

NOTE: The guidance in this advisory regarding retention of frequent flyer miles is no longer applicable. See Section 1116 of Public Law 107-107, December 28, 2001; 41 C.F.R. 301-53.

Office of Government Ethics

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Letter to a Government Attorney dated March 23, 1992

This is in response to your letter dated January 23, 1992, in which you request the comments of this Office on a letter which the General Accounting Office (GAO) received from the General Counsel of [an employee] Association urging GAO to reverse its position with respect to frequent flyer bonus miles and other incidents of official travel.

We understand that the rule established by GAO with respect to promotional materials received in connection with official travel is that set forth in Comp. Gen. Decision B-199656, July 15, 1981, and subsequent decisions. These decisions require Federal employees to account for any gift, gratuity or benefit received from private sources incident to the performance of official business. All promotional materials, including frequent traveler benefits, received by employees in connection with official travel are due the Government and may not be retained by the employee.

The General Services Administration (GSA) has issued regulations governing Federal travel which reflect the rule set forth in the decisions of the Comptroller General. On the specific subject of frequent flyer bonus miles, the GSA regulations state that frequent traveler benefits earned in connection with official travel may be used only for official travel. See 41 C.F.R. § 301-1.6(f). The regulation expressly states that "[e]mployees may not retain and use such benefits for personal travel." *Id.*

The Office of Government Ethics has authority to issue and interpret regulations governing gifts from outside sources to employees of the executive branch. However, as the above-referenced authorities indicate, frequent flyer benefits earned in connection with official travel are considered Government property and are not regarded as a "gift" to a Federal employee. Therefore, the receipt of frequent flyer benefits is not subject matter that this Office regulates directly.

Nevertheless, this Office has followed the existing rule on frequent flyer benefits established in GAO decisions and reflected in GSA regulations. For example, in the proposed regulation on

standards of conduct that this Office recently issued, the treatment of commercial discounts in general and frequent flyer benefits in particular accepts the distinction between discounts which derive from the private commercial transactions of a Government employee and benefits which spring from an employee's official Government travel. See Proposed Rule, "Standards of Ethical Conduct for Employees of the Executive Branch," 56 Fed. Reg. 33778-33815 (July 23, 1991).

Under section 2635.203(b)(2) of the Proposed Rule, favorable rates, commercial discounts and other benefits that are available to the general public or to all Government employees are excluded from the definition of "gift" and thereby are not subject to the prohibitions of section 2635.202(a) and may be accepted. In addition, under section 2635.204(c) of the Proposed Rule, although unsolicited commercial discounts and benefits that are offered to a limited class of Government employees do not receive a blanket exclusion from the definition of "gift," they may be accepted by a Government employee provided that they meet certain requirements and thereby qualify for an exception from the gifts prohibitions.

Furthermore, the Proposed Rule incorporates the established GAO rule on frequent flyer benefits obtained as a result of official travel. The Note which follows section 2635.203(b)(5) of the Proposed Rule states:

Note: Some airlines encourage those purchasing tickets to join programs that award free flights and other benefits to frequent flyers. Any such benefit earned on the basis of Government financed travel belongs to the agency rather than to the employee and may be accepted only insofar as provided under 41 C.F.R. 301-1.6(b).

See Proposed Rule, 56 Fed. Reg. 33795. Thus, under the Proposed Rule, frequent flyer benefits are clearly distinguished from commercial discounts and may not be accepted by Government employees for personal use.

Given the language and structure of the Proposed Rule, we do not believe that section 2635.204(c) may be read to "allow federal employees to fully take advantage of such [frequent flyer] benefits for themselves," as contended by [the association]. In the case of either general or limited commercial discounts and benefits, the benefits obtained do not derive from the expenditure of Government funds and may be accepted as provided for in the

Proposed Rule. However, the Proposed Rule treats frequent flyer benefits obtained through official travel as Government property and therefore not within the ambit of the provisions which allow for the acceptance of discount benefits. Moreover, within the structure of the Proposed Rule, the personal use of frequent flyer benefits secured through the expenditure of Government funds would violate the standard in section 2635.704 regarding use of Government property.

[The association] makes reference to section 2635.203(e) of the Proposed Rule which defines when a gift is solicited or accepted because of an employee's official position. This provision establishes a "but for" test. It cannot be used to suggest that if the benefit is not offered because of official position, then it may be accepted. To do so would be to ignore the distinction between discounts available in connection with an employee's personal expenditures and the benefits that are available as a result of official travel paid for by the Government.

Similarly, we believe that [the association's] discussion of 18 U.S.C. § 209 is not pertinent to this issue. Section 209 prohibits a Government employee from receiving any supplementation of salary from any source other than the Government of the United States. Frequent flyer benefits obtained through official travel are Government property. Thus, the source of these benefits, were they to be utilized by an employee for personal travel, would be the Government and not some other source such as an airline. Although we have not consulted with the Department of Justice on the question of the applicability of section 209, we believe that, because the element of a non-Government source is not present, section 209 would not apply to the receipt of such benefits.

Finally, we wish to address the [association] comments on recent testimony which this Office gave on the subject of honoraria. While our testimony did support proposed legislative changes on honoraria, we continued to support a ban on honoraria for the most senior executive and legislative branch officials as a means of fostering public confidence in Government. In the case of other employees, we testified that the critical consideration should be the relationship of the honorarium to the employee's Government duties and position and not the level of pay. We also testified that "[c]onflict of interest restrictions and standards of conduct are respected by Government employees when the restrictions seem fair and clearly related to Government

employment." And we stated further that "[w]hen that relationship is not clearly discernible, not only does adherence to the restriction suffer, but the credibility of all the standards that make up the code of conduct for Federal employees is undermined." The considerations which led to these views on honoraria, however, are quite different from those involved in the issue of frequent flyer benefits. Therefore, we do not agree with [the association] that the current rule with respect to frequent flyer benefits raises difficulties that are analogous to the deficiencies that we testified to with respect to honoraria.

As is evident from the above discussion, this Office does not have any criticism of the rule which GAO has established on this question or with GAO's interpretation of the relevant statutory authorities. To the contrary, we believe that the GAO is correct in its conclusion that frequent flyer benefits that accrue as a result of official travel are Government property. The separate and distinct question as to whether, and under what circumstances, an agency may determine that frequent flyer benefits obtained through official travel may nevertheless be used by a Government employee for other than official purposes is not directly presented at this time. This Office would have an interest in being advised of, and having an opportunity to participate in, any further dialogue on this question.

I hope that this is responsive to your request. If you have any questions concerning this letter, please feel free to contact my Office.

Sincerely,

Stephen D. Potts
Director