NEVERTHELESS SUCH DISCOUNTS SHOULD BE CONSIDERED ON A CASE-BY-CASE BASIS. OFFICERS AND EMPLOYEES - ETHICS - ACCEPTANCE OF GIFTS, ETC. PROHIBITED 2. ACCEPTANCE OF DISCOUNTS ON FOREIGN CARS OFFERED ONLY TO A LIMITED NUMBER OF FEDERAL OFFICERS MAY HAVE CONTRAVENED THE PROHIBITION IN EXECUTIVE OFFICE REGULATIONS, SETTING FORTH STANDARDS OF CONDUCT FOR FEDERAL GOVERNMENT OFFICERS AND EMPLOYEES AND PRECLUDING CONDUCT RESULTING IN OR CREATING THE APPEARANCE OF USING PUBLIC OFFICE FOR PRIVATE GAIN, 3 C.F.R. SECTION 100.735-4(C)(1), A SIMILAR STANDARD IN EXECUTIVE ORDER NO. 11222, AS AMENDED, 18 U.S.C. SECTION 201N. OUR VIEWS ARE CONSISTENT WITH GUIDANCE OFFERED BY THE UNITED STATES OFFICE OF GOVERNMENT ETHICS AND THE FORMER COUNSEL TO THE PRESIDENT, ISSUED SUBSEQUENT TO THE EVENTS INQUIRED ABOUT IN THE SUBMISSION.

THE HONORABLE JOHN D. DINGELL:

CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT AND

INVESTIGATIONS

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

BY LETTER DATED APRIL 1, 1985, YOU ASKED ABOUT THE PRACTICE OF FEDERAL GOVERNMENT OFFICIALS TRAVELING WITH OFFICIAL OR DIPLOMATIC PASSPORTS /1/ ACCEPTING DISCOUNTS ON THE PURCHASE OF FOREIGN-MADE CARS. SPECIFICALLY, YOU ASK WHETHER THIS PRACTICE IS LEGAL, WHAT REGULATIONS OR GUIDELINES APPLY, AND WHETHER THE DISCOUNTS ARE GIFTS. IN THIS REGARD, YOU WERE INTERESTED IN ACTIONS OF CERTAIN WHITE HOUSE AND NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION OFFICIALS ON A 1985 TRIP ABROAD, AS REPORTED IN THE WASHINGTON POST NEWSPAPER ARTICLE ON MARCH 7, 1985. BY AGREEMENT WITH YOUR STAFF, WE DID NOT PERFORM AN INDEPENDENT INVESTIGATION OF THE FACTS ALLEGED IN THE NEWSPAPER ARTICLE. OUR ANSWERS TO YOUR QUESTIONS ARE THUS PREMISED ON AN UNVERIFIED SET OF FACTS.

ALTHOUGH THERE ARE NO STATUTES COVERING THE ACCEPTANCE OF DISCOUNTS, THERE IS AN EXECUTIVE ORDER WITH IMPLEMENTING REGULATIONS SETTING FORTH GENERALLY APPLICABLE RULES OF ETHICAL CONDUCT FOR GOVERNMENT OFFICERS AND EMPLOYEES, AS WELL AS GUIDELINES ISSUED BY THE UNITED STATES OFFICE OF GOVERNMENT ETHICS. THE GUIDELINES, WHICH WERE ISSUED SUBSEQUENT TO THE EVENTS QUESTIONED IN YOUR

LETTER, SUGGEST THAT DISCOUNTS SHOULD BE CONSIDERED ON A CASE-BY-CASE BASIS AND THAT ACCEPTANCE OF A DISCOUNT OFFERED TO A LIMITED OR SELECT GROUP OF UNITED STATES OFFICIALS SHOULD BE EXAMINED IN LIGHT OF THE OFFEROR'S MOTIVE, AND SPECIFIC PROHIBITIONS IN THE EXECUTIVE ORDER AND THE IMPLEMENTING REGULATIONS. ADDITIONALLY, THE FORMER COUNSEL TO THE PRESIDENT ISSUED A MEMORANDUM TO THE WHITE HOUSE STAFF WHICH, AMONG OTHER THINGS, PROHIBITS ACCEPTANCE OF DISCOUNTS BASED SOLELY ON THE HOLDING OF A DIPLOMATIC PASSPORT UNLESS THE STAFF MEMBER IS OUT OF THE COUNTRY FOR MORE THAN 30 DAYS. LIKE THE OFFICE OF GOVERNMENT ETHICS GUIDELINES, THE MEMORANDUM WAS ISSUED AFTER THE DISCOUNTS IN QUESTION HAD ALREADY BEEN ACCEPTED.

1. BACKGROUND

THE WASHINGTON POST NEWSPAPER ARTICLE REPORTED THAT WHILE TRAVELING ABROAD TO MAKE PLANS FOR PRESIDENT REAGAN'S MAY 1985 VISIT TO WEST GERMANY, MICHAEL K. DEAVER, THE PRESIDENT'S FORMER DEPUTY CHIEF OF STAFF, AND SOME ASSOCIATES, ALL OF WHOM HELD DIPLOMATIC PASSPORTS, OBTAINED DISCOUNTS FOR THE PURCHASE OF NINE BMW CARS, REPORTED TO BE AT 15 TO 25 PERCENT OF THE USUAL PRICE FOR BMW CARS. ACCORDING TO THE ARTICLE, A BMW SPOKESMAN SAID THAT BMW APPROVES ONLY 75 DISCOUNTS PER YEAR TO HOLDERS OF DIPLOMATIC PASSPORTS. THESE DISCOUNTS ARE REPORTEDLY OFFERED MAINLY TO CAREER DIPLOMATS AND INTERNATIONAL AGENCY EMPLOYEES, AND "VERY VERY FEW" HAVE GONE TO ADMINISTRATION OFFICIALS. THE SPOKESMAN SAID THE COMPANY CONSIDERS SUCH FACTORS AS AN OFFICIAL'S PROMINENCE IN DECIDING WHICH UNITED STATES DIPLOMATIC PASSPORT HOLDERS ARE ELIGIBLE FOR THE REDUCED RATE. THE SPOKESMAN CHARACTERIZED THE DISCOUNT AS A PUBLIC RELATIONS GESTURE AND WAS QUOTED AS SAYING: "WE LIKE TO HAVE OPINION LEADERS DRIVING OUR CARS." THE ARTICLE ALSO RAISED THE POSSIBILITY THAT SOME OF THE UNITED STATES OFFICIALS WHO BOUGHT THE BMWS AT DISCOUNTED PRICES PLANNED TO RESELL THEM AT A PROFIT OF SEVERAL THOUSAND DOLLARS.

2. AGENCY RESPONSES

PURSUANT TO YOUR INQUIRY, WE REQUESTED REPORTS FROM THE COUNSEL TO THE PRESIDENT, THE STATE DEPARTMENT AND THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION. THE DEPARTMENT OF STATE REPORTED THAT ITS REGULATIONS GOVERNING THE ISSUANCE OF DIPLOMATIC PASSPORTS ARE CONCERNED WITH FACILITATING INTERNATIONAL TRAVEL AND DO NOT REGULATE OTHER USES WHICH MAY BE MADE OF PASSPORTS WITHIN FOREIGN COUNTRIES. THE STANDARDS OF CONDUCT APPLICABLE TO STATE DEPARTMENT'S OWN EMPLOYEES RECOGNIZE THAT EMPLOYEES MAY ACCEPT "DISCOUNTS OFFERED TO EMPLOYEES AS A CLASS." 22 C.F.R. 10-735- 202. THESE REGULATIONS DO NOT ADDRESS THE ISSUE OF A DISCOUNT OFFERED TO A SELECT FEW. THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION REPORTED THAT, IN VIEW OF THE AGENCY'S ROLE IN ESTABLISHING AND ENFORCING AUTOMOTIVE SAFETY AND FUEL ECONOMY, ITS EMPLOYEES ARE PROHIBITED BY LAW AND AGENCY POLICY FROM ACCEPTING ANY DISCOUNT GIVEN BY AN AUTOMOBILE MANUFACTURER BY VIRTUE OF THE EMPLOYEE'S POSSESSION OF AN OFFICIAL PASSPORT OR BECAUSE OF HIS OFFICIAL RESPONSIBILITIES. IT CITES AGENCY STANDARDS OF CONDUCT REGULATIONS WHICH PROHIBIT AN EMPLOYEE FROM ENGAGING IN ACTIONS WHICH MIGHT CREATE THE APPEARANCE OF USING PUBLIC OFFICE FOR PRIVATE GAIN AND WHICH PROHIBIT THE ACCEPTANCE OF ANYTHING OF MONETARY VALUE FROM ANY ENTITY WITH INTERESTS WHICH MAY BE AFFECTED BY THE PERFORMANCE OR NONPERFORMANCE OF THE EMPLOYEES' OFFICIAL DUTIES. C.F.R. 99.735-7 AND 99.735-9. THE ADMINISTRATION ALSO RESPONDED THAT NONE OF ITS 55 OFFICIALS WHO HAD BEEN ISSUED OFFICIAL PASSPORTS HAD USED THE PASSPORTS TO OBTAIN DISCOUNTS ON FOREIGN-MADE CARS.

THE COUNSEL TO THE PRESIDENT REPLIED THAT THERE WAS NOTHING PER SE ILLEGAL OR UNETHICAL ABOUT FEDERAL GOVERNMENT OFFICIALS ACCEPTING A DISCOUNT OFFERED BY A FOREIGN CAR MANUFACTURER TO THE CLASS OF OFFICIALS HOLDING A DIPLOMATIC OR OFFICIAL PASSPORT. NEVERTHELESS, IN VIEW OF THE POSSIBILITY THAT ACCEPTANCE OF DISCOUNTS MIGHT APPEAR TO BE IMPROPER, HE STATED THAT HE WAS HENCEFORTH PRECLUDING ACCEPTANCE OF DISCOUNTS OFFERED ONLY TO WHITE HOUSE STAFF MEMBERS.

THE COUNSEL TO THE PRESIDENT ALSO CONCLUDED THAT COMMERCIAL DISCOUNTS ARE NOT GIFTS SINCE THEY ARE OFFERED FOR AN UNDERLYING COMMERCIAL REASON. NEVERTHELESS, AGAIN TO AVOID THE APPEARANCE OF IMPROPRIETY, HE DIRECTED THAT WHITE HOUSE STAFF MEMBERS TREAT THESE DISCOUNTS AS IF THEY WERE GIFTS IN APPLYING THE STANDARDS OF CONDUCT WHICH, FOR THE EXECUTIVE OFFICE OF THE PRESIDENT, ARE PUBLISHED AT 3 C.F.R. PART 100. IN A MEMORANDUM DATED MARCH 11, 1985, WHICH SET FORTH THIS POLICY, THE COUNSEL TO THE PRESIDENT STATED THAT STAFF MEMBERS ARE PROHIBITED FROM USING ANY RATE OR DISCOUNT RELATED TO GOVERNMENT SERVICE TO OBTAIN ANY ITEM FOR RESALE AT A PROFIT, INDICATING THAT THIS ACTIVITY WOULD RESULT IN DISMISSAL FROM THE WHITE HOUSE STAFF AND COULD RESULT IN CRIMINAL PROSECUTION. THE MEMORANDUM ALSO PROHIBITED, ON POLICY GROUNDS, ACCEPTANCE OF DISCOUNTS BASED SOLELY ON THE HOLDING OF A DIPLOMATIC OR OFFICIAL PASSPORT, UNLESS THE HOLDER OF THE PASSPORT HAS BEEN OUT OF THE COUNTRY ON OFFICIAL BUSINESS FOR MORE THAN 30 DAYS.

3. APPLICABLE LAW

SECTIONS 201(C), 201(G) AND 209 OF TITLE 18 OF THE U.S.C. PROHIBIT GRATUITIES, BRIBES, OR SUPPLEMENTS TO OFFICIAL SALARIES. HOWEVER, THERE IS NO STATUTE WHICH DEALS SPECIFICALLY WITH DISCOUNTS OFFERED TO GOVERNMENT EMPLOYEES HOLDING OFFICIAL OR DIPLOMATIC PASSPORTS OR THE SUBSEQUENT SALE OF DISCOUNTED GOODS AT A PROFIT. RULES OF CONDUCT FOR OFFICERS AND EMPLOYEES OF THE EXECUTIVE BRANCH ARE ESTABLISHED BY EXECUTIVE ORDER NO. 11222, AS AMENDED, 18 U.S.C. SECTION 201N (1986). SUBSECTION 201(A) OF THE ORDER PROHIBITS ANY EMPLOYEE FROM SOLICITING OR ACCEPTING, AMONG OTHER THINGS, ANY GIFT, FAVOR OR OTHER THING OF MONETARY VALUE FROM ANY PERSON, CORPORATION OR GROUP WHICH (1) HAS, OR IS SEEKING TO OBTAIN CONTRACTUAL OR OTHER BUSINESS FINANCIAL RELATIONSHIPS WITH THE AGENCY; (2) CONDUCTS OPERATIONS OR ACTIVITIES THAT ARE REGULATED BY AN EMPLOYEE'S AGENCY; OR (3) HAS INTERESTS THAT MAY BE SUBSTANTIALLY AFFECTED BY THE PERFORMANCE OR NONPERFORMANCE OF HIS OFFICIAL DUTIES. SUBSECTION 201(C) STATES THAT EMPLOYEES ARE TO AVOID ANY ACTION, WHETHER OR NOT SPECIFICALLY PROHIBITED BY SUBSECTION 201(A), WHICH MIGHT RESULT IN OR CREATE THE APPEARANCE, AMONG OTHER THINGS, OF (1) USING PUBLIC OFFICE FOR PRIVATE GAIN; (2) LOSING COMPLETE INDEPENDENCE OR IMPARTIALITY OF ACTION; OR (3) AFFECTING ADVERSELY THE CONFIDENCE OF THE PUBLIC IN THE INTEGRITY OF THE GOVERNMENT.

PURSUANT TO THE AUTHORITY CONFERRED BY THE EXECUTIVE ORDER, OPM HAS PROMULGATED GENERAL REGULATIONS UNDER WHICH EACH AGENCY HEAD IS TO ISSUE REGULATIONS COVERING ITS EMPLOYEES. 5 C.F.R. SECTIONS 735.101 ET SEQ. THE OPM REGULATIONS ESSENTIALLY FOLLOW THE STANDARDS SET FORTH IN EXECUTIVE ORDER NO. 11222. ID. SECTIONS 735.201A, 735.202. NEITHER THE EXECUTIVE ORDER NOR THE CITED REGULATIONS SPECIFICALLY ADDRESS THE DISCOUNT AND RESALE ISSUES.

BY MEMORANDUM OF SEPTEMBER 17, 1985, SUBSEQUENT TO THE EVENTS QUESTIONED IN YOUR LETTER, THE OFFICE OF GOVERNMENT ETHICS PROVIDED GUIDELINES TO AGENCY ETHICS OFFICIALS ON HOW TO RESOLVE QUESTIONS INVOLVING ACCEPTANCE OF COMMERCIAL DISCOUNTS. THE MEMORANDUM INDICATED THAT THE FOLLOWING SHOULD BE CONSIDERED IN DETERMINING WHETHER AN EMPLOYEE MIGHT ACCEPT A DISCOUNT: (A) THE EMPLOYING

AGENCY'S RELATIONSHIP WITH THE ENTITY OFFERING THE DISCOUNT; (B) THE TYPES OF OFFICIAL DUTIES THE EMPLOYEE PERFORMS; (C) THE COMMERCIAL ENTERPRISE'S MOTIVES IN OFFERING THE DISCOUNT; (D) WHETHER ACCEPTANCE OF A DISCOUNT MIGHT RESULT IN AN APPEARANCE OF IMPROPRIETY, SUCH AS USE OF PUBLIC OFFICE FOR PRIVATE GAIN; AND (E) THE NATURE AND SIZE OF THE GROUP TO WHICH THE DISCOUNT IS OFFERED, WITH PARTICULAR EMPHASIS ON THIS LAST FACTOR.

CONSISTENT WITH THESE CRITERIA, THE MEMORANDUM INDICATES THAT THERE IS LITTLE NEED FOR CONCERN WHEN A FEDERAL GOVERNMENT EMPLOYEE ACCEPTS A DISCOUNT WHICH A COMMERCIAL ENTITY MAKES AVAILABLE TO THE GENERAL PUBLIC. ALTHOUGH THE MEMORANDUM ALSO SUGGESTS THE SAME CONCLUSION WHEN DISCOUNTS ARE OFFERED TO A CLASS AS LARGE AND DIVERSE AS ALL FEDERAL GOVERNMENT EMPLOYEES, IT CAUTIONS AGENCIES TO CONSIDER SUCH SITUATIONS ON A CASE-BY- CASE BASIS IN ACCORDANCE WITH THE FACTORS DESCRIBED. WHERE A DISCOUNT IS NOT AVAILABLE TO THE GENERAL PUBLIC, THE MEMORANDUM NOTES THAT THERE IS A POTENTIAL PROBLEM WHERE THE ENTITY OFFERING THE DISCOUNT HAS BUSINESS DEALINGS WITH OR IS REGULATED BY THE EMPLOYEE'S AGENCY. IN THE CASE OF THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DISCOUNTS ON AUTOMOBILES WOULD FALL WITHIN THIS CATEGORY. THE MEMORANDUM SUGGESTS THAT MORE DIFFICULT PROBLEMS ARISE WHEN A VENDOR TARGETS A NARROW CLASS OF EMPLOYEES FOR ITS DISCOUNTS. ANY SUCH DISCOUNT RAISES POTENTIAL "APPEARANCE PROBLEMS" AND WARRANTS SCRUTINY OF THE COMMERCIAL MOTIVE INVOLVED. EVEN MORE PROBLEMATICAL ARE DISCOUNTS OFFERED ON THE BASIS OF AN EMPLOYEE'S DUTIES OR POSITION SINCE THERE EXISTS THE POSSIBILITY THAT THE OFFEROR HAS TARGETED THOSE INDIVIDUALS BECAUSE OF SOME BENEFIT, BEYOND INCREASED SALES, THAT IS EXPECTED AS A QUID PRO QUO. IN THE CASE OF A DISCOUNT TARGETED AT A NARROW OR SELECT CLASS, THE OFFICE OF GOVERNMENT ETHICS INSTRUCTS AGENCIES TO 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. SECTION 201); AND

(4) WHETHER THE OFFEROR SEEKS TO SUPPLEMENT THE EMPLOYEE'S SALARY FOR HIS OR HER OFFICIAL DUTIES (18 U.S.C. SECTION 209)."

AS A GENERAL RULE, THE MEMORANDUM SUGGESTS THAT DISCOUNTS WOULD NOT BE CONSIDERED TO BE GIFTS BECAUSE THE VENDOR RECEIVES CONSIDERATION FOR THE DISCOUNT WHICH INDUCES THE SALE. IT INDICATES, HOWEVER, THAT WHEN A DISCOUNT IS IN AN AMOUNT BEYOND THE NORMAL RANGE OF DISCOUNTS AVAILABLE TO THE PUBLIC, AND WHEN IT DOES NOT REFLECT A LEGITIMATE COMMERCIAL MOTIVE TO INDUCE AN INCREASED VOLUME OF SALES, IT MAY BE CONSIDERED TO BE A GIFT FOR THE PURPOSES OF THE FINANCIAL DISCLOSURE LAWS.

4. LEGAL ANALYSIS

WE HAVE DEFINED "GIFTS" AS "GRATUITOUS CONVEYANCES OR TRANSFERS OF OWNERSHIP IN PROPERTY WITHOUT CONSIDERATION." SEE 63 COMP.GEN. 459, 461 (1984); 25 COMP.GEN. 637, 639 (1946). CONSISTENT WITH THIS DEFINITION AND IN ACCORDANCE WITH THE POSITION OF THE OFFICE OF GOVERNMENT ETHICS, DISCOUNTS CANNOT BE CHARACTERIZED IN ALL CASES AS GIFTS BECAUSE OF THE CONSIDERATION A VENDOR RECEIVES FROM THE

SALE. WE RECOGNIZE THAT THERE MIGHT BE A LEGITIMATE COMMERCIAL MOTIVE IN OFFERING SUCH DISCOUNTS TO INCREASE SALES.

AS NOTED BY THE OFFICE OF GOVERNMENT ETHICS, SERIOUS CONCERNS ARISE WHEN A DISCOUNT IS OFFERED TO A VERY NARROW GROUP OF EMPLOYEES SUCH AS THE GROUP WHICH REPORTEDLY RECEIVED DISCOUNTS IN THIS CASE. THE NEWS ARTICLE SUGGESTED THAT BMW APPROVES ONLY 75 DISCOUNTS PER YEAR, OFFERING THEM MAINLY TO CAREER DIPLOMATS, INTERNATIONAL AGENCY EMPLOYEES AND ONLY A LIMITED NUMBER OF ADMINISTRATION EMPLOYEES. FURTHERMORE, THE BMW SPOKESMAN REPORTEDLY STATED THAT ONE OF THE FACTORS IN DECIDING WHICH DIPLOMATIC PASSPORT HOLDER WAS ELIGIBLE FOR THE REDUCED RATE WAS THE OFFICIAL'S PROMINENCE. THIS IS THE KIND OF SITUATION THE OFFICE OF GOVERNMENT ETHICS FOUND TO BE THE MOST TROUBLESOME FOR IT RAISES QUESTIONS CONCERNING THE PROPRIETY OF THE COMMERCIAL MOTIVE INVOLVED AND GIVES RISE TO THE APPEARANCE THAT THE EMPLOYEE HAS RECEIVED A PERSONAL BENEFIT THROUGH THE USE OF HIS PUBLIC OFFICE. IN THIS PARTICULAR CASE, THE DISCOUNT WAS NOT SIMPLY TARGETED AT A NARROWLY DEFINED CLASS. IT WAS OFFERED ONLY TO A FEW SELECTED BY BMW ON AN AD HOC BASIS DEPENDING ON THE INDIVIDUAL'S PROMINENCE AS A PUBLIC OFFICIAL. THE REPORTED FACTS SUGGEST THAT THE INDIVIDUALS INVOLVED WOULD NOT HAVE RECEIVED THE DISCOUNTS BUT FOR THEIR PARTICULAR GOVERNMENTAL POSITIONS. UNDER THESE CIRCUMSTANCES, WE BELIEVE THAT AN EMPLOYEE'S ACCEPTANCE OF THE DISCOUNT WITH KNOWLEDGE OF BMW'S DISCOUNT POLICY WOULD CREATE AT LEAST THE APPEARANCE OF USING PUBLIC OFFICE FOR PRIVATE GAIN IN VIOLATION OF 5 C.F.R. SECTION 735.201A(A). POINT OUT THAT WE HAVE NO INFORMATION AS TO WHETHER PARTICULAR INDIVIDUALS WHO MAY HAVE ACCEPTED THESE DISCOUNTS WERE AWARE OF BMW'S DISCOUNT POLICIES.

BECAUSE THE DISCOUNT WAS OFFERED ONLY TO A SELECT FEW CHOSEN BY BMW, WE BELIEVE THE OFFICE OF GOVERNMENT ETHICS' GUIDELINES WARRANT AN ANALYSIS OF BMW'S MOTIVE IN OFFERING THE PARTICULAR DISCOUNT. IN THIS CASE, WE BELIEVE THAT BMW WAS MOTIVATED BY A CONSIDERATION THAT, ALTHOUGH COMMERCIAL IN NATURE, MAKES ACCEPTANCE OF THE PARTICULAR DISCOUNT INAPPROPRIATE. IN ESSENCE, THE DISCOUNT APPEARS TO BE A CONSIDERATION GIVEN TO CERTAIN INDIVIDUALS IN RETURN FOR THE COMMERCIAL BENEFIT BMW RECEIVES WHEN, AS A CONSEQUENCE OF THEIR PATRONAGE, POTENTIAL CUSTOMERS COME TO PERCEIVE BMW AS THE AUTOMOBILE OF CHOICE OF PROMINENT PUBLIC OFFICIALS.

THE GUIDELINES CAUTION AGAINST ACCEPTANCE OF A DISCOUNT WHERE THE OFFEROR HAS SINGLED OUT PARTICULAR INDIVIDUALS BECAUSE OF SOME BENEFIT, BEYOND INCREASED SALES, THAT THE OFFEROR EXPECTS IN RETURN. AS AN EXAMPLE OF SUCH A DISCOUNT, THE OFFICE OF GOVERNMENT ETHICS CITES THE SITUATION IN WHICH A MANUFACTURER OF AIR-CONDITIONING EQUIPMENT OFFERS DISCOUNTS TO CERTAIN "KEY" EMPLOYEES OF GOVERNMENT-OWNED UTILITIES WHO MIGHT BE IN A POSITION TO RECOMMEND VARIOUS TYPES OF AIR-CONDITIONING EQUIPMENT TO UTILITY CUSTOMERS. ESSENTIALLY, THE MANUFACTURER IS SEEKING THE GOVERNMENT OFFICIAL'S ENDORSEMENT OF ITS PRODUCT. THE PARTICULAR DISCOUNT OFFERED BY BMW IS VERY SIMILAR IN THAT IT IS OFFERED IN CONSIDERATION OF THE ADVERTISING VALUE BMW RECEIVES FROM THE SILENT ENDORSEMENT OF ITS PRODUCT BY PROMINENT OFFICIALS. ITS MOTIVE GOES BEYOND THE INDUCEMENT TO PURCHASE, WHICH THE OFFICE OF GOVERNMENT ETHICS VIEWS AS UNDERLYING PROPER COMMERCIAL DISCOUNTS. IT SEEKS TO USE THE EMPLOYEE'S PUBLIC OFFICE FOR ITS COMMERCIAL GAIN. IN THIS REGARD, THE DEPARTMENT OF JUSTICE AND THE OFFICE OF GOVERNMENT ETHICS HAVE INTERPRETED 5 C.F.R. SECTION 735.201A(A) AS PROHIBITING CONDUCT BY AN EMPLOYEE-- ACCEPTANCE OF THE DISCOUNT IN THIS CASE-- WHICH RESULTS IN THE APPEARANCE OF USING PUBLIC OFFICE FOR PRIVATE GAIN, EVEN THOUGH THE GAIN MAY BE REALIZED BY A PERSON OR ORGANIZATION OTHER THAN THE EMPLOYEE.

BECAUSE THE DISTINCTIONS BETWEEN APPROPRIATE COMMERCIAL DISCOUNTS AND THOSE SUBJECT TO QUESTION UNDER THE ETHICS RULES HAD NOT BEEN PRECISELY DRAWN AT THE TIME THE DISCOUNTS WERE ACCEPTED, NO ACTION AGAINST THOSE WHO ACCEPTED THEM WOULD BE APPROPRIATE, IN OUR VIEW.

WE ENCLOSE COPIES OF THE REPLIES FROM THE WHITE HOUSE, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, AND THE MEMORANDUM FROM THE OFFICE OF GOVERNMENT ETHICS. WE HOPE WE HAVE BEEN OF ASSISTANCE.

/1/ AN OFFICIAL PASSPORT IS ISSUED TO AN EMPLOYEE OF THE UNITED STATES GOVERNMENT TRAVELING ABROAD ON OFFICIAL DUTIES. A DIPLOMATIC PASSPORT IS ISSUED TO A FOREIGN SERVICE OFFICER, A PERSON IN THE DIPLOMATIC SERVICE OR TO A PERSON HAVING DIPLOMATIC STATUS. 22 C.F.R. SECTION 51.3.