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To: Chair Miadich, Commissioners Baker, Cardenas, Wilson, and Wood

From: Dave Bainbridge, General Counsel
Karen Harrison, Senior Commission Counsel

Subject: Prenotice Discussion of Proposed Regulatory Actions Concerning Reporting
Behested Payments: Proposed Regulations 18424, 18424.1, and 18424.2
(repealing and replacing Regulation 18215.3.)

Date: July 2, 2021

Proposed Commission Action

Staff presents three regulatory proposals related to the behested payment reporting requirements under the Act¹ for prenotice discussion. The proposed regulations included with this memorandum are intended to facilitate discussion and allow the Commission to provide guidance and instruction to staff prior to presenting final versions for approval at a subsequent Commission meeting.

Summary

At the May 11, 2021, Law & Policy Committee meeting, the Commission members discussed several behested payment reporting issues and directed staff to return with concrete proposals to facilitate meaningful disclosures in reports, timely compliance, and provide clearer guidance to officials when involved in a charitable fundraising solicitation. Staff was directed to provide regulatory language that balances prompt, informative, and accurate public disclosure of behested payments involving officials with the need to not discourage the important public service that these payments can provide. These regulations were set for further discussion and an Interested Persons Meeting at the July 6, 2021, Law and Policy Committee meeting. The proposed regulations are as follows:

New Regulation 18424 to address the need for additional disclosure in a behested payment report in two circumstances that raise questions of the payment's purposes and potential for influence: first, where the official has a relationship of control over, or is employed by, a payee nonprofit organization and second, where the payor of a behested payment is involved in a proceeding before the official's agency at the time the behested payment is made or within the

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

past 12 months. This regulation requires a brief description of the relationship where the official, or the official's immediate family member, is a founding member, a salaried employee, or an executive board member of the nonprofit organization payee, to the extent this information is known by the official. Additionally, this regulation requires a brief description of any proceeding before the official's agency in which the payor is currently involved or was involved within the past 12 months to the extent the information is known to the official. These are relationships that raise concerns about the self-interest of the official and the possibility of undue influence or access for the payee as a result of the payment. The brief description will provide information the public would want to see in the behested payment reports where there is a potential for influence in order to understand and assess the payment transaction, its purposes and the parties involved.

New Regulation 18424.1 to address situations where a behested payment payee has not provided timely payment information to an official with a behested payment reporting duty. This regulation allows that an official may properly file a behested payment report with good faith estimates of payment amounts, under certain conditions. This regulation facilitates timely reporting and provides a clear process for filing and then amending with accurate data.

Repeal Regulation 18215.3 and recast its language in new Regulation 18424.2 to address when an official's participation and appearance in a charitable organization's fundraising solicitation will result in behested payment reporting duties.

Behested Payment Reporting

Background: Law and Purpose

The Act regulates four categories of payments that involve elected officials: contributions,² income,³ gifts,⁴ and behested payments. These categories determine how a payment is reported under the Act and what, if any, limits apply.

² 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 behested payment is excluded from the definition of a contribution, but only as to the behesting committee or official. (Section 82015(c)(4).)

³ 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 Gift is a subset of "income." (Section 82030.) 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).) Gifts to a public official are reportable if more than \$50 in twelve months is received from a single source. (Section 87207(a)(1).) Gifts to officials are limited to \$520 from a single source in a calendar year, and \$10 in a calendar month from a lobbyist or lobbying firm. (Section 89503(a), Regulation 18940.2 and Section 86203.)

Applicable to elected officers and Public Utilities Commission members (referred to collectively herein as “official”), the behested payment statutes provide that when a payment is “made at the behest of” an official and made “principally for charitable purposes” or “principally for legislative, or governmental purposes,” the payment is a behested payment subject to reporting by the official when a single source makes such payments meeting or exceeding \$5,000 in a calendar year. (Sections 82004.5(c), 82041.3 and 84224.)

A “behested payment” is distinguished from a “contribution”⁵ and defined as a payment made at the behest of the official where “it is clear from the surrounding circumstances that the payment is made for purposes unrelated to the officer’s seeking or holding elective office.” (Section 82004.5(c).) Payments made principally for personal purposes (which may be reportable as gifts), and payments made principally for charitable, legislative, or governmental purposes (which may be reportable under Section 84224), are payments that meet this distinguishing criteria. (Section 82004.5(c)(1), (4) and (5).)

In defining when a payment is “made at the behest of” an official, the Legislature included a broad range of actions on the part of the official. Section 82041.3 states: “[m]ade 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 discussed further below, this has raised issues when officials appear in a charitable organization’s fundraising solicitation. (See Regulation 18215.3.)

Behested Payment Reporting Requirements

Section 84224 imposes reporting requirements on behesting officials for payments that satisfy each of the following requirements: (1) The payment is made at the behest of the official; (2) The behesting official 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; and (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. (Section 84224(b).)

A behested payment that meets the above description must be reported and filed with the official’s agency within 30 days following the date on which the payment or payments equal or exceed \$5,000 in the aggregate from the same source in the same calendar year in which they are made. (See Section 84224(a).) The report must include: “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.” (*Ibid.*)

Thereafter, any additional payments made by that same single source must also be reported within 30 days after the payment was made. (*Ibid.*) Within 30 days after receipt of any such report, state agencies must forward a copy of the report to the FPPC, and local agencies

⁵ A behested payment is excluded from the definition of a contribution, but only as to the behesting committee or official. (Section 82015(c)(4).)

must send a copy to the local elections official. (*Ibid.*) For transparency and accountability purposes, behested payments reported by state officials are posted on the Commission’s website.

Commission Authority: Effectuate the Purpose of the Behested Payment Reporting Statutes

At the May 2021 Law and Policy Committee meeting, Commissioners requested clarification on the range of the Commission’s authority to act in the realm of behested payment reporting. The issues identified at the Law and Policy Committee meeting regarding the behested payment reporting requirements may be addressed by the Commission through regulation to effectuate the purpose of the behested payment reporting requirements in Sections 820004.5, 82041.3 and 84224 in the context of the Act.

Under Section 83112, the Commission has the authority to adopt, amend and rescind rules and regulations to carry out the purposes and provisions of the Act, to the extent the regulations are not in conflict with the underlying statute, and reasonably necessary to effectuate its purpose. Generally, the purposes of the Act’s reporting requirements are to inform the public, avoid improper influences, disclose financial interests and avoid conflicts of interest, and inhibit improper practices from occurring.⁶ The purpose of the behested payment reporting requirements is to capture payments that are not direct contributions or direct gifts to officials, but are payments in which the public would have an interest given the official’s role in the exchange.⁷ Specifically, the Act requires an official’s behested payment report to make known to the public the parties’ names, the payment amount, and the circumstances, use and timing involved in a significant behested payment. (See Section 84224.) The public trust is served by the reporting when timely reports are filed, and the public can assess the “purposes” of a significant payment to ensure the payment is properly reported as a behested payment as well as assess a potential for influence that may result from the payment.

⁶ Section 81002. Purposes of Title.

The people enact this title to accomplish the following purposes:

- (a) Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited.
- (b) The activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials.
- (c) Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided.
- (d) The state ballot pamphlet should be converted into a useful document so that voters will not be entirely dependent on paid advertising for information regarding state measures.
- (e) Laws and practices unfairly favoring incumbents should be abolished in order that elections may be conducted more fairly.
- (f) Adequate enforcement mechanisms should be provided to public officials and private citizens in order that this title will be vigorously enforced.

⁷ See for example, *Duran* Advice Letter No. A-16-203; In the Matter of Tony Rackauckas, FPPC Case No. 16/612, p. 4, and *Jay* Advice Letter No. A-10-088, p. 6; the latter of which states: “The purpose of the ‘behested payment’ provision ... 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.”

Proposed Regulations

For Adoption: Proposed Regulation 18424. Behested Payment Reporting. Additional Information.

Proposed Regulation 18424 addresses the need for disclosure in a behested payment report in two instances: first, where the official has a relationship of control over, or is employed by, a payee nonprofit organization and second, where the payor of a behested payment is involved in a proceeding before the official's agency at the time the behested payment is made or within the past 12 months. The Act does not prohibit an official from having either type of relationship in a behested payment transaction, but these are relationships that raise concerns about the self-interest of the official and the possibility of undue influence or access for the payee as a result of the payment. As such, these are relationships with a potential for influence or self-dealing that the public would want to have disclosed in the behested payment reports, so that the public may better understand and assess the payment transaction, its "purposes" and the parties involved.

The May 2021 Law and Policy Committee meeting discussion identified the following relationships as a concern in a behested payment transaction: where the official, official's spouse, or an agent of the official is a founding member, a salaried employee, or an executive board member of the nonprofit organization payee. Currently officials are not required to disclose such relationships in describing the circumstances of the payment or in identifying the payee when reporting a behested payment. To limit the burden additional disclosure would place on officials, staff was directed to limit disclosure to relationships known to the official.

Proposed Regulation 18424, subdivision (a) requires an official to disclose, to the extent known to the official, a relationship between the nonprofit organization payee and the official in a behested payment report. Specifically, the proposed language requires the official to provide a brief description of any relationship between the nonprofit payee organization and the official, or the official's immediate family,⁸ to include any of the following roles at the nonprofit organization:

- (1) Any decision-making capacity within the organization, such as a board member or executive officer position.
- (2) Salaried employment at the organization.
- (3) Status as a founding member of the organization.

Because the brief description would be limited to information already known to the official, the additional requirement placed on the official would not be so burdensome as to discourage or inhibit the practice of making behests in service of the public good. The benefit of the brief description would be a disclosure of the relationships involved within the behested payment report to better inform the public and support the public's trust, as well as act to inhibit improper practices from occurring.

⁸ Immediate family means the spouse and dependent children. (Section 82029.)

Discussion also took place at the May 2021 Law and Policy Committee meeting regarding the burdens and benefits in requiring an official to also disclose in a behested payment report any recent, pending, or foreseeable governmental decisionmaking proceeding involving the official and the behested payment payor. The discussion consensus was that this type of disclosure raised many difficulties and potential traps for an official and the regulatory language must be limited to proceedings known to the official and relevant to the time period of the reported payment(s). Proposed 18424 subdivision (b) requires an official to provide a brief description, to the extent known to the official, of any proceeding before the official's agency currently or within the past 12 months in which the payor is the named party or subject of the decision. A "proceeding" for purposes of subdivision (b) includes decisions on a contract, license, permit, or other entitlement. A proceeding is considered "before the official's agency" if the matter is placed on the agency's formal agenda.

For Adoption Proposed Regulation 18424.1. Behested Payment Reporting. Good Faith Payment Estimates.

Proposed Regulation 18424.1 seeks to address situations where the official has a behested payment reporting duty, but a payee has not complied promptly with an official's request for payment information. The Law and Policy Committee members asked how an official may address this situation currently and if there is a process in place for amending a report. One comment was that officials should be able to "file with what they have" with appropriate verifications and be given a directive to timely amend with accurate information. Staff was instructed to provide guardrails for filing estimated payment amounts, with the understanding that officials should not be required to contact payors for payment amount information.

Regarding the general provisions currently available for reporting behested payment estimates and amending reports, under the general provisions of the Act, an official may file the behested payment report with the verification that states the official "has used all reasonable diligence in its preparation," and that to the best of the official's knowledge it is "true and complete." (Section 81004.) A behested payment report, like other reports under the Act, may be amended by the official at any time and amending an incorrect or incomplete report may be considered evidence of the official's good faith. (Section 81004.5.) Currently, it is generally an acceptable practice for an official to note in a behested payment report that the information is incomplete, provided to comply with the 30 day filing requirement, and then follow with an amended report in a timely manner. However, the Commission may wish to pursue a regulation that provides guidance on this issue.

Proposed Regulation 18424.1 sets out a specific process for an official to file a good faith estimates of payment amounts to satisfy the requirements of Section 84224. Subdivision (a) requires that the official must have practiced reasonable efforts to obtain the payment amount prior to the reporting deadline and that the official is unable to obtain this information from the payee. "Reasonable efforts" is defined to include, but is not limited to, making a written request to the payee prior to the filing deadline. Subdivision (b) requires that the estimate amount reflects the official's best efforts to ascertain the accurate amount. This language is consistent with Section 81004 and with the provisions for good faith estimates in reporting accrued expenses in Regulation 18421.6(b) and non-monetary contributions in 24-Hour contribution reports in

Regulation 18425(c)(2). Subdivision (c) requires the official to file an amended report with the corrected information within 10 days of receiving the information from the payee, so that timely and accurate information is reported. The proposed regulation would encourage reporting where the official is facing a difficulty in obtaining accurate information, despite making reasonable efforts, and is able to provide a good faith estimate.

Repeal Regulation 18215.3 and Adopt Regulation 18424.2. Behested Payment Reporting. Charitable Organization Fundraising Solicitations.

Interpreting the definition and application of “made at the behest of,” current Regulation 18215.3, subdivision (a) states Section 82041.3’s definition of “made at the behest of” (“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 official) with additional language expressly extending these actions to an official’s agent. Subdivision (b) addressing charitable organization fundraising solicitations, provides safe harbor language stating that a payment is *not* made at the behest of an official and *not* subject to behested payment reporting if made in response to the solicitation, *unless* the solicitation “features” the official. Regulation 18215.3(b) sets forth two circumstances in which the solicitation “features” the official: (1) where the solicitation includes the official’s name, photograph, signature, or office in a singled-out manner in the layout of the document; or (2) where the official appears in a letterhead or roster of the organization’s governing body and the body contains a majority of officials.

Under this safe harbor language, an official does not have behested payment reporting duties if the official is not singled out in a solicitation. If the official is singled-out in a solicitation, the official does not have behested payment reporting duties if the official did not take any of the actions listed in subdivision (a). An official also does not have reporting duties if the official sits on the governing body of a charitable organization and appears in a solicitation in a list of the governing body, so long as the body is not made up of a majority of officials.

The Law and Policy Committee discussion noted that guidance in this area could be improved. Staff was directed to draw bright lines where possible, and not create traps for the unwary in revising Regulation 18215.3. Staff was further directed to consider presumptions that may apply in these circumstances. Discussion noted that while a guest speaker typically has a minor role in a fundraising event, other roles are not so easily distinguished, such as a Master of Ceremonies or an honoree or group of past honorees listed in a solicitation.

Staff proposes to repeal Regulation 18215.3 and replace it with proposed Regulation 18424.2. Proposed subdivision (a) states that a payment made in response to a charitable organization fundraising solicitation is a reportable behested payment when:

(1) The solicitation is sent under the control or at the direction of, in cooperation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of the official, or agent thereof; and

(2) The solicitation “features” the official.

Proposed subdivision (b) restates the current definition of “features” in Regulation 18215.3(b)(1) and (2) with nonsubstantive changes.

Proposed Regulation 18424.2(a) and (b) makes it clear that when an official acts in concert with the charitable organization in a fundraising solicitation and is featured in the solicitation, the official must report all resulting payments in accordance with Section 84224. It also clarifies that being featured in a solicitation, by itself, does not raise behested payment reporting duties for an official.

Proposed subdivision (c) provides an exception for officials who consent to appear in a fundraising solicitation as a “guest speaker,” and their involvement does not extend beyond this role. This language recognizes that a solicitation that features an official in a guest speaker role is typically understood to be a request for fundraising solely from the organization, with the speaker as an invited guest. In contrast, an official featured in a solicitation in the role of “Master of Ceremonies” for a fundraising event would be perceived as acting in concert with the organization. A Master of Ceremonies is the face and voice of the organization at a fundraising event, and the official featured as such in a solicitation would have behested payment reporting duties. An official featured in a solicitation as an honoree under proposed Regulation 18424.2 would have behested payment reporting duties, to the extent the solicitation is sent under the control, direction, cooperation, etc., of the official as set forth in subdivision (a)(1).

Summary

Proposed Regulations 18424, 18424.1, and 18424.2 are intended to incorporate directions from the Law & Policy Committee members at the May 2021 meeting, as well as additional staff proposals based on further review. Proposed Regulations 18424 and 18424.1 support the Act’s purpose of providing relevant, timely data in a behested payment report and to provide disclosure where there is a potential for influence over the official. Proposed Regulation 18424.2 provides guidance so that officials may better understand when their interaction with a charitable fundraising solicitation may result in reportable behested payments. Staff welcomes input and further direction from the Commission.

Attachments:

For adoption:

Proposed Regulations 18424, Behested Payment Reporting. Additional Information, 18424.1 Behested Payment Reporting. Good Faith Payment Amounts, and 18424.2. Behested Payment Reporting. Charitable Organization Fundraising Solicitations.

For repeal: Regulation 18215.3. “Behested Payments” Reporting.