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To: Chair Miadich and Commissioner Baker

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Subject: **Behested Payment Issues: Section 82004.5, Behested Payment Defined, Section 82041.3, “Made at the Behest of” Defined, and Section 84224, Behested Payment Disclosure requirements, Reporting Payments Made for a Charitable, Legislative or Government Purpose.**

Date: May 11, 2021

Law & Policy Summary to Date

Commencing at the May 2020 Law and Policy Committee meeting, staff has presented information concerning behested payments and behested payment reporting to the Commissioners and public. This information has covered a range of topics, from the mechanics of filing an electronic Form 803 behested payment report on the Commission’s website, to the type and detail of information that is currently required on Form 803 under existing statutes and regulations.

Following up on prior information presented to the Commission, staff has identified four areas that the Commission may wish to focus on for possible additional regulatory action to implement and administer Section 82004.5, Behested Payment Defined, Section 82041.3, “Made at the Behest of” Defined, and Section 84224, Behested Payment Disclosure requirements. (Note references herein to an “elected official” encompass an “elected officer or Public Utilities Commission member”.) These suggestions are founded on the principle stated in *Jay Advice Letter No. A-10-088*, that the purpose of the behested payment reporting scheme is to allow for payments that serve the public good, and to provide disclosure when there is a potential for influence over an elected official:

We interpret the provisions of the Act, however, in ways that best further its purposes. (See Section 81003.) The purpose of the “behested payment” provision in Section 82015 [which contained the definition of a behested payment prior to 2017] is to capture reporting for payments that are not direct contributions to elected officials, but that the public would want to see in periodic reports. That is, the purpose is to provide disclosure when there is a potential for influence over a public official.

Issues for Consideration

(1) Reporting Payments Made for a Charitable, Legislative or Government Purpose: When a portion of the payment also constitutes a gift or income to the official.

Under Section 82004.5, a “behested payment” can be made at the behest of a committee, an elected official, or an agent thereof. Section 82041.3 defines “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.”¹ Behested payments occur in each of the following circumstances:

- (a) Full and adequate consideration is received from the committee or elected official.
- (b) The payment is made to a different candidate or to a committee not controlled by the behesting candidate.
- (c) As to an elected official, 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.

Under Section 82004.5(c), a payment made for purposes related to seeking or holding elective office is a “contribution,”² and not a behested payment. Section 82004.5(c) states five types of payments presumed to be for purposes unrelated to seeking or holding elective office. 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 82028.³ Payments that are otherwise subject to the limits of Section 86203⁴ are presumed to be principally for personal purposes.
- (2) A payment made by a state, local, or federal government agency.

¹ Note: the phrase “made at the behest of” applies in several different contexts in the Act in addition to behested payment reporting.

² In general terms, a contribution, is a payment, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, or if it is clear from the surrounding circumstances that it is not made for political purposes. (Section 82015.) A behested payment is exempt from the definition of “contribution.” (Section 82015(c)(4)).

³ In general terms, a gift is a 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).) A gift is understood to include “anything of value given to a public official without cost, including tangible items or services, unless it is expressly exempted from the definition of “gift.” Gift is a subset of “income.” (Section 82030.) Income, is a payment received, including things such as salary, wages (including a community property interest in a spouse’s wages), and gifts. (Section 82030.)

⁴ Section 86203. Unlawful Gifts. It shall be unlawful for a lobbyist, or lobbying firm, to make gifts to one person aggregating more than ten dollars (\$10) in a calendar month, or to act as an agent or intermediary in the making of any gift, or to arrange for the making of any gift by any other person. (Note: Under Section 86201, this includes gifts made directly or indirectly.)

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

Unlike a contribution, which includes a payment where there is *any* relationship to seeking or holding elective office, the above items (1), (4) and (5) need only be “principally” for a charitable, legislative, or governmental purpose. Thus, a behested payment for charitable, legislative, or governmental purposes may have other purposes or results that are regulated and reportable under the Act, i.e. a gift or income.

Example: Mayor Betts makes a behest for payments to Smith Inc. for \$10,000 to pay a vendor’s costs to put on a good government seminar. Mayor Betts attends the seminar and receives a free dinner. Smith Inc.’s \$10,000 payment is reportable as a behested payment made principally for governmental purposes. Mayor Betts would separately report the gift of the dinner involved in the payment on his annual Statement of Economic Interest form. The gift would be listed as paid by the donor/payor.

To implement and administer Section 82004.5, the Commission members may wish to consider directing staff to draft regulatory language providing guidance on how to evaluate and report the primary and any secondary purposes or results for these types of payments. The Commission members could direct staff to draft regulation language stating the reporting required in the example above: that the portion of a behested payment that confers a personal benefit on the elected official is subject to the Act’s requirements, reporting and limitations for income or for gifts. The Committee may wish to also consider regulatory language articulating factors for consideration in determining when, in the atypical case, a behested payment may have a portion of the payment that qualifies as income or a gift to the elected official from the donor/payee even though the payment is to a third party and flows to the official through that third party.

Example 2: Mayor Betts makes a behest for payments at a fundraising event for Support for Veterans, a 501(c)(3) charitable organization. The official is the salaried director for the organization. Smith Inc. donates \$80,000 over the course of the year, including box seats to an NBA playoff game, valued at \$15,000. At the encouragement of Smith Inc.’s CEO, Mayor Betts decides, as director of the nonprofit, to use the \$15,000 tickets to go to the game with his spouse and son.

The following are potential factors the Commission could use by way of regulation for determining whether a portion of the payment qualifies as income or a gift to the elected official:

- (1) Whether the elected official, the official’s immediate family member, or agent has control over the payment as a board member of the payee organization, and how the nonprofit applied the payment.

(2) If the elected official or the official's immediate family member makes personal use of the payment, a portion of the payment, or receives a gift of a meal, travel or lodging, and the payment is not otherwise excluded from the definition of a gift or income under the Act.

(3) Where the elected official or the official's immediate family is employed by the recipient/payee organization, whether there is a relationship between the payment and the potential for the elected official or official's immediate family member to receive additional compensation from the organization.

(4) Direction by the donor/payee that the payment (including a tangible item) is for the exclusive use of the elected official or their immediate family member.

(5) Whether the donor/payee is involved in a contract, license, permit, or entitlement decision pending before the elected official's agency before the official's agency within the previous [12] months, currently pending, or foreseeably occurring in the next [12] months. Note: This is similar to Regulation 18943, "Gift to Official Through Family Member regarding evidence of a purpose to influence the official.

(6) For a tangible item, the extent to which the item is for the exclusive use of the elected official, title or control is delivered to the elected official's agency, or the requirements in Regulation 18944, "Payment Made to an Agency for Use by Agency Officials" are met.

The above factors reflect language in advice letters such as: *Priamos* Advice Letters, [No. A-04-191](#) and [No. A-04-247](#), [city councilmember employed by a nonprofit 501(c)(3) organization did not receive gifts or contributions as a result of donations, but may have reportable behested payments, where his responsibilities included fundraising (for a limited time) and donations were not used to pay administrative expenses, including salaries; and no references are made to his official position or to pending city council actions or other city business in making the behest for payments.]; and *Gallagher* Advice Letter, [No. A-19-045](#) [where the official is an employee of a nonprofit organization, the official does not have a financial interest in a donor to the organization where the payment did not go to overhead, the official's income was not tied to the payment, and the official did not otherwise personally benefit from the payment; however the official may need to file behested payment reports.] See also, *Wulfsberg* Advice Letter, [No. A-03-156](#), [states the circumstances in which the Commission will treat a donation to a nonprofit as a gift to the official employed by or affiliated with the nonprofit, citing past advice letters, to include: where the nonprofit acts as the agent of the official, the nonprofit employs the official's spouse and would affect that income, the official is a board member and the donation is used to pay travel expenses for the board members.] And, *Rexroad* Advice Letter, [No. A-04-114](#), which states:

Having concluded that the payments are not reportable contributions or gifts to you, it is still important to caution that this conclusion is fact specific. Under some circumstances, these payments could still be construed to be gifts or contributions to you. For example, if some or all of the account monies are used for some other purpose, other than making a gift to the widow and her children, then you will have received reportable gifts or contributions in the amounts not used by the widow and her children. (*Jones* Advice Letter, No. A-94-072.)

In Example 2, the \$80,000 would be a reportable behested payment, as it is principally for a charitable purpose. Under past advice, the \$15,000 tickets would be a gift to the official, attributable to the donor/payee (Smith Inc.) due to the personal benefit to the official, subject to the gift requirements and limitations under the Act.

2. Behested Payment Reporting: Additional Information

Once it is determined that a payment meets the definition of a “behested payment” in Section 82004.5, one must look to the requirements of Section 84224, Behested Payment Disclosure, to determine whether it is a “reportable behested payment.” Only behested payments that are principally for a charitable, legislative, or governmental purpose, that meet the three other criteria below, and made by a single source aggregating \$5,000 or more in the calendar year, are reportable behested payments. Payments made at the behest of an official are subject to the reporting requirements in Section 84224(a) if the payment satisfies each of the following:

- The payment is made at the behest of an elected official
- The behesting elected official does not provide full and adequate consideration in exchange for the payment.
- The payment is made principally for a legislative, governmental, or charitable purpose.
- 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.

(Section 84224(b).)

If the above criteria are met, a report must be filed within 30 days of the behest and contain:

- Payor’s name, address, and the date(s) and amount(s) of the payment(s).
- Payee’s name, address.
- Brief description of the payment’s specific purpose/event.

(Section 84224(a).)

The information is filed with the official's agency on a Form 803,⁵ and the agency provides a copy to the Commission for state officials, or local ethics agency for local officials. For state officials, certain information from the Form 803 filing is posted to the Commission website.

The Committee may wish to consider directing staff to draft proposed regulation language requiring additional information in the behested payment reports to better inform the public and to provide a brief description of relationships, if any, that an elected official knows exist between themselves and the donors/payors and recipient/payees of the behested payments. Local ethics agencies have commented that this information can be helpful in situations where the elected official, or the official's spouse, is on the board or is an employee of the nonprofit organization that is the recipient/payee of the behested payment. Staff presents the following additional reporting requirements as options for consideration:

- Type of charitable organization (501(c) status) and federal tax identification number.
- A brief description of any known relationship of the elected official, their immediate family member, executive campaign staff or officeholder staff to the nonprofit organization including:
 - Any role as board member or executive officer.
 - Salaried employment.
- A brief description of any proceeding where the elected official knows or has reason to know the donor/payee is a participant in a proceeding involving a contract, license, permit, or other entitlement before the official's agency previously within a particular time frame (e.g. previous [12] months), currently pending, or foreseeably occurring in the foreseeable future (e.g. next [12] months).

3. Behested Payment Reporting: Good Faith Estimates for Payment Amount(s).

The Committee may wish to consider regulatory language allowing that Section 84224's required disclosure of "payment amounts" within 30 days may be satisfied by a "good faith" estimate amount reported within the 30 day timeline. Staff recommends the estimate amount be allowed in limited circumstances where the elected official complies with items such as the following:

- Makes a written request to the recipient/payee organization for the required information within 10 days of the behest, or otherwise practiced reasonable efforts to obtain the required payment amount information from the single source payee,
- Provides a brief explanation of the circumstances in the report.
- Files an amended report with the correct information within 10 days of receiving information, or within 10 days of knowing that the estimate information is incorrect.

⁵ The Commission has a process for state elected officials to file Form 803 electronically with the Commission.

Comment: while this language recognizes that elected officials are dependent on third parties for the information necessary to file a Form 803, allowing estimates may result in officer's regularly filing estimated reports. It may also be difficult to ensure amended reports are properly filed. The Committee may wish to consider if estimated payments should be allowed only in times of a declared state emergency or other extenuating circumstances.

4. Third Party Fundraising Solicitations.

Staff offers for the Commission member's consideration that Regulation 18215.3 could be amended or repealed and replaced with a regulation focused on issues related to fundraising solicitations. In addition to the current provisions of Regulation 18215.3, this regulation could address several solicitation-related issues:

- State a reasonable time for considering a payment responsive to a solicitation or event (30 days).
- For charitable organizations solicitations, the mere identification of an elected official as a guest speaker or honoree alone would not result in a "behest" by the official.
- Scheduled donations will not be a payment made at the behest of the official where there is a documented history of past donations, and no facts otherwise indicate the donation was made at the behest of the official.