



FAIR POLITICAL PRACTICES COMMISSION

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December 6, 2012

Prof. Robert Fellmeth
Univ. of San Diego Law School
5998 Alcalá Park
San Diego, CA 92110

Re: Your Request for Advice
Our File No. A-12-158

Dear Professor Fellmeth:

This letter responds to your request for advice regarding the lobbying provisions of the Political Reform Act (the "Act").¹ We base our advice on the facts presented. The Fair Political Practices Commission ("the Commission") does not act as finder of fact.

QUESTION

Is a lobbyist employer required to report payments on Form 635 for activities related to Public Utilities Commission ("PUC") ratemaking and adjudication proceedings?

CONCLUSION

Yes. A lobbyist employer has enumerated reporting requirements, discussed in detail below.

FACTS

You represent the Utility Consumers' Action Network ("UCAN"), a 501(c)(3) entity based in San Diego. UCAN largely advocates in rate adjudication proceedings before the PUC. UCAN routinely submits oral and written testimony in such proceedings before the PUC; testimony can be made at public hearings, public workshops, and other public formal proceedings that are part of PUC adjudications. Typically, the PUC adjudications are almost

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.

always before Administrative Law Judges, with reporters, transcripts, and contesting parties (e.g. counsel for the utility) fully participating.

UCAN is also a “lobbyist employer” in that it houses the Privacy Rights Clearinghouse (“PRC”), which contracts with a lobbyist (Lenny Goldberg) to represent its interests before the legislature and non-PUC administrative agencies. UCAN reports expenses on behalf of both entities on the FPPC’s Form 635, “Report of Lobbyist Employer” in which it has reported sums that it (including PRC) has paid to its contract lobbyist. UCAN has also reported sums that UCAN spent on attorneys and expert witnesses in PUC ratemaking and adjudication proceedings on Form 635, Part III.

In reviewing these reports and applicable statute, you have questions regarding which payments should be reported on the Form 635 for the activities described above.

ANALYSIS

The Act imposes accounting and reporting requirements on lobbyist employers, lobbying firms, and other persons spending \$5,000 or more in a calendar quarter to influence legislative or administrative action. (Sections 86114 – 86118)

The Act defines “administrative action” in pertinent part, as follows:

(a) “The proposal, drafting, development, consideration, amendment, enactment or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding or any quasi-legislative proceeding...”

(b) “Ratemaking proceeding” means, for the purposes of a proceeding before the Public Utilities Commission, any proceeding in which it is reasonably foreseeable that a rate will be established, including, but not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms.

(c) “Quasi-legislative proceeding” means, for purposes of a proceeding that involves consideration of the establishment of a policy that will apply generally to a group or class of persons, including, but not limited to, rulemakings and investigations that may establish rules affecting an entire industry.”

(Section 82002 (emphasis added)).

Your organizations, UCAN and PRC, engage in two different types of activities. Under your facts, however, these organizations are affiliated and UCAN files one 635 form for both. For this reason, while we will analyze the activities of each for purposes of clarity, we will treat them as affiliated organizations.²

² We do not have facts to determine whether these entities are affiliated entities under the Act that should file one report. For purposes of this analysis, however, we treat them as such.

UCAN's staff engages in attempts to influence the PUC via oral and written testimony in proceedings before the PUC. The testimony is given at public hearings, public workshops, and other formal proceedings related to PUC adjudications. Many of these proceedings are in front of administrative law judges.

When UCAN staff participates in these proceedings, they do not qualify as "lobbyists" under the Act. A lobbyist is

"[any] individual who receives two thousand dollars (\$2,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or whose principal duties as an employee are, to communicate directly or through his or her agents with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action."

(Section 82039(a).)

The Act excepts from this definition, however, "a communication made for the purposes of influencing [a PUC proceeding]" if the communication is made "at a public hearing, public workshop, or other public forum that is part of the proceeding, or if the communication is included in the official record of the proceeding." (Section 82039(b).) That is, UCAN employees are not lobbyists by virtue of this activity and UCAN is not a lobbyist employer by virtue of this activity. If this were the only activity in which UCAN engaged, it would not (based on these facts) be a lobbyist employer.

This is not the only activity in which UCAN engages, however. In fact, you have explicitly stated that UCAN is a lobbyist employer that has contracted with a lobbyist to represent its interests before the legislature and non-PUC administrative agencies. Reading Sections 82002 and 82039 together, this contract lobbyist does engage in lobbying and you are a lobbyist employer. Once the determination is made that you are a lobbyist employer, you are responsible for certain reporting, independent of the definition of lobbying.

At issue here is what UCAN should report on its Form 635. The Act outlines in Section 86116 the payments that must be reported. These include payments to lobbying firms, employed lobbyists, activity expenses, all contributions over \$100, and "the total of *all other payments to influence legislative or administration actions* including overhead expenses and all payments to employees who spend 10 percent or more of their compensated time in any one month in activities related to influencing legislative or administrative action." (Section 86116(b), (c), (f), (g). & (h)(1) (emphasis added).)

Section 86116(h)(2) explains the term “all other payments to influence” as used in Section 86116(h)(1):

“A filer that makes payments to influence a ratemaking or quasi-legislative proceeding before the Public Utilities Commission, as defined in subdivision (b) or (c), respectively, of Section 82002, may, in lieu of reporting those payments pursuant to paragraph (1), report only the portion of those payments made to or for the *filer’s attorneys for time spent appearing as counsel and preparing to appear as counsel, or to or for the filer’s witnesses for time spent testifying and preparing to testify*, in this type of Public Utilities Commission proceeding. This alternative reporting of these payments made during a calendar month is not required to include payments made to an attorney or witness who is an employee of the filer if less than 10 percent of his or her compensated time in that month was spent in appearing, testifying, or preparing to appear or testify before the Public Utilities Commission in a ratemaking or quasi-legislative proceeding. For the purposes of this paragraph, *time spent preparing to appear or preparing to testify does not include time spent preparing written testimony.*” (Emphasis added)

Once an organization qualifies as a lobbyist employer, all “other payments to influence” must be reported unless they fall specifically under an exception. Thus, compensation paid by the lobbyist employer to an individual for the purpose of influencing legislative or administrative action is reportable even if that individual does not qualify as a lobbyist under the Act. The applicable exceptions are more fully explained in Regulation 18616, copy enclosed.

You explained that UCAN reports compensation to its contract lobbyist and related activity expenses as well as amounts spent for attorneys and expert witnesses to testify in PUC ratemaking proceedings and any *ex parte* communications with PUC Commissioners. As explained above, UCAN should report on its Form 635:

- compensation to your contract lobbyist and related activity expenses;
- Contributions over \$100;
- Compensation paid to all attorneys and expert witnesses for time spent appearing as counsel and preparing to appear as counsel in PUC ratemaking or quasi-legislative proceedings *except* time spent preparing written testimony for those proceedings.

(See Regulation 18616 for a full list of reportable activities.)

Your filings to date have been correct insofar as you are reporting for compensation related to PUC hearings. The amount that the Act does not require you to report is that compensation related to written testimony, even if prepared for a public hearing. As discussed above, the basis for this conclusion can be found on the face of Section 86116.

Should you need to amend your forms per the information above, you can find the Form 690 here: <http://www.fppc.ca.gov/Pdf/690.pdf>.

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

Sincerely,

Zackery P. Morazzini
General Counsel



By: Heather M. Rowan
Counsel, Legal Division

HMR:jgl

Enclosure