

THE SUTTON LAW FIRM

May 11, 2020

VIA EMAIL ONLY

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

RE: Proposal for "Behested Payment" Reporting

Dear Chair Miadich:

During last week's Interested Persons meeting regarding proposed changes to the reporting requirements for "behested payments," you requested recommendations for specific regulatory language, rather than generic criticism of the prior approach to this issue. In short, we recommend that the Commission clarify and limit the scope of behested payment reporting by adopting City of San Diego's definition of "fundraising activities" in that City's lobbying law.

We believe that the letter and spirit of the behested payment law is best furthered by requiring an elected official to publicly disclose a donation to a nonprofit organization or civic cause only if there is reason to believe that the donor made the donation in connection with an attempt to influence the official's position on a governmental action. Requiring an elected official to file a report linking him or herself to a donor just because the official makes a speech at, or is otherwise featured on an invitation for, an event is overbroad and misleading. In our opinion, Commission advice and enforcement matters regarding behested payments have not taken into account the unique policy and legal considerations raised by requiring the public disclosure of donations which individuals and entities make to nonprofit organizations and civic causes.

San Diego confronted a similar situation when deciding when City lobbyists should be required to disclose fundraising activities on behalf of a candidate for City office. The City wanted to capture all political contributions raised by a City lobbyist which reasonably could be connected to the lobbyist's efforts to influence the candidate's position on City action but was at the same time cognizant that over-disclosure could impair the rights of the contributors and/or provide misleading information to the public. After considerable research by the Ethics Commission staff and several public hearings, the City concluded that disclosure should only be required when the lobbyist "takes credit" with the candidate for the contributions and the

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candidate has actual knowledge of the lobbyist's fundraising activity.

Specifically, San Diego's lobbying law only requires lobbyists to disclose contributions which they have fundraised when the lobbyist either: (1) "personally delivers" the contribution to the candidate or the candidate's campaign; or (2) "identifies oneself to a candidate or a committee . . . as having any degree of responsibility for \$2,000 or more in contributions received as a result of the solicitation." (S.D. Muni. Code section 27.4002 [definition of "fundraising activity"]; copy attached.)

The logic behind this provision in San Diego's lobbying law applies to behested payment reporting: absent actual or at least constructive knowledge that someone has made a donation because of an official's fundraising efforts, the risk of "corruption" (or the appearance thereof) does not justify disclosure. If someone buys a table at a fundraising event where an elected official makes a speech, or makes a donation to an organization after receiving a letter or seeing a social media post from the elected official asking people to support the organization, the donation can not by definition affect the official's position on a government matter affecting the donor unless and until the official is informed that the donor made the donation at his or her behest. If the official is not aware that his or her fundraising triggered the donation – either from his or her direct involvement in collecting donations or RSVPs, or by being told of a donation by the recipient or the donor – there is not sufficient risk of corruption (or the appearance) to justify public reporting of the transaction.

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Thank you very much for your consideration of this proposed regulatory language, and we look forward to working with the Commissioners and Commission staff on this issue in the future.

Sincerely,



James R. Sutton

cc: Commissioner Allison Hayward
Galena West, Esq., Director of Enforcement
Karen Harrison, Esq.

Attachment
JRS/dfm
#1000.01

Expenditure lobbyist means any *person* who makes expenditures for public relations, media relations, advertising, public outreach, research, investigation, reports, analyses, studies, or similar activities designed to influence one or more *municipal decisions*, to the extent that such *payments* total \$5,000 or more within a calendar quarter. An expenditure is made on the date a *payment* is made or on the date consideration, if any, is received by the *expenditure lobbyist*, whichever is earlier. Expenditures for *lobbying activities* reported by a *lobbying firm* or *organization lobbyist* on a quarterly disclosure report shall not be considered for purposes of calculating the \$5,000 threshold.

Fundraising activity means soliciting, or directing others to solicit, *contributions* from one or more contributors, either personally or by hosting or sponsoring a fundraising event, and either:

- (a) personally delivering \$2,000 or more in *contributions* to:
 - (1) a *candidate's* election committee;
 - (2) a *candidate-controlled* ballot measure committee;
 - (3) a *candidate's* (including an elected *City Official's*) professional expense committee; or
 - (4) a committee primarily formed to support or oppose one or more *candidates*, or
- (b) identifying oneself to a *candidate* or a committee identified in subsection (a) as having any degree of responsibility for \$2,000 or more in *contributions* received as a result of that solicitation.

Gift means any *payment* that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public. Any *person*, other than a defendant in a criminal action, who claims that a *payment* is not a *gift* by reason of receipt of consideration has the burden of proving that the consideration received, is of equal or greater value. *Gifts* are subject to the exceptions set forth in Municipal Code section 27.3525. *Gifts* do not include a ticket, invitation, or other admission privilege to an event held for a non-profit entity.

Immediate family means an individual's spouse or registered domestic partner, and any dependent children.