

California Fair Political Practices Commission

MEMORANDUM

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

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

Re: Adoption of Proposed Regulation 18215.3 – Behested Payment Reporting:
Charitable Donation Solicited by elected Officers or Members of the Public
Utilities Commission

Date: August 25, 2011

I. Introduction

Staff's proposed adoption of Regulation 18215.3 responds to several years of staff advice that attempts to develop a standard for certain categories of behested payments. By adopting this regulation, the Commission will offer guidance to public officials who participate in charitable organizations and events. While the regulation does not attempt to solve all the issues surrounding behested payments, staff anticipates that adopting this regulation will add clarity.

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, forgiveness of a loan, 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).) 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).) 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.)

In pertinent part, 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”),¹ 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 “behested payments,” the payment must still be reported.

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 that the public would want to see in periodic reports. That is, the purpose is to provide disclosure of payments when there might be a potential for influence over a public official.

Common examples of behested payments include an Indian tribe making a payment to an elementary school at the behest of a senator, a donation for the purchase of computer monitors for an elementary school at the behest of an assembly member, and a prominent cable company making a contribution to California Educational Solutions at the behest of the Attorney General. Payments made at the behest of statewide elected officials are available on the FPPC's website, here: <http://www.fppc.ca.gov/index.php?id=499>.

As noted above, under the statute, a donation to a charitable organization is made at the behest of an elected official only if the payment is solicited, requested, or suggested by the elected official or otherwise made to the organization in cooperation, consultation, coordination with, or with the consent of the elected official. Behested payments reporting also applies when donations to charitable organizations are solicited by an elected official or by staff or an agent acting for that elected official, such as their chief of staff, director or other staff.

This broad definition of “at the behest,” however, has led to some odd results. For example, in the *Filchev* Advice Letter, No. I-09-073, we were asked whether if a member of the PUC was on the board of directors, an advisory council, or a fundraising committee of a charitable organization, a donation to the organization is a reportable behested payment. We advised that a donation to a charitable organization is not a reportable behested payment merely because an elected official serves on the board of directors, an advisory council, or a fundraising committee of the organization and the official's name is listed on a solicitation. In addition, a donation to a charitable organization in response to a letter soliciting a donation is not necessarily a reportable behested payment if the name of an elected official holding a position with the organization is identified in the letterhead or the text of the letter. *Id.* *Filchev* stated, however, that if the solicitation letter is signed by the elected official or a reasonable person could conclude the letter is from or on behalf of the elected official, a donation will be a reportable behested payment. *Id.*

In light of the *Filchev* Advice Letter and other letters (*e.g.*, *Peth* Advice Letter, A-11-063, advising that listing the Governor's name as co-chairman on a letter from the Governor's

¹ As of January 1, 2009, the California Public Utilities Commission is included for purposes of Section 82015(b)(2)(B).

Council on Physical Fitness and Sports does not create a behested payment when neither the Governor, nor his staff would be soliciting contributions), staff has identified a need to clarify, by regulation, under what scenarios a behested payment occurs.

III. Regulatory Changes

Staff held an interested persons meeting on July 14, 2011 to hear public input on possible regulation language. The meeting yielded many useful comments that informed the proposed regulation language. Specifically, Staff has not re-defined “made at the behest of,” but rather seeks to offer guidance for the most common question that arises, which is when a public official is on the roster, steering committee, board, etc., of a charitable organization that sends out a solicitation, but the official is not actively soliciting the contribution his or herself. Therefore, the proposed regulation codifies prior staff advice as to when a solicitation “features” the public official in order to trigger the behested payment reporting requirements.

IV. Potential Costs

There are no costs associated with this regulation.

Staff recommends adopting Regulation 18215.3.