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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich and Commissioner Hayward

From: Dave Bainbridge, General Counsel
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Subject: Behested Payment Issues: Reporting Payments Made for a Charitable, Legislative or Government

Date: May 6, 2020

Introduction

The Commission recently requested a review and discussion of behested payment reporting issues. Behested payment transactions operate outside the Act’s strict gift and contribution disclosures and limitations. The potential political influence involved may be publicly known only to the extent the behested payments are reported. The Commission’s request follows recent proposed legislation to change behested payment reporting, as well as recent media accounts investigating various behested payment practices that some believe could involve an undisclosed personal benefit or financial interest. The Commission’s inquiry also comes amid information suggesting that the current behested payments rules may be ambiguous or confusing to follow in some instances. Staff presents background on the behested payment reporting requirements, current issues, and proposed actions for the Commission’s consideration and direction. The Commission’s goal is to examine these issues concerning behested payments for the purposes of improving compliance and transparency.

Note: The Act uses the term “made at the behest of” in four contexts.¹ This memorandum discusses behested payments with a charitable, legislative and governmental purpose subject to the reporting requirements in Section 84224.

¹ Regulation 18225.7 helpfully explains this:

(a)(1) The term “made at the behest” is used in four contexts in the Act: (i) for “contributions” and “expenditures” defined in Sections 82015 and 82025; (ii) for “independent expenditures” defined in Sections 82031 and 85500, to differentiate between expenditures that are made in coordination with a candidate or committee versus those that are made by a person independent of the candidate or committee; (iii) for “behested payments” reports filed by an elected officer or a Public Utilities Commissioner who solicits funds for charitable, legislative or governmental purposes as specified in Section 84224; and (iv) for communications identifying a state candidate as specified in Section 85310.

Behested Payment Reporting

*“Behest” is commonly understood as a “command, directive, or an earnest request, or a strongly worded request.”*²

In plain terms, when an elected official plays a role in requesting a payment for a charitable, legislative or governmental purpose, the payment is neither a contribution³ nor a gift⁴ to the official. It is a behested payment. (Section 82004.5.) These payments are not subject to any limitations, but the elected official must report when a single source makes payments at the elected official’s request that meet or exceed \$5,000 in a calendar year. (Section 84224.) Simply stated, an elected officer is deemed to play a role in the transaction where the payment is directed by, made at the request of, or made in cooperation with the elected official. (Section 82041.3.)

The Legislature created the behested payment category in 1997, for the following purpose:

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 payments once a threshold is met and exceeded.

(Senate Rules Committee Senate Floor Analysis of SB 124 (4/30/97).)

In 2017, the Legislature removed the behested payment definition language from Section 82015 and adopted: Section 82004.5, defining a “behested payment,” Section 82041.3, defining “made at the behest of” for all purposes within the Act, and Section 84224 detailing an elected

² <https://www.dictionary.com/browse/behest> as viewed April 20, 2020.

³ 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).)

⁴ 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).)

officer or Public Utilities Commission member (hereinafter collectively referred to as the “elected official”) reporting requirements.⁵ Sections 82004.5 and 82041.3 must be read in conjunction with Section 84224’s reporting requirements to determine if a payment is a behested payment, “made at the behest of,” and reportable by the elected official.

“Behested Payment” and “Made at the Behest of” Defined

Section 82004.5 defines a “behested payment,” to distinguish the payment from a contribution, as well as from a gift.⁶ Our focus is on subdivision (c)(4) and (5), payments where the surrounding circumstances make it clear the payments are unrelated to the elected official’s election activities, and made principally for a charitable, legislative, or governmental purpose:

“Behested payment” means a payment *made at the behest of* a committee, an elected officer, a member of the Public Utilities Commission, or agent thereof, under any of the following circumstances:

...

(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. For purposes of this subdivision, ... The following types of payments are presumed to be for purposes unrelated to an elected officer’s seeking or holding of elective office:

(1) A payment made principally for personal purposes, in which case it may be considered a gift under the provisions of Section 82028.⁷ Payments that are otherwise subject to the limits of Section 86203 [lobbyist gifts] are presumed to be principally for personal purposes.

...

(4) A payment made principally for charitable purposes

(5) A payment made principally for legislative or governmental purposes by persons other than a state, local or federal government agency.

Section 82041.3, defining “*made at the behest of*,” includes a broad list of actions on the part of an elected official. This definition applies to Sections 82004.5 and 84224, as well as the term’s usage in other contexts in the Act. This section adopted earlier language from Regulation 18215.3, discussed further below.

⁵ Assembly Bill 867 of 2017, c.749

⁶ Important text is in italics for ease in distinguishing the relevant language for this discussion.

⁷ Unstated is that it may also be considered income (gift is a form of income) and therefore may be considered a financial interest, subject to disclosure and conflict of interest prohibitions. See Sections 82030, 87103.)

“Made at the behest of” means 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.

As noted, a payment that meets the definition of a “behested payment” and “made at the behest of an elected officer” is not necessarily a payment that must be reported under Section 84224.

Behested Payment Reporting

The purpose of the “behested payment” reporting is to inform the public of significant transactions involving an elected official, and the influence that may accompany the payments. The reporting requirement recognizes that payments to an elected official’s endorsed charities can be a form of “influence buying” by the payor⁸ and influence wielding by the elected official.⁹ Section 84224 requires reporting by an elected official, but only when the single source for a payment has made significant behested payments.

Section 84224, subdivision (a) requires an elected officer to report, within 30 days of payment, behested payments equaling or exceeding \$5,000, in the aggregate, from a single source in a calendar year where the payment meets each of the following requirements in subdivision (b):

- (1) The payment is *made at the behest of* an elected officer or member of the Public Utilities Commission.
- (2) The behesting elected officer or member of the Public Utilities Commission 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) If made principally for a legislative or governmental purpose, the payment is made by a person other than a state, local, or federal governmental agency.

Once a single source reaches the \$5,000 threshold, any additional payments must be reported within 30 days of the payment. An elected official must report the name of the payor, address, amount and dates of payments, name and address of the payee, and a description of the purpose or event. The report is filed with the elected official’s agency and is a matter of public record. It is the agency’s duty to forward the report to the Commission.

⁸ “Behested Payments: Critics Take Aim,” February 2, 2018, by Linda Rosenthal, J.D., For Purpose Law, <https://www.forpurpose.com/behested-payments-critics-take-aim/>, as viewed 4/20/20.

⁹ “The New Thing for California Politicians? Sweet Charity” Part 3, CalMatters, by Laurel Rosenthal, February 18, 2020. <https://calmatters.org/projects/california-lawmaker-nonprofits-politics-charity-campaign-finance-foundation-dark-money/> as viewed April 20, 2020.

Regulation 18215.3: Interpreting and Administering Section 84224

In 2012 the Commission adopted Regulation 18215.3 regarding the behested payment reporting requirements. The regulation reflected past Commission advice, as well as input from the regulated community specifically regarding the desire of officials to participate in charitable fundraising efforts without unwittingly incurring reporting requirements.¹⁰ In addition to providing a definition for “made at the behest of,”¹¹ subdivision (b) established a “safe harbor” for payments in response to a charitable organization’s solicitations.¹²

Regulation 18215.3 states:

(a) Except as provided in subdivision (b) below, for purposes of behested payment reporting as required by Section 84224, “made at the behest of” means 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 the elected officer, Public Utilities Commission member, or his or her agent.

(b) A payment is not “made at the behest of” an elected officer or a Public Utilities Commission member and is not subject to behested payment reporting if the payment is made in response to a fundraising solicitation from a charitable organization requesting a payment unless the solicitation features an elected officer or Public Utilities Commission member.

The safe harbor provision in subdivision (b) applies to payments related to a charitable organization’s fundraising solicitation *unless* the elected official is featured in the solicitation. All other payment situations are subject to the “made at the behest of” standard in subdivision (a).

Regulation 18215.3(b) sets forth two circumstances in which the solicitation “features” the elected official:

¹⁰ See February 27, 2012 Commission staff memorandum regarding the adoption of Regulation 18215.3

¹¹ This definition was adopted, with the exception of the terms: “the elected officer, Public Utilities Commission (“PUC”) member, or his or her agent” in 2017 as Section 82004.5 for all uses in the Act. (Assembly Bill 867 of 2017, c. 749.)

¹² A safe harbor provision of a statute or a regulation specifies that certain conduct will be deemed *not to violate* a given rule. A safe harbor provision is usually found in connection with a vaguer, overall standard. (See “Case Law, Systematic Law, and a Very Modest Suggestion” Statute Law Review 35(2), 159-180 [U of Michigan Public Law Research Paper No. 361](#).) and referenced in [https://en.wikipedia.org/wiki/Safe_harbor_\(law\)](https://en.wikipedia.org/wiki/Safe_harbor_(law)) as viewed January 29, 2020.

Note : Advice letters also refer to subdivision (b) as a limited exception to subdivision (a).

(1) For purposes of this regulation, a solicitation “features an elected officer or PUC member” if the item mailed includes the elected officer’s photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color.

(2) An elected officer or PUC member is also featured in a solicitation if the roster or letterhead listing the governing body contains a majority of elected officers or PUC members.

One frequent question is whether a charitable organization’s solicitation featuring an official will *always* result in a behested payment under this regulation? The answer is no. If the official is featured, the safe harbor is not applicable, but the factors in subdivision (a) must then be established.

For example, in *Wiener* Advice Letter, No. A-14-099, the official was featured in a charitable organization’s invitation to a fundraising gala. The Commission advised that the standard in subdivision (a) applied and then determined that no facts were presented showing the official’s cooperation or coordination in the solicitation. The official agreed to be an honoree at the event, but had no knowledge that he would be featured in the invitation to the gala, and there were no other facts indicating his involvement. Additionally, the Commission determined that the solicitation did not feature him in such a way that a recipient would believe the official was making the request for payment. The Commission advised that the resulting payments were not “made at the behest of” the official.

Another question is why an elected official should have to report at the \$5,000 level where the official is “only playing a ceremonial role” in the event or solicitation? As a general rule, where an official consents to be “featured” in a charitable organization’s solicitation, the official is in fact “cooperating and coordinating” with the organization in the fundraising solicitation. Payments in response will be “made at the behest of” the official and subject to reporting. The consent to be featured is a significant act. Charitable organizations seek to single-out the official in a fundraising invitation with the expectation it will generate payments. The consent of the official to be featured shows not only cooperation and coordination in this effort, but also, in most instances, is likely viewed by a recipient as a request for payment by the official in concert with the organization. (See for example, *Rivas* Advice Letter, I-19-056.)

Pending Legislation

Assembly Bill 3078 (Garcia) seeks to amend Section 84224 to narrow the reporting requirements for behested payments. This bill excludes payments in response to an invitation from an IRS designated 501 nonprofit organization that solicits funds from the Section 84224 reporting requirements, *unless* the elected official makes a direct written or verbal request for payment. Additionally, the bill states a “direct written request” requires more than the official’s signature, name or photograph appearing in the solicitation.

The term “nonprofit” reaches a much broader group of organizations, such as trade associations, sport leagues and unions, than “charitable organizations,” covered under Regulation 18215.3(b)’s safe harbor. While a charitable nonprofit must serve a public good, and not engage in political activities, a trade association-type nonprofit exists for the benefit of promoting its member’s business interests. This expands the “safe harbor” to include payments in response to fundraising solicitations for a charitable, legislative, or governmental purpose.

The bill’s language also expands the “safe harbor” to only require reporting where the official makes a “direct request” in the solicitation. This would greatly narrow the reporting requirements. Payments resulting from “suggestions, actions of coordination, cooperation, or actions in concert with,” the elected official and the organization would no longer be reported. Additionally, it is unclear what actions would meet the “direct request” standard, if a fundraising solicitation signed by the official does not rise to the level of a “direct written request” as stated in this bill.

The bill seeks to amend Section 84224 to add subdivision (c) as follows:

(c) This section does not require an elected officer or member of the Public Utilities Commission to report payments made in response to an invitation to an event hosted by a nonprofit organization that is exempt from taxation under Section 501 of the Internal Revenue Code, including an invitation that solicits funds for the organization, unless, in addition to meeting the requirements in subdivision (b), the elected officer or member of the Public Utilities Commission, or an agent thereof, makes a direct written or verbal request for a payment for a legislative, governmental, or charitable purpose. For purposes of this subdivision, an elected officer or member of the Public Utilities Commission shall not be considered to have made a direct written request solely because the name, signature, photograph, or similar identifying information of the elected officer or member of the Public Utilities Commission is included in the invitation to the event.

Issues

Reporting Issues: Data, Timeliness, Crisis-period and Attribution

Officials often express that they wish to “lend their name” to a worthy cause, but cite problems in reporting the \$5,000 payments that may result, especially when working with small, local charitable organizations. To comply with reporting requirements, a charitable organization needs to provide an official with a list of all donors responding to the solicitation in a timely manner, prior to the 30-day deadline. The official must then aggregate the payments data from one organization with other payment records to determine if a single source has reached the threshold amount in this payment.

We note that charitable organizations and elected officials are accustomed to tracking, aggregating and reporting, payments. Charitable organizations must recognize donor’s tax-deductible contributions and, for marketing purposes, are aware of their donor lists and outreach. Elected officials must track, aggregate and report contributions. Also, the \$5,000 from a single-source limit significantly reduces the number of behested payments that require reporting.

As recent events have shown, a crisis situation may create reporting requirements for an elected official behesting payments to charitable organizations in a time of extreme difficulty in a community. This situation can result in urgent requests to the Commission for clarifications from local counsel, and concerns about proper attribution. In a crisis, where requests are being made by multiple elected officials, it may be less clear when a donor's payment to an organization is attributable to the behest of a particular elected official. We note that in a time of crisis, the "ask and ye shall report" rule still applies, and each official has a duty to report regardless of the number of officials joining in a request.

Behested Payments: Unlimited and Unreported

A recent series of articles detailed that the amount of money flowing to nonprofits controlled by California legislators or their staff has "skyrocketed over the last decade - from \$105,000 in 2011 to \$2.9 million in 2019" and that much of the money "comes from corporations and unions that lobby the Legislature."¹³ An earlier 2011 article reported that "[s]pecial interest groups are donating money to causes supported by California's Latino legislators — potentially buying influence — without any public disclosure."¹⁴ According to the 2001 article, the caucus claimed it was not required to report these payments under the behested payment reporting requirements. It filed reports in some years, but not in others. The article further stated: "Watchdog groups contend that unlimited charitable donations can wield as much political clout as campaign contributions that are capped at \$3,900 per election."

Unreported behested payments create a back-channel for unlimited payments involving elected officials that may play a role in a decision-making or political process; a role that occurs outside the public's awareness. This lack of transparency in the political process is contrary to the intent of the Act. Additional legislation, regulation, or enforcement actions may be necessary to gain transparency in this process.

Behested Payments with a Personal Benefit: Skirting Gift and Conflict of Interest Provisions

Behested payments may also confer a personal benefit that should be disclosed and limited under the Act's gift provisions, and which may require disqualification from decisions affecting the source. However, currently, there may be ancillary personal benefits that do not clearly disqualify an official from decisions affecting the source.

For example: A city councilmember employed as a local college foundation's executive director, with the duty to solicit funds and endowments for the foundation, must report solicited donations to the foundation as behested payments. However, if solicited donations determine his executive director salary or bonuses, the payments would result in a personal benefit, and may be

¹³ "The New Thing for California Politicians? Sweet Charity" Part 1, CalMatters, by Laurel Rosenhal, February 18, 2020.. <https://calmatters.org/projects/california-lawmaker-nonprofits-politics-charity-campaign-finance-foundation-dark-money/> as viewed April 20, 2020.

¹⁴ See for example, "Veil Drawn on Donors to Latino Caucus Controlled Nonprofit," <https://www.eastbaytimes.com/2011/07/06/veil-drawn-on-donors-to-latino-caucus-controlled-nonprofit/>.

considered a gift or income to the official. (*Ewin* Advice Letter, No. I-09-127 and see *Holland* Advice Letter, A-07-176 (2008).) Barring a showing of personal benefit, the official is not typically prohibited from participation in decisions involving the source of the payments. But it is of note that a behest may raise issues of personal benefit even if salary is not immediately impacted, such as where the payments may affect the viability of an organization or the earnings potential of the official as an employee.¹⁵

In the context of gifts, it can be difficult to draw lines between a behested payment made “principally” for a government purpose and a payment confers a personal benefit (gift). For example: The Commission recently considered if payments made at the behest of the Lt. Governor to the “Committee to Support the Office of the Lt. Governor,” a 501(c)(4) organization should have been deemed gifts instead of reported as behested payments.¹⁶ Some of the payments were used to furnish the Lt. Governor’s office and to commission artwork for the office. The donations to the 501(c)(4) would have exceeded gift limits. Currently, the law does not delineate such items as gifts rather than reportable behested payments.

Staff Recommendations

Plain Language for Requirements in Statutes and Regulation

1. Propose legislation to state the behested payment definitions and reporting requirements in plain language. Current statutory and regulatory language uses archaic terms, passive voice, “safe harbors,” terms that apply in multiple contexts, and self-referencing definitions.
2. Propose amendments to Regulation 18215.3 or to AB 3078 to clarify the “featured” safe harbor in plain language:
 - An elected officer or PUC member that consents to be featured in a fundraising solicitation by an organization must report the resulting qualifying payments.
 - An elected officer who is featured in a fundraising solicitation without the consent, cooperation or coordination of the official, or agent thereof, is not required to report payments resulting from the solicitation.

¹⁵ *Id.* Part 2, February 19, 2020. <https://calmatters.org/projects/california-political-legislative-nonprofits-rob-bonta-wife/> as viewed April 20, 2020.

¹⁶ “California GOP asks state to investigate furniture buy for lieutenant governor’s office,” Sacramento Bee, by Sophia Bollag, May 24, 2019. <https://www.sacbee.com/news/politics-government/capitol-alert/article230769504.html>. As viewed April 24, 2020.

- An elected officer or PUC member that is listed in a fundraising solicitation as a member of the organization’s governing body must report the resulting qualifying payments if the governing body is comprised of a majority of elected officers or PUC members.
- “Featured in a solicitation” includes the use of the official’s photograph, name in a singled-out manner, or signature. It does not include the official’s name appearing in a governing body list or letterhead, unless the list of names contains a majority of elected officers or members.
- Consider using “display” in place of “feature” for plain language.

Clarify Reporting in Particular Situations

1. Amend Regulation 18215.3 to, in addition to clarifying “featured” (as discussed above) to:
 - Clarify the duty of the elected officer in consenting to be featured in a solicitation to inform the charitable organization of the payment reporting requirements in Section 84224.
 - Allow estimates to be filed electronically within the 30-day time period with the Commission, where the exact amount is undetermined, to be followed by exact amounts.
 - Provide a standard reasonable time period, such as 30 days, for attribution of payments following distribution of a solicitation or following an event involving an elected official.
2. Amend AB 3078:
 - Propose “featured” language clarifications as noted above, in place of the bill’s current proposed language.
 - Propose amendments narrowing “nonprofit” in the bill to “charitable organizations” in the event the bill allows such payments to go unreported.
 - Limit the subsequent payment reporting after the initial \$5,000 to require reporting only after each additional \$5,000 aggregate payments, rather than any subsequent payments.
 - Exempt a public call for payments to generally support charitable organizations providing essential services by an elected official in a time of a declared emergency from the reporting requirements in Section 84224. This would not apply to private or specific requests.

- Allow reports to be filed electronically directly with the Commission. The Commission then forwards a copy to the agency, and the agency would retain the public record inspection and production duties.

Summary

Staff presents the background on behested payment reporting issues for discussion in furtherance of the goal of promoting compliance in reporting and transparency in the political process.