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From: Nicholas Sanders <nsanders@campaignlawyers.com>
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To: CommAsst
Subject: Law and Policy Committee Comment re: Behested Payment Discussion with Interested Persons

EXTERNAL EMAIL

Chair Miadich and Commissioner Hayward-

My name is Nick Sanders and I submit this comment on behalf of Sutton Law Firm. Thank you for convening a discussion about behested payments, and thank you to Mr. Bainbridge and Mrs. Harrison for your hard and thoughtful work on the subject. Our firm has dealt extensively with behested payment rules, and we believe that the Legal Division's memorandum may be the most thought that anyone has ever put into the state's behested payment laws. Therein lies one of the biggest issues as the Commission now seeks to comprehensively address and enforce behested payment reporting for the first time: neither the Legislature nor the Commission has ever created a framework for behested payment reporting compliance. There is no real legislative history – behested payment reporting was merely slipped into the definition of “contribution” without significant guidance or clear rules. Mrs. Harrison's citation to a committee report is essentially the only thing that anyone knows about the purpose law. There appear to have been no news articles at the time, no scandals and no public outcries about which we are aware. The byzantine language simply appeared. In addition, there has never been comprehensive advice from the Commission about how the rules work and are applied – the entire compliance framework has been created by inconsistent advice letters, there is still no FAQ or manual available for the public and for years the only information given to public officials about the reporting obligation was one brief slide towards the end of the officials' AB 1234 ethics training. Simply put, this is going to be new to a lot of people, and there is a dearth of policy guidance which can help the FPPC create from scratch a new set of safe harbors, presumptions and exceptions.

We therefore want to provide three brief comments for your consideration:

- (1) There is inconsistency in the current interpretation of the law. Different advice letters have come to dramatically different conclusions without substantiation. As today's memorandum points out, the Rivas Letter and Weiner Letter provide opposite advice based on conclusory comments by Commission staff, and turned the regulated community's understanding of the law on its head. To be clear, inclusion in an honorary committee and/or lending one's name to a nonprofit does not mean that an official is sufficiently involved with the nonprofit's fundraising that it rises to the level requiring behested payment reporting. It merely means that the official supports and wishes to promote the nonprofit. It is difficult for anyone to interpret where and when support/promotion becomes a behest, and we have had to assume that the Weiner Letter has been overturned. This sort of common law approach has placed a significant burden on public officials' ability to help community nonprofits at exactly the wrong time.
- (2) Without clearly delineated lines about what constitutes a behested payment, the Commission risks crossing into the legislative or judicial, rather than administrative, realm. AB 3078 for example seeks to clarify that a behested payment requires direct contact between an official (or his or her agent) and a donor. This line makes sense. It is a policy decision which should be

made by the Legislature and it reflects the difficulty of drawing lines in the real world. For example, if an elected official appears on the honorary committee of a nonprofit, then the logistics of reporting under current FPPC interpretation would likely require that the official request and report all donations made to that nonprofit. But this runs counter to the policy of the law. From the official's perspective, he or she would actually learn of donations which "helped" this favored nonprofit (and thereby potentially curry favor) about which he or she would otherwise remain unaware. From a donor's perspective, a donor to the nonprofit who gives every year may stop donating if he or she wishes to remain private or believes that a donation will be affiliated with a public official with whom the donor disagrees. Line-drawing of this sort also runs the risk that the FPPC will engage in decisions best left to the courts or quasi-judicial officers. If an official does not ask a donor to give money, then it is difficult to see how that donation might curry favor with the official. To do so, the Commission would need to make a determination about a donor's and/or official's state of mind. And without limiting reporting to direct requests, an official can be charged with failing to report behested payments that he or she had no idea were made. To do so, the Commission would need to begin litigating its own reasonable person standard for what an official should have known. These tricky judicial and policy decisions are the realm of the legislature, courts and public officials charged with quasi-judicial responsibilities, and are best left there.

- (3) The Commission should move slowly in adopting comprehensive new regulations or interpretations. Legal Division's memorandum was placed online just yesterday, and the public has had little time to digest its suggestions and provide comment. Our comments here are merely the low-hanging fruit. There are significant policy decisions which the Commission needs to make before new regulations are drafted and before enforcement cases begin to redefine the rules. We believe – and we believe the Commission agrees, and the public desires – that public officials should be involved with nonprofit fundraising. Doing so helps communities and promotes social wellbeing. We also agree that reporting true behested payments provides useful information to the public. But as mentioned, the current state of flux in the laws has stifled officials' ability to, for instance, post on social media requesting PPE donations to a local hospital. We simply cannot advise that a client make such a request, even to the broad public, because it would be logistically impossible for the hospital to track, value and transmit relevant donations, and for the public official to report those donations, within 30 days. The Commission's recent interpretations seem to require exactly that, and Legal Division's memorandum buttresses this concept by simply assuming that such complex reporting is simple. Like our other comments, this is just the immediate example at our fingertips. There are certainly others, and we believe that a thorough review will ferret out the important lines and thresholds to provide important transparency and permit officials' involvement in nonprofit fundraising.

At this time, we believe that the FPPC can best address these issues by taking slow, considered action, and publicly declaring its current interpretations through publications such as an FAQ. Given the confusion and inconsistency of the law, we of course believe that new regulations and guidance may be necessary. But the pending legislation demonstrates that the policy decisions are currently being considered by the Legislature, and we find it problematic that the FPPC seems to be re-interpreting the law to fit a policy which has not yet been considered by the full Commission and which may creep outside of the administrative. We also believe that the Commission would benefit from comment and discussions with both the regulated community and the nonprofit sector, who can assist the FPPC in understanding how fundraising actually occurs.

We again want to thank the Law and Policy Committee and Legal Division staff for its thoughtful approach to this issue. The Legal Division has provided a great first step, and we want to offer our assistance in any way that we can as it delves deeply into a new behested payment reporting regime.

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