



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 8, 2021

Rei Onishi
Deputy Legal Affairs Secretary & Chief Ethics Advisor
Office of Governor Gavin Newsom
1303 10th Street, Suite 1173
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. I-21-084

Dear Deputy Legal Affairs Secretary Onishi:

This letter responds to your request for advice regarding the campaign reporting provisions of the Political Reform Act (the “Act”).¹ Because your inquiry is general in nature, we are treating your request as one for informal assistance.² Please note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

When reporting a behested payment made by a donor advised fund (“DAF”) on a Behested Payment Report, California Form 803, who should an elected official report as the “payor” of such funds?

CONCLUSION

While the term “payor” is not currently defined in the Act or Commission regulations, consistent with the purpose of behested payment reporting, an elected official should identify the “payor” of the behested payment with as much specificity as the official knows or can determine by inquiring with the sponsoring organization. In those instances in which the official knows or can determine a person who is the source of a behested payment made through a DAF, the official should identify that person as the “payor.” If the official does not know the identity of the person whose DAF is being used to make a behested payment and the sponsoring organization will not

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.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

identify that person, the official should report that the payment was made by a DAF, provide the name of the DAF, if known, and the name of the sponsoring organization.

FACTS AS PRESENTED BY REQUESTER

You are Deputy Legal Affairs Secretary and Chief Ethics Advisor for the Office of the Governor seeking advice regarding how the Act's current reporting framework applies to behested payments made by a DAF, which is an individual tax-advantaged account held at a charitable entity, such as Vanguard Charitable. A donor makes a contribution to the DAF and realizes a tax deduction at the time of the contribution. Then, usually at some later time, the donor makes a recommendation to the DAF to make a contribution to another charitable entity. The DAF usually makes the recommended contribution if the proposed receiving charity meets the DAF's criteria for receiving a grant.³

ANALYSIS

Payments made to candidates for political purposes meet the definition of a "contribution" under Section 82015 and are subject to the Act's contribution reporting requirements. The Act defines another type of payments, "behested payments," which involve an elected officer, but are distinguished from contributions. Under Section 82004.5 of the Act, the term "behested payment" includes a payment made at the behest of an elected officer, or the officer's agent, and "it is clear from the surrounding circumstances that the payment was made for purposes unrelated to the officer's seeking or holding of elective office" (Section 82004.5(c)), such as "[a] payment made principally for charitable purposes." (Section 82004.5(c)(4)). The phrase "made 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" an elected officer or the officer's agent. (Section 82041.3; Regulation 18215.3.)

Section 84224 imposes reporting requirements for behested payments that satisfy each of the following requirements: (1) The payment is made at the behest of an elected officer or member of the Public Utilities Commission; (2) The behesting elected officer or member of the Public Utilities Commission 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

³ According to Vanguard's website, "[a] donor-advised fund (DAF) is a charitable giving account designed exclusively to invest, grow, and give assets to charities for meaningful and lasting impact. Here's how it works: You donate assets into a DAF and recommend how those assets should be invested. Your contribution is tax-deductible and the assets in the DAF grow tax-free. When you're ready, recommend a grant to a charity you care about, and we take care of the rest. Some people call it a giving vehicle. Others call it a philanthropic fund. We call it the most convenient, tax-efficient way to give back." (See <https://www.vanguardcharitable.org>.)

address of the payee; a brief description of the goods or services provided or purchased, if any; and a description of the specific purpose 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. (*Ibid.*)

With respect to DAFs, the Internal Revenue Service (“IRS”) states:

Generally, a donor advised fund is a separately identified fund or account that is maintained and operated by a section 501(c)(3) organization, which is called a *sponsoring organization*. Each account is composed of contributions made by individual donors. Once the donor makes the contribution, the organization has legal control over it. However, the donor, or the donor’s representative, retains advisory privileges with respect to the distribution of funds and the investment of assets in the account.⁴

To the extent that the official does not know or has no reason to know the payment was made from a DAF, the payor will be identified as the sponsoring organization. However, your request assumes that an official is aware the behested payment is made by a sponsoring organization from a DAF, and you therefore seek general clarification regarding the proper person to report as the “payor” on Form 803.

The purpose of the “behested payment” reporting requirements is to capture payments that are not direct contributions to elected officials or gifts, but payments in which the public would have an interest given the official’s role in the exchange, which helps to protect the public’s trust. For transparency and accountability purposes, behested payments reported by state elected officers are posted on the Commission’s website.

The Act does not define “payor” in the context of behested payments and the determinative issue here is who should be reported as the “payor” in those circumstances in which an official knows or has reason to know that the funds have been provided from a DAF, and may know the identity of the donor⁵ of the DAF payment. In this regard, considering the donor’s “advisory” role in the distribution of DAF funds, the public interest in disclosure is best served where the donor of the payment is identified when the official knows or can determine the identity of the donor.

In consideration of the public interest served by reporting behested payments, we would advise an elected official to attempt to determine the original source of a behested payment when the official knows or has reason to know the behested payment involves a DAF. The official should report the “payor” on the Form 803 with as much specificity as the official knows, or can determine by inquiring with the sponsoring organization. In those instances in which the official knows or can determine the donor, the official should identify the donor. If the official does not know the identity

⁴ See [Donor-Advised Funds | Internal Revenue Service \(irs.gov\)](#). See also, [26 USCS § 4966](#), defining “donor advised fund.”

⁵ For this analysis, “the donor” refers to the person or persons who established the DAF with the sponsoring organization.

of the donor and the sponsoring organization will not identify the donor, the official should report that the payment was made by a DAF, provide the name of the DAF, if known, and the name of the sponsoring organization.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:dkv