



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
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**To:** Chair Miadich, Commissioners Cardenas, Hatch, and Hayward

**From:** Dave Bainbridge, General Counsel  
Ryan O'Connor, Commission Counsel

**Subject:** Behested Payments

**Date:** August 5, 2019

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### **LEGAL BACKGROUND**

The Act regulates three categories of payments for an elected officer – contributions, gifts, and behested payments. These categories determine how a payment is reported and what, if any, limits apply.

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 or it is clear from the surrounding circumstances that the payment is not made for political purposes.” (Section 82015(a).) A payment is made for political purposes if it is made “[f]or the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure,” or if the payment is received by or made at the behest of a candidate, a controlled committee, an official committee of a political party, or an organization formed primarily for political purposes. (Regulation 18215(a).)

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); Regulation 18940.1.) Gifts to a public official are reportable if more than \$50 in twelve months is received from a single source. (Section 87207(a)(1).)

A “behested payment” is a payment made at the behest of a committee or elected officer that is neither a contribution nor a gift. The Legislature created “behested payments” through legislation in 1997 that amended the Act’s definition of “contribution.” The Legislature believed the interpretation of “contribution” at the time applied to too many types of payments and attempted to remedy this problem by distinguishing behested payments from contributions. The legislation also created reporting requirements for behested payments, but, unlike contributions and gifts, behested payments are not subject to limits.<sup>1</sup>

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<sup>1</sup> The stated purpose of the amendment to former Section 82015 was as follows: “This bill recognizes that elected officeholders engage in governmental, legislative and charitable activities which are neither ‘campaign’ activities nor ‘personal’ activities. Payments made by others to assist in the conduct of such governmental, legislative, or charitable activities, even ‘at the behest of’ an elected officeholder are neither ‘gifts’ nor ‘contributions’ and should not be subject to limits. The bill does, however, require public disclosure of these

In 2017, legislation removed the definition and reporting requirements for behested payments from Section 82015 and incorporated the definition and reporting requirements in new sections of the Act. (See Sections 82004.5, 82041.3, and 84224.)<sup>2</sup>

Under Section 82004.5, a “behested payment” can be made at the behest of a committee, an elected officer, a CPUC member, or an agent thereof. Section 82041.3 defined “made at the behest of” to mean “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.”<sup>3</sup> Behested payments occur in one of the following circumstances:

- (a) Full and adequate consideration is received from the committee or elected officer.
- (b) The payment is made to a different candidate or to a committee not controlled by the behesting candidate.
- (c) As to an elected officer, it is clear from the surrounding circumstances that the behested payment was made for purposes unrelated to the officer’s seeking or holding of elective office.

Notwithstanding the Act’s definition of contribution, Section 82004.5(c) further provides that certain payments are presumed to be for purposes unrelated to an elected officer’s seeking or holding of elective office. The consequence of this presumption is that the specified payments are not considered contributions under the Act and are reportable only to the extent the payments must be reported as gifts or behested payments. Payments subject to this presumption include:

- (1) A payment made principally for personal purposes, in which case it may be considered a gift under the provisions of Section 82028.
- (2) A payment made by a state, local, or federal government agency.
- (3) A payment made to a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.
- (4) A payment made principally for charitable purposes.<sup>4</sup>
- (5) A payment made principally for legislative or governmental purposes by a person other than a state, local, or federal governmental agency.<sup>5</sup>

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payments once a threshold is met and exceeded.” (Senate Rules Committee Senate Floor Analysis of SB 124 (4/30/97).)

<sup>2</sup> Sen. Bill No. 867 (2016-2017, Reg. Sess.).

<sup>3</sup> Added by Stats. 2017, Ch. 749. Please note that the phrase “made at the behest of” applies in several different contexts in the Act in addition to behested payment reporting.

<sup>4</sup> Historically, payments that were “made principally for a charitable purpose” include: an elected officer’s cosponsored event to benefit a nonprofit that provides services to the public (*Foster* Advice Letter, No. I-02-213); an elected officer’s solicitation of funds for a widow and children of a fallen U.S. Marine (*Rexroad* Advice Letter, No. A-04-114); an elected officer’s cosponsored event raising funds for nonprofits geared towards women’s health issues (*Stone* Advice Letter, No. A-06-127).

<sup>5</sup> Payments that were “made principally for a governmental purpose” include: an elected officer’s retention of an expert consultant (*Steele* Advice Letter, No. A-06-091); an elected officer’s cosponsored conference regarding college and career choices (*Gallegos* Advice Letter, No. A-98-192); a district attorney’s solicitation of payments to a law firm to represent the State of California as plaintiff (*Stoen* Advice Letter, No. A-03-185).

Significantly, the fact that a payment is a behested payment or presumed unrelated to an elected officer's seeking or holding of elective office under Sections 82004.5 and 82043.3 does not automatically qualify a payment as a *reportable* behested payment. Sections 82004.5 and 82041.3 must be read in conjunction with Section 84224, which establishes when a behested payment must be reported under the Act. Under this section, a behested payment must be reported only if all of the following are established:

- (1) The payment is made at the behest of an elected officer or member of the CPUC.
- (2) The behesting elected officer or member of the CPUC does not provide full and adequate consideration in exchange for the payment.
- (3) The payment is made principally for a legislative, governmental, or charitable purpose.
- (4) The payment is made by a person other than a state, local, or federal governmental agency.

Thus, as defined by the Act, a payment that falls within the definition of a behested payment is not a contribution under the Act. Moreover, a payment for personal purposes, even if a behested payment by definition, is not a reportable behested payment under Section 84224 because the payment is not made for a legislative, governmental, or charitable purpose. A payment for personal purposes is reportable only to the extent that the payment is a reportable gift under the Act.

In regard to behested payment reporting requirements, an elected officer or CPUC member must generally file a report detailing the payment if the payment is principally for a legislative, governmental, or charitable purpose and the aggregate amount from a single source is \$5,000 or more per calendar year. (See Section 84224.)<sup>6</sup> Behesting elected officers and CPUC members must complete Form 803 – Behested Payment Report.

Form 803 details all of the following information: name of payor; address of payor; amount of the payment or payments; date or dates the payment or payments were made; the name and address of the payee; a brief description of the goods or services provided or purchased, if any; and, a description of the specific purpose or event for which the payment or payments were made. The form must be filed within 30 days with the officer's or member's agency and is public record subject to copying and inspection. For transparency and accountability purposes, behested payments reported by state elected officers and CPUC members are posted on the Commission's website. Behested payments reported by local elected officers are forwarded by local agencies to the officials with whom the officers file their campaign statements.

### **BEHESTED PAYMENTS TO FURNISH OFFICE**

In May of this year, the Enforcement Division received a complaint filed by the California Republican Party alleging Lieutenant Governor Eleni Kounalakis reported behested payments for funds that should have been classified as contributions or gifts and therefore subject to limits.<sup>7</sup> In early 2019, the Lieutenant Governor reported behested payments totaling \$337,500 to an Internal

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<sup>6</sup> Added by Stats. 2017, Ch. 749.

<sup>7</sup> For the office of lieutenant governor, the current contribution limit is \$6,400 per election. The applicable gift limit is \$500 per source, per calendar year.

Revenue Code Section 501(c)(4) social welfare organization entitled the “Committee to Support the Office of the Lt. Governor” (“Committee”). The payments came from various labor unions and private enterprises, amongst others. The Committee used the payments to fund the Lieutenant Governor’s inauguration and furnish the Lieutenant Governor’s office at the Capitol, including chairs, desks, conference room furniture, picture frames, and artwork. Also, some of the money was solicited to fund stipends for student artists attending public California universities whose art will be featured in the Lieutenant Governor’s office. Enforcement Division did not open an investigation in response to the complaint, citing insufficient evidence of a violation of the Act.

As noted above, Section 82004.5(c) states that payments made principally for personal, charitable, or legislative or governmental purposes are presumed unrelated to an elected officer’s seeking or holding of elective office. In this case, payments to the 501(c)(4) to furnish the office appear to fall within the parameters of the presumption that the payments are unrelated to an elected officer’s seeking or holding of elective office because the payments have either been provided for the personal use of the elected officer or for the charitable or governmental purpose of facilitating the state’s business. Accordingly, the Act does not support a finding that the payments constitute contributions to the behesting officer.

Less clear is whether the payments provided a personal benefit to the behesting officer, which would require that the payments be reported as gifts to the officer and subject to the Act’s gift limits. However, in this regard, a finding that the payments are principally charitable or governmental in purpose would establish that the payments are not gifts under the Act and past advice provides little insight as to whether payments to furnish a governmental office should be regarded as a behested payment or gift under the Act.

FPPC staff have routinely advised that elected officers may raise money through behested payments to fund inaugural events. The practice is commonplace. FPPC staff have not previously advised on whether the purchase of office furnishings for a government office constitutes behested payments. FPPC staff have advised that artwork donated to a government agency could provide a personal benefit to a public official, and therefore qualify as a gift, if the artwork were designated to be hung in the office of the official at the time of the donation.<sup>8</sup>

Conversely, FPPC staff advised that a house purchased for the use of the Governor while in office was permissible under the Act.<sup>9</sup> In that instance, a foundation sought to purchase a residence for then-Governor George Deukmejian and future governors. The funds for the purchase came primarily from excess funds from the Governor’s inaugural celebration. The foundation intended to furnish the house as well. The furnishings were to belong to the foundation and be made available on the same terms as the house. The Governor was not able to take them with him when he left office. The letter advised that providing the house and its furnishings to the Governor was a gift to the state, not a gift to the Governor, as it did not confer a significant or unusual benefit to the officer. Once the state accepted the gift, the state had control over the residence, not the foundation. Finally, staff found it significant that use of the house was not limited to the Governor and his family. It was made available to future Governors, at the discretion of the state. Subsequent advice from FPPC staff emphasized that the advice was intended to be limited to those facts and

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<sup>8</sup> *Fredrick* Advice Letter, No. I-09-020.

<sup>9</sup> *Raye* Advice Letter, No. A-84-077.

whether a payment to the state confers a “significant or unusual benefit” on any officer requires a case-by-case analysis.<sup>10</sup> The *Raye* letter predated the creation of the behested payment reporting but is still instructive on the interpretation of gifts under the Act.

### **POTENTIAL ACTION**

If the Commission determines the purchase of furnishings for government offices at the behest of an elected officer should not fall within the definition of a behested payment, it should consider whether such payments should constitute gifts or contributions. If gifts, the Commission could adopt a regulation clarifying when items of this nature primarily confer a personal benefit on the officer and therefore qualify as gifts under the Act. Defining such payments as a contribution would require a statutory change.

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<sup>10</sup> See *Leidigh* Advice Letter, No. I-94-129; *Bell* Advice Letter, No. A-94-376