

October 25, 2013

Paras Modha, Acting Chief Counsel
CA Gambling Control Commission
2399 Gateway Oaks Drive, Suite 220
Sacramento, CA 95833-4231

Via email & U.S. mail
pmodha@cgcc.ca.gov

Re: Your Request for Advice
Our File No. A-13-116a

Dear Mr. Modha:

This letter responds to your request for reconsideration of advice provided to your agency on behalf of Chairman Lopes and Commissioner Schuetz in the *Dhillon* Advice Letter, No. A-13-116. You base the new request on changed circumstances. Your question pertains to the gift provisions of the Political Reform Act (the “Act”).¹ This letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. Would Macau University of Science and Technology’s (the “university”) reimbursement of Chairman Lopes’ and Commissioner Schuetz’s travel, lodging, and subsistence costs constitute gifts under Section 82028(a)?
2. If so, may Chairman Lopes and Commissioner Schuetz accept these gifts?
3. If they cannot accept these gifts, do the travel, lodging, and subsistence costs meet the exception under Section 89506(a)(2)?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

CONCLUSIONS

1. The university's reimbursement of Chairman Lopes' and Commissioner Schuetz's travel, lodging, and subsistence costs constitute gifts under Section 82028(a).
2. Chairman Lopes and Commissioner Schuetz cannot accept these gifts because they exceed the Act's gift limit, which is currently \$440.
3. The exception in Section 89506(a)(2) may apply in this situation because the university appears to be a person domiciled outside the United States which substantially satisfies the requirements for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code. Nevertheless, as discussed below, under the Act's conflict of interest provisions, receipt of the travel payments may require the Commissioners to disqualify themselves from participating in later Gambling Control Commission decisions that have a material financial effect on the source of the travel payments.

In addition, as discussed below, if the university is merely an intermediary for gifts actually made by private donors (such as the Macau casinos), then the exception will not apply, and no donor may donate more than \$440 toward each official's travel and other gifts.

FACTS

In your current letter, you provide the following changed facts:

“Macau casinos have asked MUST [Macau University of Science and Technology] to conduct a study to determine the feasibility of operating casinos beyond the border of Macau and continental Asia. One of the areas specifically mentioned is gaming on tribal lands in the United States. The MUST Board of Directors acceded to the request by casino owners and issued a directive to the MUST School of Business to begin research for the purpose of determining the feasibility of Macau casinos participating in casinos operated on tribal lands in the United States. Chairman Lopes and Commissioner Schuetz have been invited by MUST to attend a symposium in Macau to discuss this matter. The symposium coincides with the annual Macau Gaming Equipment show at the Macau Convention Center. All expenses for the trip to Macau will be paid by MUST, including airfare, hotel, food, and local transportation.”

We understand that Commissioners have full disclosure under the agency conflict of interest code and must report all interest in real property in the State of California, as well as investments, business positions, and sources of income, including gifts, loans and travel payments.

On October 23, 2013, you provided the following additional information:

“Macau University of Science and Technology (MUST) is a non-profit multidisciplinary university established as a public welfare legal entity with the approval of the Macau S.A.R. government. MUST is organized exclusively for educational purposes and none of its earnings inure to private shareholders or individuals through distributions or otherwise. MUST does not attempt to influence legislation as a substantial part of its activities and does not participate in any campaign activity for or against political candidates. MUST is run by a foundation, which includes on site, the University, university hospital and an internationally accredited k-12 school. MUST aspires to be in the vanguard of social development, to be the cradle of innovation and a premier application oriented comprehensive university.”

ANALYSIS

The term “gift” is defined in Section 82028(a) as:

“Any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public without regard to official status.”²

In an effort to reduce improper influences on public officials,³ the Act regulates the receipt of gifts by public officials in three ways:

- First, the Act places limitations on the acceptance of gifts by certain public officials. The current limit is \$440 from a single source in a calendar year. (Section 89503; Regulation 18940.2.) This gift limit applies to all elected state and local officials or other individuals designated in Section 87200; all candidates for state, local, or judicial office; and any employee designated in his or her agency’s conflict-of-interest code, as adopted pursuant to Section 87300, if the employee would be required to disclose the receipt of income or gifts from the source of the gift on his or her statement of economic interest. (Section 89503.)
- Secondly, so that the public is made aware of any potential influences from gifts, the Act imposes reporting obligations on certain public officials requiring that any gift (or any gifts that aggregate to \$50 or more from the same source) received during the calendar year are disclosed on the officials’ statements of economic interests. Reporting requirements apply to

² Section 82044 defines payment, in part, as any “rendering of ... services or anything else of value, whether tangible or intangible.”

³ A “public official” is “every member, officer, employee, or consultant of a state or local governmental agency.” (Section 82048.)

all officials listed in Section 87200 (Section 87202), all candidates for an office specified in Section 87200 (Section 87201), and employees designated in an agency's conflict-of-interest code as specified in the code (Section 87302(b)).

- Finally, the Act prohibits any public official from making, participating in making, or using his or her position to influence the outcome of a governmental decision involving the donor of a gift or gifts with an aggregate value of \$440 or more provided to, received by, or promised to the official within the 12 months prior to the date the decision is made. (Sections 87100, 87103(e), Regulations 18700, 18703.4.)

Travel costs paid for by a third party generally are reportable gifts under the Act. Therefore, absent an exception, the value of transportation, lodging, and meals for the conference in Macao, would be considered reportable gifts and subject to the three provisions discussed above. (Section 82028; *Gault* Advice Letter, No. A-07-158.)

Gifts of Travel – Exceptions

Under some circumstances, even though a payment for transportation, lodging, and subsistence will be a reportable gift and subject an official to a possible conflict of interest under the Act, the gift may be exempt from the Act's gift limit, which is currently \$440.

Section 89506(a), in relevant part, provides an exception from the gift limits for certain travel payments:

“(a) Payments, advances, or reimbursements, for travel, including actual transportation and related lodging and subsistence which is reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy, are not prohibited or limited by this chapter if either the following apply:

“(1) . . .

“(2) The travel is provided by a government, a governmental agency, a foreign government, a governmental authority, a bona fide public or private educational institutions, as defined in Section 203 of the Revenue and Taxation Code, a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, or by a person domiciled outside the United States which substantially satisfies the requirements for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.”

Thus, the travel may not be subject to limits if it is provided by a government, a governmental agency, a foreign government, a governmental authority, a bona fine public or private educational institutions, as defined in Section 203 of the Revenue and Taxation Code, a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal

Revenue Code, or by a person domiciled outside the United States which substantially satisfies the requirements for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.

For an organization to be exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, the following generally applies.

- An organization must be organized and operated exclusively for charitable and educational purposes and none of its earnings may inure to any private shareholder or individual. All tax-exempt organizations must follow the non-distribution agreement, wherein income is not redistributed to board members, directors or officers, members, or other parties analogous to shareholders.
- In addition, it may not be an action organization. For example, it may not attempt to influence legislation as a substantial part of its activities and it may not participate in any campaign activity for or against political candidates.
- The organization must be organized or operated for the benefit of private interests, and no part of a Section 501(c)(3) organization's net earnings may inure to the benefit of any private shareholder or individual. If the organization engages in an excess benefit transaction with a person having substantial influence over the organization, an excise tax may be imposed on the person and any organization managers agreeing to the transaction.

Based on the facts provided, it appears that the university would be considered a tax-exempt organization if in the United States. It appears to be a university organized and operated exclusively for educational purposes. In addition, there are no facts alleging that the university's earnings inure to any private shareholder or individual, or is an action organization. Thus, the exception applies to your facts.

Please note, when a official receives a gift that is not subject to gift limits due to application of Section 89506, the gift is still reportable and can be the basis for a potential conflict of interest under Section 87100. (Sections 87100 and 87103.) Specifically, the official would have a conflict of interest if he or she makes, participates in making or uses his or her official position to influence a governmental decision that would have a reasonably foreseeable material financial effect on the source of the gift within the 12-month period following when the gift is made.

Gifts of Travel – Source of Gift

Moreover, the exception would not apply if the university were not the true source of the gift. Regulation 18945 provides the Commission's rule for determining the source of a gift and provides the following, in pertinent part:

“(a) The person who makes the gift to the official(s) is the source of the gift unless that person is acting as an intermediary. The person is acting as an

intermediary for the source of the gift when the gift to the official was provided under any of the following conditions:

“(1) The person receives a payment from a source and the payment is made to the official after the source identifies the official as the intended recipient of the gift;

“(2) The person receives a payment from a source after soliciting the payment with the understanding that the payment will be used for the sole or primary purpose of making a gift to an official; or

“(3) The person receives a payment from a source after the payment was solicited by the official or the official’s agent for the purpose of making a gift to the official.

“(b) Under any of the conditions identified in subdivision (a)(1)-(3), the source of the payment is the source of the gift.

“(c) If a public official’s pro-rata share of the cost of the benefit provided at an event constitutes a gift to the official, the person hosting the event, unless the admission to the event was provided by someone other than the host, shall be deemed the source of the gift so long as the event is widely attended by persons other than governmental officials.

“(d) Presumption of Source by Official. Notwithstanding subdivision (a), an official may presume that the person delivering the gift or, if the gift is offered but has not been delivered, the person offering the gift to him or her is the source of the gift unless it is clear from the surrounding circumstances at the time the gift is delivered or offered that the person delivering or offering the gift is not the actual source of the gift.

“(e) Presumption of Source by Intermediaries. A person that qualifies as an intermediary as a result of a payment solicited from an official pursuant to subdivision (a)(3) may presume that he, she, or it is the source of the gift unless the person does not know or have reason to know of the official’s solicitation.”

Under the facts provided, Macau casinos have asked the university to conduct a study to determine the feasibility of operating casinos beyond the border of Macau and continental Asia. So long as the university will pay for Commissioner Schuetz’s and Chairman Lopes’ travel expenses, hotel, and food, the exception will apply. However, if other private donors (such as the Macau casinos) were to pay or reimburse the university, the university would merely be the intermediary of the gift from the private donors and the exception to the gift limit would not apply.

Therefore, if the Macau casinos provided the funds through the university to pay for Commissioner Schuetz's and Chairman Lopes' travel expenses, they will be considered the source of the gift and no casino could donate more than \$440 toward each official's travel and other gifts. However, without additional facts, we cannot provide you further guidance on this issue.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Heidi G. Kim
Legal Intern, Legal Division

HGK:jgl