

September 8, 2014

William D. McMinn
Deputy General Counsel
San Diego Unified Port District
3165 Pacific Highway
P.O. Box 120488
San Diego, CA 92112-0488

Re: Your Request for Advice
Our File No. A-14-156

Dear Mr. McMinn:

This letter responds to your request for advice regarding the gift provisions of the Political Reform Act (the “Act”).¹ The Commission does not act as the finder of fact when rendering advice (*In re Ogelsby* (1975) 1 FPPC Ops. 71), meaning that any advice we provide assumes the facts the requestor provides to us are accurate. If this is not the case, then our advice could be different.

QUESTION

If the San Diego Unified Port District (the “District”) enters into an agreement with the University of Phoenix for a ten percent reduction in tuition for employees of the District who enroll in classes at the University, does the reduction in tuition equate to a gift to the District employees who receive the discount?

CONCLUSION

No. The ten percent tuition discounts provided by the University of Phoenix are not considered gifts to District employees under the Act, as they are a rebate or discount made by the University in the regular course of business to attract students and the tuition discounts are widely made to members of the public without regard to official status.

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.

FACTS

You are requesting written advice concerning the operation of the San Diego Unified Port District, a public agency and tideland trustee organized and existing pursuant to the San Diego Unified Port District Act, which has been codified in the California Harbors and Navigation Code, Appendix 1.

The District is governed by a Board of Port Commissioners and has jurisdiction over tidelands surrounding the San Diego Bay, submerged lands in the Bay, and any other lands acquired by the District, which are held in trust for the benefit of the people of the State of California for the purposes of commerce, navigation, fisheries and recreation.

You are Deputy General Counsel and the authorized representative for the District in this matter. The District has been invited to participate in the University of Phoenix, Inc.'s tuition reduction program where District employees would receive a ten percent tuition reduction. The reduction would apply to any University program, including certificate programs, and single courses, including professional development courses. The University has provided an "Alliance Memorandum of Understanding" to the District in order for the reduction to apply to District employees who attend the University. This agreement is a one-page form whereby the University of Phoenix agrees to make a ten percent tuition reduction available to District employees and the District agrees to communicate the educational opportunities to its employees.

The District inquired as to the "pool" of participants being large enough for the reduction to be considered as being offered to the public. The District received a response from the University stating that the "University of Phoenix has partnerships with approximately 3,000 corporate entities and governmental agencies; all of which receive tuition reduction."

You request an advice letter regarding the Act and Government Code Section 1090² concerning the following question: If the District enters into the agreement with the University for a reduction in tuition of ten percent, does the reduction in tuition equate to a gift to the District employees who receive the discount?

ANALYSIS

Section 89503(c) prohibits designated employees of a state or local agency from accepting gifts from any single source in any calendar year totaling more than \$440³ if the

² Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. To trigger the applicability of Section 1090, there would need to be some evidence that one of the members of the Port Commission had a prohibitory financial interest in the agreement with the University of Phoenix, in which case the entire Board would be prohibited from acting on the agreement. But here, there is no evidence that such an interest is present. Because Section 1090 does not appear to be implicated by your facts, we do not provide further analysis of it.

³ Regulation 18940.2 states the current gift limit amount of \$440.

employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interests.⁴ In addition to the Act's gift prohibitions, the Act also requires public officials subject to its reporting obligations to disclose certain sources of a gift if the gift is valued at \$50 or more. (Sections 87207 and 87302.)

The Act defines a gift 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.*” (Section 82028, *emphasis added.*) Consequently, a discount is a gift unless the discount is made in the regular course of business to members of the public without regard to official status.

Shortly after the Act was passed, the Commission interpreted the above statutory language in connection with a discount offered by the Holiday Inn to all state employees, concluding that the Act does not impose any restrictions or reporting requirements on those who offer such discounts, or on public officials who take advantage of such discounts, as long as the discount is uniformly offered to all state employees. (*In re Russel* (1975) 1 FPPC Ops. 191; see also the *LaMar-Haas* Advice Letter, No. A-04-003.)

In this opinion, the Commission stated:

“... many discounts are offered to all members of the public and do not create any potential for improper influence. Requiring the disclosure of all discounts would impose burdensome reporting requirements without serving a legitimate public purpose. Consequently, the statutory definition of ‘income’ excludes discounts which are made available to members of the public without regard to their official status.”

The Commission further determined that:

“The statutory language does not require that the discount be made available to ‘all’ members of the public, but implies that the discount will be offered on a uniform basis to a diverse group. [Here] the discount is made available to all employees of the State of California. This group is a large and heterogeneous assortment of individuals Because of the size and diversity of the class, we conclude that a discount available to all state employees is a discount made ‘available to members of the public.’”

⁴ You have not provided information as to the status of the employees involved (i.e., whether they are designated employees and if so whether their designation category includes reporting income or gifts from universities). For purposes of our analysis, we will assume you are asking on behalf of those designated employees who are required to report such interests on their statement of economic interests.

Since the Commission's opinion in *Russel*, we have advised that a discount "made available to members of the public without regard to their official status" includes: all county employees (*Abbott* Advice Letter, No. A-88-049); all city employees *Cornelius* Advice Letter, No. I-92-260); and all district employees (*Schechtman* Advice Letter, No. A-96-218). More recently, we advised in the *Lamar-Haas* Advice Letter, *supra*, that discounts offered by Disneyland to "emergency personnel in every government sector" also fit the criteria of a discount "made available to members of the public without regard to their official status." There, although the discount was offered to a certain class of employees rather than all employees of a state, county, city, or district, we found that "the number of fire fighter, law enforcement and rescue personnel employed in the entire State of California is large enough in size to represent a discount made available to the public as contemplated by the *Russel* opinion."

In this case, the District has been invited to participate in the University of Phoenix's tuition reduction program where District employees would receive a ten percent tuition discount. The reduction would apply to any University program, including certificate programs, and single courses, including professional development courses. You asked the University of Phoenix about the size of the pool of participants who are offered tuition discounts. The University of Phoenix responded that it has partnerships with approximately 3,000 corporate entities and governmental entities, many of which are within the state of California, and all of them receive tuition reduction. The University offers the discounts in the regular course of business to attract students.

Because the tuition discounts offered by the University of Phoenix are offered in the regular course of business on a uniform basis to a large group of governmental and private sector employees, we conclude that these discounts fall within the parameters of the *Russel* opinion. Accordingly, any District employee who enrolls in a course or certificate program at the University of Phoenix and takes advantage of the tuition discount has not received a gift or income that is either reportable on his or her statement of economic interests (Form 700) or subject to the gift limits of the Act.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Hyla P. Wagner
Senior Counsel, Legal Division

HPW:jgl