

M E M O R A N D U M

TO: Lawsikia Hodges, Esq.
Jason Gabriel, Esq.

CC: Lynne Rhode, Esq.

FROM: Kevin E. Hyde

DATE: October 21, 2019

RE: JEA Performance Unit Plan

This memorandum addresses the Long Term Performance Unit Plan (the "PUP" or the "Plan") approved by the JEA Board on July 23, 2019 and laws relating to its implementation.

Description of the PUP

The PUP¹ allows eligible employees to defer compensation to purchase a specified number of performance units from JEA and redeem them in later years for a cash payment equal to the redemption price. Any eligible employee may decide to participate or decline.

Eligible employees include all full-time JEA employees (including full-time attorneys from the Office of the General Counsel dedicated exclusively to JEA, appointed employees, and represented employees) actively employed with JEA for at least three months prior to the performance units purchase date. The eligibility of employees to participate in the program depends solely on their employment status and execution of and compliance with a performance plan participation agreement (Exhibit 2). 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

¹ Attached as Exhibit 1 is the JEA Long-Term Performance Unit Plan, the plan document. Exhibit 2 is the Long-Term Performance Unit Agreement, which an individual employee will sign.



FOLEY & LARDNER LLP

and (ii) not disclose confidential JEA information except as required by law or to perform employment duties. A breach of these covenants would result in the forfeiture of unvested units except for a return of the aggregate purchase price for such units. 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 pool of units will be allocated² amongst employees based on his/her position level and the most recent annual performance review. The units will be available for purchase at \$10.00 per unit in the first months of the calendar year following the calendar year in which JEA's annual financial audit statement is completed. Unpurchased units will return to the pool. Eligible employees will pay the purchase price of the unit by electing to defer a portion of his/her salary (equal to the aggregate purchase price for the performance units) into an FDIC-insured savings account. 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 by the Plan Administrator (the JEA Compensation Committee chair) no later than 30 days following the completion of JEA's annual financial audit statement.

The calculation of the redemption price is dependent on JEA's current year value, which is defined as the sum of JEA's net position per JEA's annual audited financial statement, 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 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. If an employee is retirement-eligible and retires prior to the vesting date, the units will vest on the normal vesting date.

² The allocation of performance units available to each employee for purchase will be directed by the JEA Compensation Committee Chair, who is the Administrator of the Plan.

³ As a part of the JEA's Board's exploration of alternative scenarios to address the utility's fiscal challenges, JEA is also considering selling the utility. If that occurs, the performance period ends, the amount owed to the employee will become the obligations of the acquirer to be paid post-closing, and the PUP will be extinguished.

Questions Related to PUP

Since inception, a number of questions have been asked about the PUP. These questions are addressed below.

1. Does JEA have the authority to issue the PUP?

Article 21 of the City of Jacksonville Charter (the "Charter") provides plenary power to JEA to "manage, operate and promote the utilities system." (Charter at s. 21.04(a)). JEA may "enter into contracts with any person or entity, public or private, deemed necessary or desirable by JEA in connection with carrying out its powers and duties." (Charter at s. 21.04(e)) (Emphasis added). JEA may also "do all acts and deeds necessary, convenient or desirable, incidental to the exercise and performance of the powers and duties granted to JEA in this article." (Charter at s. 21.04(t)).

JEA's powers relating to employees is stated in Section 21.08 of the Charter:

All employees of the utilities system shall be employees of JEA and shall be subject to articles 16 and 17 unless otherwise provided by the council, which shall be and continue to be the legislative body as provided in section 447.203(10), Florida Statutes. JEA shall be fully responsible for the administration and operation of all utility services as set out in this article and in order to meet its administrative and operational responsibilities, JEA shall have **full and independent** authority to hire, transfer, promote, discipline, terminate and evaluate employees engaged to provide any and all of the utilities services for which it is responsible and accordingly, consistent with the provisions of article 17, JEA may establish employment policies relating to hiring, promotion, discipline and termination, and other terms and conditions of employment, and enter into negotiations with employee organizations with respect to wages, hours and terms and conditions of employment and take such other employment related action as needed to assure effective and efficient administration and operation of the utilities system. In order to effectively implement the foregoing, JEA shall perform all functions with regard to its own employees that are performed by the City department or division which oversees city employees in regard to personnel matters....(emphasis added).

Except for deferred compensation,⁴ the Charter does not specifically state that JEA may establish terms of compensation. But compensation is an integral part of employment and by implication is included within the phrase "other terms and conditions of employment." JEA's "full and independent authority" over its employees is essentially meaningless if JEA cannot set the terms of compensation.

⁴ Section 21.09(j).



FOLEY & LARDNER LLP

The PUP is a form of deferred and long-term incentive compensation which is well within JEA's right to establish absent explicit and contrary authority. This inherent power is evident by Section 21.05 of the Charter:

The powers of JEA shall be construed liberally in favor of JEA. No listing of powers included in this article is intended to be exclusive or restrictive and the specific mention of, or failure to mention, particular powers in this article shall not be construed as limiting in any way the general powers of JEA as stated in Section 21.04. It is the intent of this article to grant to JEA full power and right to exercise all authority necessary for the effective operation and conduct of JEA. It is further intended that JEA should have all implied powers necessary or incidental to carrying out the expressed powers and the expressed purposes for which JEA is created. The fact that this article specifically states that JEA possesses a certain power does not mean that JEA must exercise such power unless this article specifically so requires. JEA's power to levy special assessments shall not be deemed to be the power to levy taxes.

The issue, then, is whether the PUP lends to the effective operation and conduct of JEA. The PUP and the individual Long-Term Performance Unit Agreement each contain the following recital stating the PUP's purpose:

JEA desires to have long-term incentives, in accordance with its total compensation philosophy approved by the Board in January 2019 and the compensation framework established by the Board in June 2019 that motivates Employees to drive the customer, community and environmental value of JEA.

The PUP further specifies its purpose in Section 1 (a) and (b):

(a) The purpose of this JEA Long-Term Performance Unit Plan (this "Plan") is to provide a means by which employees of JEA may be given incentives to (i) remain with JEA, (ii) drive value for customers, (iii) drive value for the community of North East Florida, (iv) drive environmental value, and (v) drive financial value for JEA and the City of Jacksonville.

(b) JEA hereby seeks to retain the services of Employees and to provide incentives for such Employees to exert maximum efforts for the success of JEA and for the benefit of JEA's customers and the community it serves and the City of Jacksonville.

Based on the plenary power granted to JEA, and the PUP's stated purposes, we conclude JEA has the authority to implement the PUP.



FOLEY & LARDNER LLP

2. May JEA establish who is eligible to purchase a PUP?

All JEA employees are eligible to participate in the PUP. "Employee" means:

"Employee" means, except as otherwise recommended by JEA's Chief Executive Officer and approved by the Administrator, any (i) full-time employee of the JEA Group who has been employed by any member of the JEA Group for at least three (3) months prior to the Purchase Date and (ii) full-time attorney from the Office of the General Counsel of the City of Jacksonville who is dedicated exclusively to JEA for at least three (3) months prior to the Purchase Date. (JEA Long-Term Performance Unit Plan at Section 2(k). (PUP at Section 2(k)).

The Charter provides the General Counsel may "employ, supervise and terminate assistant counsels to assist with the efficient provisions of legal services for the City's independent agencies." (Charter at s. 7.01)). "The general counsel shall appoint assistant counsels and fix their compensation subject to the approval of the mayor." (Charter at s. 7.07)). Nothing in these provisions prohibit an assistant counsel assigned to JEA from participating in the PUP, provided that the General Counsel has authorized it.

3. Does the PUP Violate Article 21.09 of the Charter?

Article 21.09 of the Jacksonville City Charter contains the following provision related to the award of contracts by JEA:

Section 21.09. - Awards of contracts.

- (a) JEA shall not be subject to the provisions of Chapter 126, Ordinance Code of the City of Jacksonville, as the same may be amended from time to time, however, JEA in entering into any contracts relating to the construction, reconstruction, repair, operation or maintenance of the utilities system or the purchase of supplies, equipment, machinery and materials for the utilities system or the contracting or otherwise purchasing for any advisory, professional or any other services may establish such rules, regulations or procedures as it may deem desirable or necessary in connection therewith. In the absence of such specific authority, rules, regulations or procedures, JEA shall follow the provisions of Chapter 126 of the Ordinance Code of the City of Jacksonville, as the same may be amended from time to time. JEA shall have the right to reject any and all bids, in whole or in part, in the best interests of JEA. Nothing in this chapter shall be construed to limit the power of JEA to construct, repair, or improve the utilities system, or any part thereof, or any addition, betterment or extension thereto, directly by the officers, agents, and employees of JEA, or otherwise by contract. JEA is authorized to implement and to take all actions necessary to administer a purchasing and procurement program directed to Minority Business Enterprises including, but not limited to, prime contractors, subcontractors, consultants,



FOLEY & LARDNER LLP

subconsultants, and suppliers. Any such Minority Business Enterprise program shall be implemented by JEA to remedy discrimination or the present effects of past discrimination, if any, suffered by Minority Business Enterprises in the business community in the area served by JEA. For purposes of this chapter, the term "Minority Business Enterprise" shall be defined by JEA and shall include, at a minimum, those business entities that are legitimately owned, operated and controlled by persons who have been shown to have been discriminated against or who suffer from the present effects of past discriminations, if any, in the business community in the area served by JEA. Such program shall be used to redress and remedy discrimination or the present effects of past discrimination, if any, as may be determined by JEA, and which are shown to have been suffered by Minority Business Enterprises, in the business community in the area served by JEA.

- (b) No member of JEA or officer or employee thereof shall either directly or indirectly be a party to, or be in any manner interested in, any contract or agreement with JEA for any matter, cause or thing whatsoever in which such member shall have a financial interest or by reason whereof any liability or indebtedness shall in any way be created against JEA. If any contract or agreement shall be made in violation of the provisions of this section the same shall be null and void and no action shall be maintained thereon against JEA.

Section 21.09 relates to procurement, not employee compensation. Section 21.09(a) clearly relates to those contracts where a competitive procurement process must be used. ("JEA shall follow the provisions of Charter 126...."). This type of process is not used in employee matters.⁵ When read together, sections 21 (a) and (b) contemplate and relate to an award of contracts to vendors or suppliers to JEA rather than to employment or compensation agreements. This is evident by a number of factors.

First, the PUP is not awarded to employees or subject to any procurement process. The PUP is a voluntary benefit program in which an employee may or may not participate. To participate, the employee must purchase the PUP on the same terms as any other participant. JEA is not selecting or awarding the right to participate in the PUP. The Plan Administrator or designee determines the number of PUPs an individual may purchase.

Second, if Section 21.09(b) precluded the PUP (as some form of impermissible contract between employees and JEA), it would also preclude other forms of contractual indebtedness such as (a) individual employment agreements providing for compensation except for services previously performed; (b) pension obligation to JEA employees, namely Unfunded Actual Award Liability; and (c) deferred compensation. Each of these agreements give JEA employees a "financial interest" in JEA and a potential indebtedness of JEA. Allowing these items, but

⁵ Section 21.08 (JEA may "enter into negotiations with employee organization.")



FOLEY & LARDNER LLP

prohibiting the PUP would be inconsistent with Charter provisions (previously discussed) allowing JEA to establish terms and conditions of employment.

Third, the PUP requires an employee to invest deferred compensation into the PUP. An indebtedness is only created above the original investment if the Net Position Value is correspondingly increased.

4. Do some PUP participants have an advantage over others in deciding whether to participate?

The PUP is available only to a defined group of individuals – JEA employees and certain attorneys assigned to JEA. Thus, the PUP is not open to the “public.” Some have questioned whether certain individuals within the eligible group will have an impermissible advantage over others due to position held or access to information. The answer is “no.”

Because the PUP involves only transactions between JEA, on the one hand, and employees and attorneys of JEA, all of whom are “insiders,” on the other, the PUP raises no insider trading concerns. Insider trading under the securities laws requires a transaction with an “outsider” who is disadvantaged in a transaction with an insider due to lack of information, and no such outsiders are involved in the PUP.

Apart from insider trading concerns, it is important for securities law purposes that all of the PUP participants be provided with all material financial information about JEA and all material information about how the PUP payments will be calculated when they make their Deferral Elections, so that they are able to make an informed investment election. We understand that this requirement will be addressed as follows:

- Each participant will receive a copy of the PUP document itself, which outlines the conditions of an employee’s participation. Except for the precise number of PUPs made available to a particular individual, the terms are the same for all employees.
- Schedule A provides employees information as to how the PUP value is calculated. The “Value Change Percentage”, as discussed in Schedule A, determines the increase or decrease of the Redemption Price. That determination is based on JEA’s audited financial statements and the aggregate consideration paid, distributed, credited or otherwise provided to the City and to JEA customers during the “Performance Period,” all of which are public records.
- JEA intends to provide employees extensive information, including risk factors and hypothetical projections, during the enrollment period to assist employees with deciding whether to purchase one or more PUP(s). Each employee will receive the same information.



FOLEY & LARDNER LLP

- A representative of JEA's HR department will be available to answer questions from employees and employees will be strongly encouraged to obtain their own financial and legal counsel to advise on the Plan should they chose to do so.

There is also a concern over potential inequities among individual participants if some employees have access to information that others do not. So long as all material information relating to the PUP value calculation is disclosed to all participants, they have sufficient information to make a fully informed decision concerning their Deferral Election, and the fact that some participants have access to additional information does not impact the fairness of the other participants' Deferral Elections. To the extent there is concern that some participants may gain access to additional material information relating to the PUP value calculation, JEA may avoid such concerns over inequity by (a) requiring those participants to elect to decide whether to participate in the PUP prior to receiving that material information or (b) excluding those participants from the PUP.

The PUP mitigates any remaining risk from these concerns by limiting the amounts that may be invested and allowing only future deferred compensation to be invested, (thus preventing an employee from investing (or jeopardizing) additional personal monies or obtaining money from any other source to purchase the PUP).

5. Does the PUP comply with the Florida Code of Ethics for Public Officers and Employees?

JEA employees eligible for the PUP are covered by F.S. 112.311, the Florida Code of Ethics for Public Officers and Employees. See F.S. 112.312(2) defining "agency" to include a "municipal government entity of this state." The prohibitions discussed below relate to employees of covered agencies.

It is important to evaluate the purpose of the PUP in reviewing the applicable ethics laws. The PUP clearly states its purpose:

The purpose of this JEA Long-Term Performance Unit Plan (this "Plan") is to provide a means by which employees of JEA may be given incentives to (i) remain with JEA, (ii) drive value for customers, (iii) drive value for the community of Northeast Florida, (iv) drive environmental value, and (v) drive financial value for JEA and the City of Jacksonville. (PUP at Section 1a).

Nothing in the stated purpose or the actuality of the PUP creates a conflict between the participating employee and JEA or the customers JEA serves. Indeed, participating employees only stand to benefit if the value of JEA increases.

The Florida Code of Ethics for Public Officers and Employees makes it clear that the applicable laws are designed to prevent conflicts between the personal interests of employees and the public. The law also states that governmental agencies (e.g. JEA) may take measures to retain



FOLEY & LARDNER LLP

employees and that the code of ethics should not be a barrier from doing so. F.S. 112.311 specifies this intent:

1) It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than the remuneration provided by law. The public interest, therefore, requires that the law protect against any conflict of interest and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.

(2) It is also essential that government attract those citizens best qualified to serve. Thus, the law against conflict of interest must be so designed as not to impede unreasonably or unnecessarily the recruitment and retention by government of those best qualified to serve. Public officials should not be denied the opportunity, available to all other citizens, to acquire and retain private economic interests except when conflicts with the responsibility of such officials to the public cannot be avoided.

(4) It is the intent of this act to implement these objectives of protecting the integrity of government and of facilitating the recruitment and retention of qualified personnel by prescribing restrictions against conflicts of interest without creating unnecessary barriers to public service.

(5) It is hereby declared to be the policy of the state that no officer or employee of a state agency or of a county, city, or other political subdivision of the state, and no member of the Legislature or legislative employee, shall have any interest, financial or otherwise, direct or indirect; engage in any business transaction or professional activity; or incur any obligation of any nature which is in substantial conflict with the proper discharge of his or her duties in the public interest. To implement this policy and strengthen the faith and confidence of the people of the state in their government, there is enacted a code of ethics setting forth standards of conduct required of state, county, and city officers and employees, and of officers and employees of other political subdivisions of the state, in the performance of their official duties. It is the intent of the Legislature that this code shall serve not only as a guide for the official conduct of public servants in this state, but also as a basis for discipline of those who violate the provisions of this part. (Emphasis added)

Nothing in the PUP is prohibited by the legislative intent expressed in F.S. 112.311. Indeed, the PUP promotes the legislative intent of recruiting and retaining governmental employees. Contrary to creating a conflict of interest, the PUP aligns the interest of employees and JEA, creating long-term value for JEA and its customers.



FOLEY & LARDNER LLP

Additionally, there is very limited appellate case law interpreting F.S. 112.311.⁶ But, certain cases and Attorney General Opinions provide further guidance, though not arising from potential compensation vehicles such as the PUP. The opinions underscore the intent behind the statute and the ills the statute is designed to prevent.

First, a conflict must be substantial to be prohibited. AGO 1973-215 ("the personal investment in an enterprise that is prohibited by the act is one that will create a 'substantial conflict' between his private interest and the public interest"). See also AGO 1980-71 ("Thus, we do not believe that the Code of Ethics should be interpreted to prohibit the most remote possibilities of conflicts of interest, but rather to prohibit those relationship which are in substantial conflict with the proper discharge of duties in the public interest.")

Second, the Code of Ethics is designed to prevent individuals from acting against the interest of their agency or the public. "A primary objective of the Code of Ethics is that governmental officials avoid recurring situations in which there is a temptation to place personal gain, economic or otherwise, above the discharge of their fiduciary duty to the public." *Zerweck v. State*, 409 So.2d 57, 60 (Fla. 4th DCA 1982). Contrary to acting against the interest of JEA, the PUP is designed to encourage employees to personally invest in JEA and work to increase its value. Only if this occurs does the PUP gain value and the employee stand to benefit. Thus, the interests of JEA employees and JEA itself are strictly aligned.

Likewise, the PUP does not violate the more specific provisions of Chapter 112. Specifically:

- a. The PUP is not a Prohibited Gift

To participate in the PUP the employee must do a "Deferral Election." A "Deferral Election" means:

"Deferral Election" means an election by an Employee under the Agreement to defer pay to purchase Performance Units under this Plan payable for services to be performed in calendar years beginning after the date the Election Notice becomes irrevocable. An Employee shall make a new Deferral Election with respect to each Performance Period to the extent that such Employee is eligible to participate in this Plan for such Performance Year. (PUP at Section 2(h)). (Emphasis added)

An employee who purchases a PUP is not receiving a "gift" as defined in F.S. 112. F.S. 112.311(b)1 states that a "gift" does not include "salary, benefits, services, fees, commissions, gifts or expenses associated primarily with the donee's employment, business, or service as an officer or director of a corporation or organization." The participating employee is deferring a part

⁶ The statute was enacted in 1974. Legislative history is only available in the state library. We have not yet been able to access that legislative history.



FOLEY & LARDNER LLP

of his or her salary to purchase the PUP. As such, the restrictions of F.S. 112.313(2) prohibiting a public officer from soliciting or accepting a gift do not apply.⁷

b. The PUP is not Unauthorized Compensation.

Florida Statute 112.313(4) prohibits a public officer from accepting unauthorized compensation if the public officer knew or reasonably should have known that "it was given to influence a vote or action in which the officer, employee, or local government attorney was expected to participate in his or her official capacity." This section does not apply to the PUP. First, nothing is "given" to the participating employee. The PUP is a form of deferred compensation which has been duly authorized and adopted by the JEA Board. Employees choose how much, if any, of their earned compensation to defer for the purchase of allotted Plan units. Moreover, the PUP is offered to employees generally and not any individual specifically. Participation is purely voluntary. Thus, the PUP cannot be said to influence any individual or particular action. If anything, the PUP is designed to promote retention across all levels of JEA employees and increased or improved performance.

c. The PUP Does Not Confer a Special Benefit to a Particular Employee.

All JEA employees, as well as defined representatives of the Office of General Counsel, are eligible to purchase a PUP. This class is similar to JEA employees who are eligible to participate in the JEA deferred compensation plan, i.e. it is a benefit incidental to their employment. It is not a special privilege, benefit or exemption solely for a particular individual or one which a particular individual can secure for himself. Thus, the PUP is not prohibited by F.S. 112.313(6) (prohibits a public employee from using an official position to secure a special privilege, benefit or exemption for himself.)

d. A Participating Employee Does Not Misuse a Public Position

Section. 112.313(6) prohibits misuse of public position. That statute provides:

No public officer, employee of an agency, or local government attorney shall *corruptly* use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit or exemption for himself, herself, or others. The section shall not be construed to conflict with s. 104.31. (Emphasis added)

⁷ This conclusion is further strengthened by the definition of gift within F.S. 112.312(12)(a). A gift "for purposes of ethics in government and financial disclosure required by law, means that which is accepted by a donee or by another on the donee's behalf, or that which is paid or given to another for or on behalf of a donee, directly, indirectly, or in trust for the donee's benefit or by any other means, for which equal or greater consideration is not given within 90 days..."



FOLEY & LARDNER LLP

The PUP is available to all employees who may decide whether or not to participate and is incidental to their employment (e.g. a form of deferred compensation). No individual is able to secure something not available to other JEA employees. It is also important to note that the PUP was developed at the instruction of the JEA Board, authorized by it, and will be administered under Board auspices and the redemption price certified by the Board. Further, an independent auditor will certify all values and financial results that will substantiate the value of the PUP. No individual can affect or create a benefit which is not approved or authorized by the Board. And, no JEA Board member can participate in the PUP. Thus, there is complete independence of participants from the creation and authorization of the PUP and certification of values related to the PUP.

To establish a violation of s. 112.313(6), the following elements must be proven by clear and convincing evidence:

“(a) the employee used or attempted to use his official position; (2) to secure a special privilege, benefit or exemption for himself or another and (3) acted corruptly in doing so, that is, with wrongful intent and for the purpose of benefiting himself or another person from some act or omission, which is inconsistent with the proper performance of his public duties. Corruptly is statutorily defined as being done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from act or omission of a public servant which is inconsistent with the proper performance of his or her duties. To satisfy this statutory element, proof must be adduced that Siplin [the Respondent/Appellant] acted with reasonable notice that [his or her] conduct was inconsistent with the proper performance of his or her public duties and would be a violation of the law of the code of ethics. *Siplin v. Commission on Ethics*, 59 So.3d 150, 151-152 (Fla. App. 5th Dist. 2011) (internal citations omitted).

Employees eligible to participate in the PUP are not receiving compensation inconsistent with the proper performance of their duties. Indeed, the PUP is based on the employee properly performing their duties and incentivizing them to do so. Moreover, all eligible participants are properly advised of the conditions of eligibility to participate in the PUP and its terms. The JEA Board has approved the PUP and the employee does not have notice that the PUP is inconsistent with performing his or her duties. Consequently, the PUP, and those who participate in it, do not violate s. 112.313(6).

6. Must the PUP Be Registered under the Securities Laws?

The PUP is exempt from registration under the securities laws. As described above, the PUP is an opportunity for JEA employees to defer compensation, purchase units within the PUP, and realize gain, if any, if the enterprise value of JEA increases. The PUP 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 respect to improving the health of the utility).



FOLEY & LARDNER LLP

JEA's performance will be measured on the change in JEA's net position during the performance period.

A security may be considered any situation where individuals invest money in a common enterprise with the expectation to earn a profit solely through the efforts of someone other than themselves. Employees must remain employed to receive benefits under the PUP. The employees' continued effort is required. Moreover, since the performance units are being issued and sold by JEA, then the performance units are exempt from registration under 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.

As long as the total subscription for the PUP does not exceed \$1,000,000,⁸ 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 will not be applicable.

7. Is the PUP a Deferred Compensation Plan Allowed by Florida Law?

Florida law and the JEA Charter allow employees of a governmental unit to participate in a deferred compensation plan.

The relevant Florida statute, F.S. 112.215, states in part:

In accordance with a plan of deferred compensation which has been approved as herein provided, the state or any state agency, county, municipality, other political subdivision, or constitutional county officer may, by contract or a collective bargaining agreement, agree with any employee to defer all or any portion of that employee's otherwise payable compensation and, pursuant to the terms of such approved plan and in such proportions as may be designated or directed under that plan, place such deferred compensation in savings accounts or use the same to purchase fixed or variable life insurance or annuity contracts, securities, evidence of indebtedness, or such other investment products as may have been approved for the purposes of carrying out the objectives of such plan. Such insurance, annuity, savings, or investment products shall be underwritten and offered in compliance with the applicable federal and state laws and regulations by persons who are duly authorized by applicable state and federal authorities. (F.S. 112.215(3)) (Emphasis added)

The statute further provides the basis for establishing the plan and criteria for approving the various accounts and investment accounts or vehicles. (F.S. 112.215(5-6)).

⁸ As written, the PUP is scheduled to have 100,000 units at \$10.00 per unit.



FOLEY & LARDNER LLP

Article 21.07(j) of the JEA Charter specifically provides that “JEA shall have the option to establish an employee deferred compensation program separate from the city’s employee deferred compensation program.” Under this authority, the JEA 457 Deferred Compensation Plan was established in 2002 for the purpose of providing employees of JEA and employees of the (now former) St. Johns River Power Park System with a voluntary method deferring taxation on compensation until death, retirement or certain other events. See memo dated July 6, 2018 from Aaron Zahn to JEA Board and as approved by JEA Board on July 30, 2018.

The PUP is not a traditional deferred compensation plan such as the one currently in place with JEA. However, the PUP is akin to and fits with the deferred compensation plan allowed by F.S. 112.215. If JEA desires to treat the PUP as a deferred compensation plan pursuant to §112.215, the JEA Board must approve the PUP (it has); as required JEA will seek a determination that the compensation deferred by employees to purchase the PUP is not currently taxable (F.S. 112.215(5) and (6)(b)); and that the proceeds to the employees from the PUP, if any, will not be included in the employee’s taxable income until proceeds are actually received (F.S. 112.215(6)(a)). Finally, the PUP does not impose any liability on JEA, “except to show that the payments have been [or will be] remitted for the purposes for which the compensation has been deferred.” (F.S. 112.215(9)). Specifically, Section 9(c) of the JEA Long-Term Performance Unit Plan states, “[t]his Plan is intended to constitute an ‘unfunded’ program, and no amount shall be set aside to fund any payments hereunder prior to the end of the Performance Period. JEA’s obligations under this Plan are unfunded and unsecured, and the Participants have no rights other than those of general unsecured creditors of the JEA Group with respect to any payment hereunder.” Further, a JEA Employee stands to gain nothing if the Threshold Value Target is not attained during the applicable Performance Period (Section 2(t) of the JEA Long-Term Performance Unit Plan).

In addition to the requirements under F.S. 112.215, the Administrator of the PUP should consult F.S. 112.21 to determine the applicability of requirements of custodial accounts in which the deferred compensation used to purchase performance units will be held. It is our understanding that JEA intends to hold the deferred compensation in an interest-bearing FDIC- insured account such as those currently used for other existing JEA deferred compensation plans.

8. Is JEA Pledging Credit to Participating Employees?

Article 7, Section 10 of the Florida Constitution prohibits JEA from becoming a “joint owner with, or stockholder of, or giv[ing], lend[ing] or us[ing] its taxing power or credit to aid any corporation, association, partnership or person.” As indicated above, JEA is not giving or using its taxing power or credit to help any JEA employee who purchases a PUP with deferred compensation. The Florida Supreme Court has described the pledging of credit as follows:

As used in Article VII, section 10, “credit” means “the imposition of some new financial liability upon the State or a political subdivision which in effect results in the creation of a State or political subdivision for the benefits of private enterprises. This Court has explained that the lending of public credit means:

[T]he assumption by the public body of some degree of direct or indirect obligation to pay a debt of the third party. Where there is no direct or indirect undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit.

Under this definition, we conclude that the COP's in this case do not contemplate a pledge of the District's credit, and that only a public purpose, and not a paramount public purpose, need be shown. *Miccouskee Tribe v. South Florida Water Management District*, 48 So.3d 811, 823 (Fla. 2010) (internal citations omitted).

Further, as previously stated, any amount owed to employees under the PUP will become the obligation of the acquirer to be paid post-closing.

As earlier explained, a participating employee only realizes a gain on the deferred compensation used to purchase the PUP if the Threshold Value Target set forth on the Redemption Price Schedule is attained during the applicable Performance Period, i.e. there is an increase in value of JEA itself. No public property is placed in jeopardy by default of the participating employee or any other third party.

Given that no credit is being pledged, Article VII, Section 10 requires only that a public purpose be met. The PUP's stated public purpose is to "provide a means by which employees of JEA may be given incentives to (i) remain with JEA, (ii) drive value for customers, (iii) drive value for the community of Northeast Florida; (iv) drive environmental value, and (v) drive financial value for JEA and the City of Jacksonville. (Section 1(a) of the JEA Long-Term Performance Unit Plan)."

The Florida Attorney General has opined that "if the expenditure primarily or substantially serves a public purpose, the fact that the expenditure may also incidentally benefit private individuals does not violate Article VII, section 10." AGO 2005-02. The AGO further stated that the determination of whether the expenditure of funds fulfills a public purpose is one that the legislative body, in this case the JEA Board, must make. *Id.* As noted above, the PUP specifies the public purpose, and the JEA Board has approved the PUP.

9. Is the PUP permissible under Florida Laws related to "Extra Compensation?"

The PUP gives employees the choice of purchasing units that can increase in value if the value of JEA increases and decrease in value if the value of JEA decreases. The Plan is voluntary and requires employees that wish to participate to buy-in by deferring their personal compensation to purchase the units and to execute an agreement pertaining to the Plan. As developed below, the Plan does not therefore constitute "extra compensation" under section 215.425, Florida Statutes.



FOLEY & LARDNER LLP

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.").

We have reviewed the applicable legislative history of section 215.425 and have not identified anything suggesting that plans such as the PUP are, or are intended to be, prohibited by the statute. The provision applies principally 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 services); *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 all eligible employees to participate through a voluntary payment in enterprise creation at the risk of not receiving a return on the investment made to purchase the performance units. The PUP also 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 number of performance units available for purchase by each employee is directed by the Plan Administrator and is based on the employee's position level and annual performance review. The redemption payments for the units depend solely on the change in value of JEA. Thus, section 215.425 does not apply to the Plan, and the Plan does not constitute "extra compensation."

CONCLUSION

We appreciate the opportunity to review the PUP. Please call if there are any questions.