

June 2, 2020

VIA EMAIL

Richard Miadich, Chair
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

Re: Behested Payments

Dear Chairman Miadich:

I write on behalf of the California State Senate and State Assembly regarding the June 4, 2020, Law and Policy Committee's meeting at which you will discuss behested payments.

As an initial matter, I would like to convey a general observation that the current statutes and regulations regarding behested payments work well and are not in need of major adjustments. While my clients do not object to several of the suggestions put forth in the Commission's memorandum of May 6, 2020, they wish to point out that the existing reporting regime for behested payments has worked well for nearly 25 years and major changes are simply not needed.

A. Background and Legislative History

Behested payments became an issue in the mid-1990s when the Commission, through a series of advice letters, opined that payments made at the request of an elective official were deemed to be either gifts or campaign contributions, even when those payments provided no personal benefit to the elected official, nor served any campaign or electoral purpose. For example, the Commission concluded that payments by a third party for refreshments to be made available to the public attending a legislative meeting would constitute a contribution or gift to the legislators requesting the refreshments, unless adequate consideration was provided in exchange. (*Leidigh* Advice Letter, FPPC No. A-96-223.)

Since gifts were subject to limits and campaign contributions were also recently limited, the result of the Commission's advice was effectively to prevent elected officials from requesting payments by third parties for charitable or governmental purposes, even though there was no personal benefit or campaign purpose related to those payments.

As a result, the Legislature, working closely with the Commission, adopted legislation in 1997 creating the current behested payment reporting requirements. The purpose of the legislation,

as your May 6, 2020, staff memorandum points out, was to permit elected officials to engage in governmental and charitable activities without statutory caps, but impose a requirement for public disclosure of those activities. Consequently, when elected officials request payments of \$5,000 or more from third parties for legislative, governmental or charitable purposes, the elected official must file a public report with his/her agency. With respect to the Legislature, those reports are transmitted to the Commission and made available to the public on the Commission's website.

Since 1997, thousands of such reports have been filed by public officials. Only recently, in 2017, did the Legislature revisit the original behested reporting requirements, and even then, made only modest changes to the law. Similarly, the Commission did not see the need for regulations until 2012, 15 years after the original legislation was adopted, and only made minor changes, including adding safe harbor provisions for charitable solicitations. Moreover, the Commission has had few occasions to impose penalties on elected officials who have failed to file such reports.

In short, the behested payment reporting requirements have worked relatively well for nearly 25 years, and any changes now should be well considered before adoption. Finally, we note that while the Commission has the authority to adopt regulations interpreting the requirements of law, those regulations may not impose new or different reporting requirements upon elected officials beyond what the statutes provide. That remains the role of the Legislature and Governor.

B. Response to Issues Identified in the Commission Staff Memorandum

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

The Legislature is in agreement that during a crisis, reporting requirements can pose a serious problem in terms of compliance with deadlines imposed by the Political Reform Act. The current pandemic has made that quite clear. Elected officials at all levels of government have been asking for donations to assist in the crisis. As the Commission staff memorandum notes, it can be very difficult, and sometimes impossible, to determine which call for charitable donations prompted the donation to be made. In addition, in times of crisis, hospitals, food banks and other charitable organizations may be unable to keep records in sufficient detail for the behested payment requirements, including the 30-day reporting requirement. This problem extends beyond behested payment reporting. The Legislature is willing to work with the Commission in addressing reporting deadlines that arise during a crisis.

2. Behested Payments: Unlimited and Unreported

The staff memorandum cites two news articles about increasing behested payment disclosure, including payments made by those who lobby the legislature. Of course, that was the whole purpose of the 1997 behested payment statute, to provide sunshine on those who may be attempting to influence elected officials through payments for charitable and governmental purposes.

The memorandum also alludes to “unreported” behested payments. If such nonreporting is occurring, current law covers that situation and it should be addressed by enforcement of the existing law by the Commission, as opposed to new laws or regulations.

3. Behested Payments with a Personal Benefit

The staff memorandum suggests that some behested payments may confer a personal benefit upon the behesting elected official. If that is in fact the case, then the Commission has the ability to address this under current law through its enforcement process.

C. Response to Staff Recommendations

1. Plain Language for Requirements in Statutes and Regulation

If the Commission desires to rewrite its current regulation in “plain language,” the Legislature certainly has no objection, although the Legislature would hope the Commission would draft all its regulations in plain language. Words have meaning and if the Commission intends to change words in its current regulation, the Legislature encourages the Commission to stay within the boundaries of the intent now expressed in those regulations and to provide ample time for public review.

2. Clarify Reporting in Particular Situations

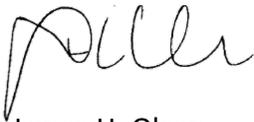
The Legislature would need to know what changes would be made to “clarify” Regulation 18215.3 relative to “consenting to be featured” before providing an opinion. The suggestion that estimates be allowed when exact amounts are unknown, is a positive change. The same is true of providing a period of time for attribution of payments following distribution of a solicitation or following an event, although it is not clear how the suggested 30 days differs from the current 30-day requirement to file a behested payment report.

Our understanding is that AB 3078 will not be moved forward this session, so we offer no collective views on that legislation. With respect to changing how behested payment reports

Richard Miadich, Chair
June 2, 2020
Page 4

are filed, legislators currently file their behested payment reports with their agency just like other elected officials. Both houses of the Legislature then timely provide copies of behested payment reports filed by Members to the Commission, and those filings are posted on the Commission website at times determined by the Commission. This practice has worked well for many years, and my clients prefer to retain that process absent a demonstrated need for change.

Sincerely,

A handwritten signature in black ink, appearing to read "Lance H. Olson". The signature is fluid and cursive, with a large initial "L" and "O".

Lance H. Olson

LHO:NL
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