

Kirwan, Michael B.

From: Kirwan, Michael B.
Sent: Thursday, August 15, 2019 2:45 PM
To: Hyde, Kevin E.
Subject: RE: Kevin E Hyde sent you "JEA Request to Attorney General re Performance Plan"

Kevin,

If we view the performance units as being issued and sold by JEA, then the performance units are exempt from both the federal and state securities laws. The units are exempt from registration since they are being issued by a public instrumentality of a state. Section 3(a)(2) of the Securities Act of 1933 and Section 517.051(1) of the Florida Statutes provide this exemption.

The anti-fraud rules should always be considered to apply so an offering memorandum should describe the opportunity for the eligible JEA employees. Whether the municipal securities disclosures required for offerings of \$1,000,000 or more as provided by Rule 15c2-12 of the Securities Exchange Act of 1934 are triggered by an offering of \$1,000,000, I would defer to Chauncey for guidance.

Regarding the letter, a few observations:

1. Who is the letter coming from? The General Counsel's office?
2. In the fourth paragraph, a statement is made to "encourage employees to have 'skin in the game.'" This would seem to suggest that the units are an incentive which may contradict the statements in paragraph 16.
3. Paragraph 8 states that eligible employees can purchase a specified number of units. Do all employees get to subscribe for the same number or is the subscription limit tied to some other criteria?
4. Paragraph 10 refers to vesting of units. This is a new concept since the letter previously stated that the employees had to purchase the units. If the units are purchased, what is the vesting for?
5. Paragraph 10 states that a breaching employee would have to pay back amounts previously received. Paragraph 4 stated that the performance period would be 3 years so what would be the payments prior to 3 years?
6. Paragraph 11 states that the redemption price will include the purchase price. This suggests that the unit can't go negative. If it can't go negative, then it would seem there is no risk of loss other than time value of money. If there is no risk of loss, could argue there is no security being issued. But if no risk of loss, isn't this compensation? Paragraph 12 could be read to suggest that if the JEA's net position decreases, the redemption value decreases.
7. What is the formula for unit payouts, is it simply the percentage by which JEA's net position has changed? Should paragraph 12 be read to mean that it is only the last 12 months that are looked at?
8. Is there a cap on the unit payout? If not, could be very expensive which can expose a board to charges of corporate waste, etc.
9. Paragraph 16 states that the units are not incentives and not connected to services being rendered. If true, then what is the purpose?

Happy to discuss,
Michael

Michael B. Kirwan

Foley & Lardner LLP
One Independent Drive | Suite 1300
Jacksonville, FL 32202-5017
P 904.633.8913

[View My Bio](#)

-----Original Message-----

From: Hyde, Kevin E. <KHyde@foley.com>

Sent: Wednesday, August 14, 2019 4:46 PM

To: Kirwan, Michael B. <MKirwan@foley.com>

Subject: Kevin E Hyde sent you "JEA Request to Attorney General re Performance Plan"

Michael:

See attached draft letter regarding the performance unit plan that JEA is offering its employees. This letter (which is being revised by JEA) seeks an advisory opinion from the AG regarding compliance with a specific Florida statute. But, JEA wants to know whether any blue sky laws (do we need to issue any blue sky letter?) are implemented or if this would be treated as a private placement (any requirements for someone being an accredited investor?) Melissa Coffee is looking at this from a securities law standpoint. Please review and let me know your thoughts. I will be out tomorrow but hopefully in some on Friday. Colleen can give you the number. Jacksonville Electric Authority General Advice.

Thanks.

The preceding email message may be confidential or protected by the attorney-client privilege. It is not intended for transmission to, or receipt by, any unauthorized persons. If you have received this message in error, please (i) do not read it, (ii) reply to the sender that you received the message in error, and (iii) erase or destroy the message. Legal advice contained in the preceding message is solely for the benefit of the Foley & Lardner LLP client(s) represented by the Firm in the particular matter that is the subject of this message, and may not be relied upon by any other party.

[OGC info]

The Honorable Ashley Moody
Attorney General, State of Florida
Department of Legal Affairs
The Capitol PL01
Tallahassee, Florida 32399-1050

August 125, 2019

Re: Request for Formal Advisory Opinion

Dear General Moody:

We write to request a Formal Advisory Opinion regarding a matter of importance to JEA (formerly known as the "Jacksonville Electric Authority") (now formally known as "JEA") and, critically, to the approximately 2000 JEA employees who provide dedicated service to JEA and its customers. JEA is an independent authority of the City of Jacksonville and is subject to the jurisdiction of the Jacksonville City Charter, ordinances and, of course, state laws and regulations.

Formatted: Highlight

Over the past few months the Board and Senior Leadership Team of JEA have been exploring multiple scenarios of operation and investment to ensure that JEA customers and Northeast Florida receives the most cost-effective and efficient electric, sewer and water utility services. This inquiry was necessary due to the rapidly evolving utility forces due to declining sales resulting from energy efficiency measures taken by its customers. In short, JEA is facing financial constraints because both homeowners and businesses are investing in more energy efficient light bulbs, appliances, and building materials which has resulted in declining per account revenue and still has increasing costs. This fiscal and technological crisis has resulted in a number of initiatives designed to improve the fiscal health of the utility landscape and certain constraints JEA faces as a municipal electric, water and sewer provider. Currently, JEA is an independent authority of the City of Jacksonville and is subject to the jurisdiction of the Jacksonville City Charter, ordinances and, of course, state laws and regulations.

On July 23, 2019 the JEA Board approved exploring strategic alternatives, including issuing an Invitation to Negotiate (an "ITN").¹ The ITN was publicly issued on August 2, 2019, and invites interested parties to "submit Replies detailing strategic alternatives that are aligned with JEA's goal of maximizing customer, community, environmental and financial values over the long term." (ITN at p. 19).² The ITN requires any successful Reply to meet certain Minimum Requirements, including (1) protection of certain employee retirement benefits; (2) maintenance of substantially comparable employee compensation and benefits for three years; and (3)

Formatted: Highlight

Formatted: Highlight

Formatted: Highlight

Formatted: Highlight

Formatted: Highlight

¹ Resolution 2091-07, available under Board agenda and packet materials for July 23, 2019 meeting. www.jea.com/about

² The ITN is available at www.jea.com/xxxxxx

retention payments to full time employees of 100% of current base compensation. (ITN at p. 19, 20, 27, 35, 47 and FAQ 19, 20 and 26.). Additionally, the requirement of employee protection and substantially comparable employee compensation and benefits is included in the Evaluation Criteria stated in section 3.2.3, including also a confirmation of funding of retention payments to employees.

Commented [HKE1]: Discuss

Formatted: Highlight

~~As part of JEA's response to its fiscal issues, on July 23, 2019, in addition to the above, on July 23, 2019 the JEA Board passed Resolution 2019-10, approving a Long Term Performance Unit Plan (the "PUP") as part of JEA's response to its fiscal issues. The PUP, to be described later in Section A herein, is designed to allow employees to personally invest in the enterprise growth of JEA in the next three years (i.e. encourage employees to have "skin in the game" with with XXX to the fiscal health of the utility). The PUP is not dependent on any strategic alternative (i.e. investment, recapitalization, sale) occurring but will be measured on the change in JEA's Net Position, as shown on the JEA's audited financial statement during the three year defined performance period.~~

The JEA Board approved Resolution 2019-10 and the creation of the PUP on July 23, 2019. ~~Add in statement regarding long term nature of the PUP; see first two whereas clauses of the resolution~~ Attached is a copy of Resolution 2019-10 and Exhibits 1 and 2 to that resolution. Exhibits 1 and 2 provide a detailed summary of the PUP and Redemption Price Schedule for the PUP.

The Office of General Counsel of the City of Jacksonville has opined that the JEA Board acted within its authority and the applicable City Charter and ordinances in approving Resolution 2019-10. ~~See memo dated (date), a copy of which is attached.~~

Formatted: Underline

In summary, the PUP affords full-time JEA employees the opportunity to purchase units at \$10.00 per unit and redeem them for an amount dependent on JEA's current year value. The Plan is voluntary and is dependent upon the employee's employment status at JEA. JEA seeks an advisory opinion that the PUP comports with section 215.425, Florida Statutes, or any other state law deemed to be implicated.

A. Description of Long-Term Performance Plan:

The PUP allows eligible employees to purchase a specified number of performance units from JEA and redeem them for a cash payment equal to the redemption price. The PUP is entirely voluntary. Any ~~eligible~~ employee may decide to participate or decline.

Eligible employees include all (i) full-time employees actively employed with JEA for at least three months prior to the purchase date, ~~(including and~~ (ii) full-time attorneys from the Office of the General Counsel of the City of Jacksonville who are dedicated exclusively to JEA for at least three months prior to the purchase date). The eligibility of employees to participate in the program is dependent solely on their employment status and is not dependent on any other incentive-based measure such as performance reviews, sales, etc.

To participate, the employee must agree to comply with the following covenants: (i) devote his/her best efforts to faithfully discharge his/her duties on behalf of the JEA and not take any action that would be contrary to the best interests of the JEA and, (ii) not disclose confidential JEA information except as required by law or to perform employment duties, or (iii) not make any unauthorized public statements about, among others, JEA and government officials of the City of Jacksonville. A breach or threat to breach these covenants would result in the forfeiture of unvested units and/or the employee will promptly repay all or any portion of the cash payment previously paid to him/her in respect of his/her performance duties. The agreements regarding the Plan will be subject to Sections 409A and 457(f) of the Internal Revenue Code and will be governed by the laws of Florida and subject to arbitration in Duval County.

A total of 100,000 performance units will be available for purchase at \$10.00 per unit. Eligible employees will pay the purchase price of the unit by electing to defer a portion of his/her salary payment equal to the aggregate purchase price for the performance units. At redemption, the employee will receive a cash payment in the amount of the redemption price that will include the purchase price paid per unit. JEA's Chief Financial Officer will calculate the redemption price and it will be certified no later than 30 days following the completion of JEA's audit.

The calculation of the redemption price is dependent on JEA's current year value which is the sum of JEA's net position per JEA's audited financial statements, the aggregate consideration paid, distributed, credited or otherwise provided to the City of Jacksonville during the 12-month period prior to the end of the performance period, and the aggregate consideration paid, distributed, credited or otherwise provided to JEA's customers during the 12-month period prior to the end of the performance period. Depending on the increase or decrease of JEA's current year value, the redemption price for the units will increase or decrease. Payments made regarding the units will be paid less applicable withholding taxes.³

The employee must be actively employed by JEA on the vesting date for the units to vest. If an employee is involuntarily terminated (without cause or due to death or disability) prior to the vesting date, then the employee will receive a payment for the units at the same time as the amounts would have been paid had the employee not been terminated. If the employee's termination of employment is voluntary, then the employee forfeits the units and aggregate purchase price. If an employee is retirement-eligible and retires prior to the vesting date, the units will vest on the normal vesting date.

B. Questions:

1. Whether JEA's PUP is in accordance with section 215.425, Florida Statutes, and does not constitute unlawful "extra compensation,
2. Whether² JEA's PUP comports with other Florida laws, if any, applicable to employee participation in enterprise creation.

Commented [NM2]: Whether section 215.425, Florida Statutes, is applicable to JEA's proposed plan.

³ As part of the JEA's Board exploration of alternatives to the utility's fiscal challenges, JEA is also considering selling its utility. If that occurs, the amount owed to the employee will be paid and the Plan will be extinguished.

C. The Plan does not Violate Section 215.425, Florida Statutes

~~In advising on this question, it should be noted JEA's proposed plan is commonplace in the corporate world where employees invest in the success of the company but it is unique in government, unique as is frankly its decision to explore strategic alternatives.~~ This office has not located any applicable case law or advisory opinions. Very simply, JEA's PUP gives employees the choice of purchasing units that can increase in value if the value of JEA increases. The Plan is voluntary and requires employees that wish to participate to buy-in by using their personal monies to purchase the units and to execute an additional agreement pertaining to the Plan. The Plan does not constitute "extra compensation" under section 215.425, Florida Statutes.

Section 215.425 provides that "no extra compensation shall be made to any [public employee] after the service has been rendered or the contract made." The intent behind this provision is that public employees should not receive gratuities for services that were already rendered. AGO 2005-07 ("The purpose of such a provision is to prevent payments in the nature of gratuities for past service, and the restriction pertains to extra compensation given after service has been performed, not to compensation earned during service.") The provision has mostly been applied in instances where public employees were to receive retroactive compensation for work already performed. See AGO 92-49 (holding that the Police Pension Board of Trustees could not pay a cost of living allowance to a retired police officer already receiving pension benefits for prior service); see also AGO 91-51 (holding that severance payments in lieu of notice violated the provision because the employee renders no service after termination and the payments were compensation for work already performed).

JEA's PUP plainly does not constitute "extra compensation" because the redemption payments are not compensation for the services that the employees render as part of their employment with JEA. Rather, the PUP allows employees to participate in enterprise creation at the risk of not receiving a return on the investment made to purchase the PUP. The PUP is in stark contrast to the factual scenarios in which this office has previously applied the provision. The PUP does not serve to provide gratuities to the employees for their past service that they have been previously paid for and does not serve as a bonus program or incentive program to reward employees. Indeed, to participate in the Plan, JEA employees must opt-in at their sole discretion and expend their personal funds to purchase the units. The redemption payments for the units depend solely on the increase in value of JEA and are not connected to the services the redeeming employee renders as part of his/her employment with the JEA. Thus, section 215.425 does not apply to the Plan and the Plan does not constitute "extra compensation."

D. No Other Laws are Implicated

As to Question 2, we seek the guidance of this office to determine whether any other Florida laws of which we are currently not aware are implicated. We intend to send the Florida Commission on Ethics a request similar to this letter to receive its opinion.

We appreciate your assistance with this matter. Please let us know if you need any additional information.

Sincerely,

[]