

Executive Branch Ethics Commission
ADVISORY OPINION 09-20
July 24, 2009

- RE:**
1. Is it necessary for the Executive Branch Ethics Commission (“Commission”) to grant a gift exception to the Education and Workforce Development Cabinet for distribution of E-Learning vouchers provided by Microsoft Corporation (“Microsoft”) to Kentucky citizens?
 2. Does the proposed E-Learning program constitute an endorsement or promotion of Microsoft that is prohibited by KRS Chapter 11A?

- DECISION:**
1. No.
 2. No.

This opinion is issued in response to your July 10, 2009 request for an advisory opinion from the Executive Branch Ethics Commission (the “Commission”). The matter was reviewed by the Commission on July 24, 2009 and the following opinion is issued.

You seek authorization on behalf of the Education and Workforce Development Cabinet (“Cabinet”) for permission to participate in a Microsoft eLearning program. You state that Microsoft seeks to improve access to education and workforce readiness skills with a program called Elevate America Initiative. The goal of the Elevate America Initiative is to donate training vouchers (“vouchers”) for Microsoft eLearning courses and select Microsoft certification exams for distribution to citizens of the Commonwealth of Kentucky. Other states are already participating in this program. The two types of vouchers available are general learning vouchers and specialized IT professional training vouchers, and citizens completing the training will have the opportunity to take certification exams. These vouchers would provide training that is not currently offered by the Cabinet. The Cabinet would implement the program through its Office of Employment and Training, Division of Workforce and Employment Services.

In response to this donation, Microsoft requests that the Cabinet display materials provided by Microsoft at each voucher distribution location consisting of a poster, program information sheet, and a screensaver installed and displayed on state-owned computers designated by local staff.

You note that as an employer, Microsoft is subject to the administration of KRS Chapter 341 by the Division of Unemployment Insurance, an agency within the Cabinet.

KRS 11A.005(1) provides:

(1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:

- (a) A public servant be independent and impartial;
- (b) Government policy and decisions be made through the established processes of government;
- (c) A public servant not use public office to obtain private benefits; and
- (d) The public has confidence in the integrity of its government and public servants.

KRS 11A.020(1)(d) provides:

- (1) No public servant, by himself or through others, shall knowingly:
 - ...
 - (d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

KRS 11A.045 (1) provides:

(1) No public servant, his spouse, or dependent child knowingly shall accept any gifts or gratuities, including travel expenses, meals, alcoholic beverages, and honoraria, totaling a value greater than twenty-five dollars (\$25) in a single calendar year from any person or business that does business with, is regulated by, is seeking grants from, is involved in litigation against, or is lobbying or attempting to influence the actions of the agency in which the public servant is employed or which he supervises, or from any group or association which has as its primary purpose the representation of those persons or businesses. Nothing contained in this subsection shall prohibit the commission from authorizing exceptions to this subsection where such exemption would not create an appearance of impropriety.

“Gift” is defined in KRS 11A.010(5) to mean a payment, loan, subscription, advance, deposit of money, services, or anything of value, unless consideration of equal or greater value is received; “gift” does not include gifts from family members, campaign contributions, or door prizes available to the public.

The Commission must first determine whether the training vouchers are a gift requiring a gift exception. Several previously issued advisory opinions establish the Commission’s long-standing interpretation of KRS 11A.045 (1) that a state agency may not accept gifts, including in-kind contributions, from persons or businesses that are regulated by the agency. See Advisory Opinions 02-48 and 96-42. Microsoft is regulated by the agency for purposes of Unemployment Insurance. However, the Commission is of the opinion that the proposed vouchers are not a gift to the agency, but instead are gifts to citizens of the Commonwealth of Kentucky. The Cabinet would not receive a benefit from the vouchers, since the training offered through the vouchers is not currently being provided by the Cabinet. Instead, the Cabinet is merely a conduit for distribution of the vouchers to private citizens.

Next, the Commission must review the proposed program to determine if the implementation of the program would amount to the Cabinet impermissibly endorsing Microsoft. The Commission has previously distinguished “partnering” from “endorsing”. With the permission of the Commission, an agency may enter into an agreement with a private entity in a program that will benefit the entire Commonwealth, or will promote economic development or tourism in the state. An agency may not “endorse” a private company by publicly and actively promoting one private company over another. The proposed agreement between the Cabinet and Microsoft is a permissible partnership, because the entire Commonwealth will benefit through the workforce development and training offered by Microsoft to citizens of the Commonwealth. However, if one or more other private companies express an interest in a similar partnership arrangement, those private companies should be afforded the same opportunity to enter into a similar partnership with the Cabinet.

In regard to Microsoft’s proposal that the Cabinet display materials provided by Microsoft at each voucher distribution location consisting of a poster and program information sheet, the Commission has consistently stated that a state agency should not publicly and actively recognize a private product or company, or acknowledge a corporate donor, in a public manner such as in the newspaper or on television. See Advisory Opinions 02-21 and 07-27. However, the Commission has previously stated that the placement of a plaque or marker to identify a public/private partnership does not rise to the level of an active or public endorsement by a state agency. See Advisory Opinions 02-33 and 07-27. Similarly, the Commission does not consider the placement of a reasonably sized poster or the distribution of information sheets to those receiving the vouchers to rise to the level of a public endorsement of Microsoft by the Cabinet, provided that the poster and information sheets contain a written disclaimer that the Commonwealth of Kentucky does not endorse Microsoft or its products. However, the installation of a screensaver on state-owned computers would not be appropriate in this instance.

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Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: Gwen R. Pinson

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