

## California Fair Political Practices Commission

### MEMORANDUM

**To:** Chair Ravel, Commissioners Eskovitz, Garrett, Montgomery and Rotunda

**From:** Zackery P. Morazzini, General Counsel  
Heather Rowan, Commission Counsel

**Re:** Adoption of Proposed Regulation 18215.3 – Behested Payment Reporting

**Date:** February 27, 2012

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#### *I. Introduction*

Staff’s proposed adoption of Regulation 18215.3 responds to several years of questions from the regulated community (and others) regarding behested payments and when reporting is required. The regulation also provides a definition for “made at the behest of” and narrow exceptions that apply to particular payments that are made at the behest of an elected officer or PUC member. By adopting this regulation, the Commission will offer guidance to public officials who participate in charitable organizations and events and will provide a useful exception to agencies that seek outside help from another public entity.

#### *II. Background and Current Law*

The Act creates two basic categories of payments made to a candidate: contributions and gifts. Generally, a “contribution” includes “a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless *it is clear from the surrounding circumstances that it is not made for political purposes.*” (Section 82015(a), emphasis added.) A “gift” is “any payment that confers a *personal benefit* on the recipient, to the extent that consideration of equal or greater value is not received . . . .” (Section 82028(a), emphasis added.) These categories assist in determining how a particular payment should be reported and also determine what, if any, limits apply.

Additional descriptors and exceptions apply to those payments that are classified as contributions. For example, a payment “made at the behest of” a committee is a contribution to the committee unless full and adequate consideration is received. (Section 82015(b)(1).) Similarly, payments made at the behest of a candidate are also contributions, unless certain factors apply. A payment is made at the behest of a candidate whenever it is made “under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of” a candidate. (Section 82015; Regulation 18225.7.)

Section 82015(b)(2)(B)(iii) establishes a third type of payment subject to a unique reporting scheme. This section provides that even if a payment is made “at the behest” of an elected officer or a member of the Public Utilities Commission (“PUC”),<sup>1</sup> it is not considered a contribution to that officer if it is made principally for legislative, governmental, or charitable purposes, in which case it is neither a gift nor a contribution. Referred to as a “behested payment,” the payment must still be reported, but is not subject to contribution or gift limits. The officer must file a report detailing the payment if the payment is principally for a legislative, governmental or charitable purpose and the aggregate amount is \$5,000 or more.

This report, known as a “behested payment report,” must be filed within 30 days with the officer’s agency when the amount of the payment, or aggregate payments for similar purposes made at the behest of the officer by the same source, is \$5,000 or more in a calendar year. The purpose of the “behested payment” provision in Section 82015 is to capture reporting for payments that are not direct contributions to elected officials, but payments in which the public would have an interest.

According to the legislative history, the Legislature added Section 82015(b) in response to the complexity of applying the gift/contribution analysis to events sponsored by an officeholder and other entities (referred to as “co-sponsored” events). FPPC staff had been advising in a series of letters to legislators dealing with these district events for constituents that whether a payment for a co-sponsored event constituted a contribution or a gift to an elected officer must be made on a case by case basis. (*See, e.g. Milman Advice Letter, I-93-357.*) Staff would examine the payments and the definition of contribution and then decide whether the factors presented weighed more heavily as a contribution, related to the candidate’s candidacy for elected office, or they did not.

The Legislature believed that the FPPC interpretation resulted in all payments being contributions subject only to minor exceptions. (*See, e.g., Senate Rules Committee Analysis, SB 124, 1997.*) Section 82015(b) was intended to remedy this problem by creating a third category of payment, that was neither a contribution nor gift, but a “behested payment.”

### ***III. Regulatory Changes***

The proposed regulation has three components: 1) a definition of “made at the behest of,” 2) a limited exception to behested payment reporting requirements for an elected officer merely being listed on the roster of a nonprofit organization’s fundraising letter, and 3) a limited exception to behested payment reporting requirements for payments made from one governmental agency to another made at the behest of an elected officer.

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<sup>1</sup> Note that Section 82015(b)(3) applies all the provisions discussed herein to members of the PUC. Whether mentioned or not in this memorandum, this regulation applies to elected officers under Section 82015(b)(2) as well as members of the PUC under Section 82015(b)(3).

1. *Definition: "Made at the Behest of"*

The statute does not specifically state a definition for "made at the behest of." Regulation 18225.7, related to expenditures, offers a definition of "made at the behest of" that has never explicitly been applied to behested payments. For this reason, staff proposes to use nearly the same language to aid the easy application and analysis of whether a payment is "behested." Staff has chosen this definition because it is most likely to add clarity and uniformity, and also because in 1997 when the legislature added Section 82015(b) to the definition of contribution, it was this definition (or nearly so) that the legislature appeared to presume to be most fitting.

2. *Nonprofit Organization Fund-raising Solicitation*

The first exception relates to a solicitation made by a non-profit or similar organization that has elected officers or PUC members on its board of directors. The exception helps to clarify requests that staff has received involving an elected officer or PUC member who is on the board of directors, an advisory council, or a fundraising committee of a charitable organization, and the organization sends out a solicitation letter. (See, e.g., *Filchev* Advice Letter, No. I-09-073.) In the *Filchev* letter, staff advised that a donation to a charitable organization is not a reportable behested payment merely because an elected officer serves on the board of directors, an advisory council, or a fundraising committee and his or her name is listed on a solicitation for that reason. This regulation further clarifies that if an elected officer or PUC member is "featured" (as defined) in the solicitation, or if the board (or applicable committee) is comprised of a *majority* of elected officers or PUC members, *and* the organization receives a payment in response to that solicitation, the payment is reportable as a behested payment if it is \$5000 or more in the aggregate in a calendar year from a single source. (Section 82015(b)(2)(B)(iii).)

3. *Routine Government-to-Government Payments*

The second exception responds to telephone-only questions staff has received over several years and comments that arose at the December, 2011 Interested Persons meeting. Section 82015(b)(2)(B) states that a payment made at the behest of a candidate is a contribution to the candidate unless it is clear from the surrounding circumstances that that the payment was made for purposes unrelated to his or her candidacy for elected office. One example of a payment that is presumed to be for purposes unrelated to the candidate's candidacy is a payment "made by a state, local, or federal governmental agency or by a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code." (Section 82015(b)(2)(B)(ii)). The language of the statute has created confusion, however, over whether certain routine government-to-government payments would technically need to be reported as behested payments. The FPPC does not want to interfere with the sensitive work of agencies in California that occasionally depend on other agencies' support to carry out their official duties.

For example, a situation could arise wherein a county sheriff (elected officer) requests law enforcement assistance from a state or federal government agency and in response, the governmental entity provides service or funds. The proposed language clarifies that those payments should not be classified as behested payments that the sheriff is required to report if over \$5000 in a calendar year. This regulation states that government-to-government payments made at the behest of an elected officer or member of the PUC, are not reportable as behested payments if they are used "in the regular course of official agency business."

A situation that staff does not intend to include in this narrow exception occurs when a public official writes to a state agency on behalf of another requesting funding. For example, an assembly member who writes a letter on behalf of a public school district to support a request for grant funding or a senator who writes on behalf of a high school student in support of a college scholarship for that student are not included within this exception. These requests are not made of another agency and for the purpose of the official business of the elected officer's agency as explicitly stated in the regulation.

The regulation does not provide any further exceptions to behested payment reporting.

Staff has gathered input regarding behested payment reporting over the past year. Staff first held an interested persons meeting on July 14, 2011 to hear public input on possible regulation language. Following this, the Commission heard and commented on the regulation language, deciding that it wanted to reconsider the draft language at the March, 2012 meeting, including the language mentioned above. Staff solicited further comments from the public at a second interested persons meeting on December 13, 2012. The meeting yielded many useful comments that informed a revision to the proposed regulation language.

These comments have been included within the proposed language, as discussed above.

#### ***IV. Potential Costs***

There are no costs associated with this regulation.

Staff recommends adopting Regulation 18215.3.