

www.ca-ilg.org/behested_payments

Understanding the “Behested Payments” Issue

3/28/12

Overview

An elected official who fundraises for worthy causes is wise to be aware of California’s transparency requirements that apply to such activities. Officials will usually hear of this requirement referred to as the “behested payments” requirement.

Behested payments are donations made to a government agency or charity at the request of an *elected* official for a legislative, governmental or charitable purpose.¹ Behested payments are not considered gifts, but must be disclosed if donations from a single source in a calendar year equal or exceed \$5,000.²

The Transparent Public Official: Understanding the “Behested Payment” Reporting Requirements

Public officials engage in many different activities—governmental, political, and personal. Sometimes the context is that they see a need in their community and they take steps to see that that need is met. Some officials sit on nonprofit boards where the expectation is that board members will help fundraise for the organization. Other elected officials have jobs that involve fundraising. Sometimes a public agency itself will be involved in seeking help to meet the agency’s needs from private sources because of the agency’s limited financial resources.

In any of these and similar scenarios, public officials need to be aware that there are disclosure requirements when contributions reach a certain level. The Fair Political Practices Commission refers to these contributions as “behested payments.” (The dictionary definition of a “behest” is “an earnest or strongly worded request.”³) Certain disclosure or transparency requirements apply when a public official successfully asks others to help with an effort.

The Institute for Local Government thanks volunteers Joseph L. J. Appel for his assistance with producing this piece, as well as Mary Frances McHugh, City Attorney, Yreka, and Jeffrey L. Massey, Kronick, Moskovitz, Tiedemann & Girard, for reviewing and commenting on its content.

“Ask and Ye Shall Report”

In general, public officials need to be mindful that any time they ask someone for something, they may need to disclose the gesture that results from that request. Different reporting rules apply based on the *purpose* of the requested gesture.

- **Political Requests:** When the request relates to supporting a candidate or ballot measure, the public official or candidate needs to be mindful of the rules relating to asking for campaign contributions.⁴
- **Personal Requests:** When the request would benefit a public official or candidate (or their families) personally, the individual needs to be mindful of the [rules relating to asking for or receiving gifts](#).⁵
- **Worthy Cause Requests:** When the request is for support of a governmental, legislative or charitable purpose, the elected official needs to be mindful of the disclosure rules relating to such requests.⁶

Although the particulars of each form of disclosure rules differ, their underlying purpose is the same: to give the public a way to know who is making gestures a public official might appreciate. This information helps the public assess whether or not that appreciation might influence that official’s decisions. This in turn serves the law’s goal of promoting unbiased governmental decision-making.⁷

This paper examines the disclosure rules associated with the last category of worthy cause requests: behested payments to support governmental, legislative or charitable causes.

Determining When a Behested Payment Has Been Made

When is a payment a “behested” payment? The language in the statute refers to “a payment made at the behest of” a public official.⁸ The Fair Political Practices Commission’s rules define the phrase “made at the behest of” as meaning the official or candidate (or their employee or agent):

- Requests or suggests the donation;
- Controls or directs the donation; or
- Plays a cooperating, consulting, or coordinating role with respect to the donation.⁹

A donation can also be at the behest of the official when the donation is made “in . . . concert with” the official or is made “with the [official’s] express, prior consent.”¹⁰

A frequently asked question is whether being part of the leadership of an organization that sends out a fundraising solicitation will trigger an obligation to report a donation.¹¹ In order for it to do so, the solicitation must “feature” an elected officer.¹² A solicitation “features” an elected officer if his or her 1) photograph, 2) signature, or 3) otherwise singles out the official.¹³ A solicitation singles out the official if their name or office is prominently displayed in the document’s headlines, captions, or lettering size, color or type face.¹⁴

The solicitation also “features” the official if the roster or letterhead listing the organization’s governing body contains a majority of elected officers.¹⁵

For governmental fundraising, a donation is not a behested payment if the elected official solicits payments from another local, state, or federal governmental agency and the donation will be used in the regular course of the official’s agency’s business.¹⁶

As always, an official is well-advised to seek advice from either agency counsel or the Fair Political Practices Commission on how these requirements apply in particular situations. With that caveat, the following are examples of how the rules have been applied to public officials’ activities.

Charitable Fundraising Examples

- **The Official Endorses an Organization to a Funder.**¹⁷ An official solicits donations from a nonprofit (funder) organization to fund another nonprofit (recipient) organization with a letter which features her photograph and title on the letterhead. If the request was successful and the nonprofit received \$5,000 or more from that funder, the official would need to report her successful endorsement of the recipient nonprofit for funding.
- **The Official’s Name (and Only His Name) is on the Event and Fundraising Materials.**¹⁸ In another situation, an official and his staff organized a fundraising walk/run, the proceeds of which go to six nonprofits geared towards women’s health issues. The Fair Political Practices Commission concluded that the official would need to report contributions that equal or exceed \$5,000 from a single source on Form 803.
- **Officials Who Are Staff for Nonprofits.** This can be a tricky situation because the contributions to the nonprofit can have more of a direct impact on the finances of an official who also serves as staff to the nonprofit. As a result, donations to the nonprofit need to be analyzed not only for whether they are made at the behest of an official, but also for whether they are gifts to the official. Similarly, the official or candidate must be able to

Other Ethical Issues Relating to Nonprofit Activities

For an analysis of other ethical and legal issues that can arise for public officials involved with nonprofit organizations, see www.ca-ilg.org/nonprofits.

demonstrate that the contributions to the nonprofit are for purposes unrelated to one's candidacy for elective office and hence are not really campaign contributions.¹⁹

In analyzing these issues, the Fair Political Practices Commission has examined how closely linked an official is to the nonprofit. On the gift issue, if the donations sought form the base of the official's wages or represent a substantial amount of the nonprofit's budget (such that the official's salary or continued employment could be affected), an official would be well-advised to get advice on whether the donations are gifts to the official and therefore subject to the Political Reform Act's gift provisions.²⁰ Another problem area is when the donations are used to pay specific expenses of staff or directors.²¹ Something else to avoid when one has the dual role of nonprofit staff and public official is referring to one's status as a public official when soliciting funds as a nonprofit staff member.²²

Even if a donation isn't a gift to an official, the official will need to determine whether contributions to the nonprofit that the official solicits total \$5000 or more over the course of a year and therefore need to be reported. Again, the analysis is fact specific. There is some indication in the Fair Political Practices Commission's opinions that the same factors that keep the donation from being a gift to the official, including keeping one's status as a public official completely separate from one's activities as nonprofit staff, helps the Fair Political Practices Commission conclude that the reporting requirement does not apply.²³

- **When an Elected Official and Her Business is Involved in the Fundraising.**²⁴ Illustrating the fact-specific nature of the analysis, the Fair Political Practices Commission concluded that a public official would need to be alerted to reporting obligations when she participated on a committee involved in fundraising for a new facility for a local nonprofit. The elected official's name did not appear on advertisements for fundraising events, but her store's name did. She also made space in her store to sell tickets for fundraising events and collectible items (proceeds from the sale of which benefitted the facility). She also donated gift baskets to be raffled off to raise money for the effort. The Fair Political Practices Commission concluded that these activities were sufficient to trigger the need for the official to be alert for donations totaling \$5,000 or more during a year from a single source, so those donations could be reported.

Avoiding Even the Appearance of Influence

Promoting the public's confidence and trust that their agencies make merit-based, fair and unbiased decisions is a key priority for many local officials.

For this reason, some officials make a practice of not seeking support from those who either do or may have business pending before their local agencies. Others have a "black out" period in which they won't make requests within a certain time frame (for example, within a year of franchise renewal decision). Some local agencies codify such practices into local rules.

Governmental Fundraising

- **The Fundraising Pays for Inaugural Activities.**²⁵ In a situation involving a nonprofit formed to fundraise for a mayor's inaugural activities, the Fair Political Practices Commission seemed to conclude the mayor-elect would need to report any contributions from an individual donor of \$5,000 or more, as well as the overall payments by the nonprofit organization on the inauguration. This was even though the mayor-elect was not on the nonprofit organization's board, would not be involved in the organization's fundraising and would not be involved in any other way in the day-to-day operations of the organization. The mayor-elect's chief role was to show up at the events. Presumably, however, these events were planned in consultation or coordination with the mayor and the Fair Political Practices Commission concluded the reporting requirement would be triggered.
- **Funding for Additional Staff Support.**²⁶ Local officials frequently serve on a number of committees and regional bodies—the work of which can be time-consuming and quite technical. Recognizing this and wanting to do a good job, one local official sought staff support from other public entities in connection with her service on a regional water quality control board. The Fair Political Practices Commission found that such support needed to be reported. Moreover, everyone in the funding chain had to be reported—the public agencies, the council of government to which the public agencies contributed resources, and then the city that hired the staff using the resources collected by the council of governments.
- **Outside Counsel Expenses.**²⁷ A district attorney retained a private law firm to represent the county in major litigation against a large corporation. To obtain funding for the effort, the district attorney contemplated using both campaign funds and additional contributions from the community that would go directly to the law firm. The Fair Political Practices Commission said both approaches could be proper. With respect to the non-campaign contributions, the Fair Political

Practices Commission advised the district attorney that, if his fundraising efforts secured \$5,000 or more from a single source, those contributions would need to be reported.

Finally, an official needs to be mindful that the reporting requirement relates to who is making the contribution. Thus, if an official fundraised for a variety of causes over the course of a year, the official needs to be alert to the point at which any one donor's payments equal or exceed \$5,000 or more in that calendar year. When that threshold is reached, the official needs to report that donor's generosity.

Reporting Behested Payments: The \$5,000 Threshold

Not all requests to support worthy causes are subject to the reporting requirements: only those payments that add up to or exceed \$5,000 from a single source within a calendar year must be reported.²⁸ The report must:

- Be made within 30 days of the payment that reaches or goes over the \$5,000 threshold;
- Must include the name and address of payor, the name and address of the payee, amount and date of the payment(s), a brief description of the goods or services provided, if any, and a description of the specific purpose or event for which the payment(s) were made.²⁹

The Fair Political Practices Commission provides a [form](#) ("Form 803") to facilitate such reports.³⁰ The form must be filed with the official's state or local agency within 30 days.³¹

In addition, any subsequent payments made by the same source after the \$5,000 threshold has been met must be disclosed in the same manner.³²

Other Things to Know

- **Multiple Askers.** If two officials make a request for a donation from someone and then that individual donates \$5,000 or more, each official must report the full amount of the donation.³³ The Fair Political Practices Commission rejected the notion that each official should be considered responsible for just half the donation, on the theory that the purpose of the disclosure requirement is to alert the public to acts of generosity potentially influencing decision-makers. In this scenario, the Fair Political Practices Commission noted, it's relevant for the public to know that two public officials would be grateful for the donor's action.
- **Common Expenses.** In another situation, someone wanted to produce a series of public service announcements featuring a variety of public officials.³⁴ The

announcements shared common production costs—the question was whether those costs could be divided among those officials who benefitted from participating in the ads. Again, the Fair Political Practices Commission said “no” to any division of the dollar amounts involved, finding instead that each official had to consider and report the entire amount of those common production costs if those costs were necessary to produce the official’s ad.

- **Donors and Intermediaries Must be Tracked.**³⁵ If the scenario involves someone collecting multiple donations (for example, either the inaugural committee or the council of governments in the above examples), the public official must be careful to find out who donated to the intermediary group. If any of those donations totaled \$5,000 or more (either for this cause or others that the official has been involved in fundraising for over the course of the year), the donor and the person/entity collecting the donations must be reported.

About This Resource

This document is a service of the Institute for Local Government (ILG) whose mission is to promote good government at the local level with practical, impartial, and easy-to-use resources for California communities.

ILG is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities and the California State Association of Counties. For more information and to access the Institute’s resources on gift rules public officials go to <http://www.ca-ilg.org/GiftCenter>.

As part of its mission of promoting good government at the local level, the Institute tries to help local officials understand those rules.

These informational materials, however, are not legal advice. Attorneys can and do disagree on how to interpret the rules in this area. In addition, the rules can and do change over time.

Officials are encouraged to consult with an attorney or relevant regulatory authorities for up-to-date information and advice on specific situations.

References and Resources

¹ See Cal. Gov't Code § 82015 (note the behested payment reporting requirement also applies to candidates).

² *Id.*

³ See www.dictionary.com.

⁴ See Cal. Gov't Code § 82015(b)(2)(B).

⁵ See Cal. Gov't Code § 82015(b)(2)(B)(i). Note that the usual presumption is that any time a payment is made to a public official and that official does not provide something of equal value in return, the payment is considered either a contribution or a gift. See Cal. Gov't Code §§ 82015, 82028.

⁶ See Cal. Gov't Code § 82015(b)(2)(B)(iii) (noting that such payments are neither gifts nor contributions).

⁷ See Cal. Gov't Code §§ 81001 & 81002; *Gloria & Emerald Advice Letter* No. A-09-273 (2009).

⁸ The specific language in Government Code section 82015(b)(2) is:

A payment made at the behest of a candidate is a contribution to the candidate *unless the criteria in either subparagraph (A) or (B) are satisfied:*

. . .

(B) It is clear from the surrounding circumstances that the payment was made for purposes unrelated to his or her candidacy for elective office. *The following types of payments are presumed to be for purposes unrelated to a candidate's candidacy for elective office:*

(i) A payment made principally for personal purposes, in which case it may be considered a gift under the provisions of Section 82028. Payments that are otherwise subject to the limits of Section 86203 are presumed to be principally for personal purposes.

(ii) A payment made by a state, local, or federal governmental agency or by a nonprofit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

(iii) A payment not covered by clause (i), made principally for legislative, governmental, or charitable purposes, in which case it is neither a gift nor a contribution. However, *payments of this type that are made at the behest of a candidate who is an elected officer shall be reported within 30 days following the date on which the payment or payments equal or exceed five thousand dollars (\$5,000) in the aggregate from the same source in the same calendar year in which they are made.* . . .

See Cal. Gov't Code § 82015(b)(2)(B)(iii)(emphasis added). The statute goes on to explain the reporting process.

⁹ See 2 Cal. Code Regs. § 18215.3(a).

¹⁰ See 2 Cal. Code Regs. § 18215.3(a). See also [Limitations and Restrictions on Gifts, Honoraria, Travel and Loans: A Fact Sheet for Local Elected Officers and Candidates for Local Elective Offices, Local Officials Specified in Government Code Section 87200, Judicial Candidates, Designated Employees of Local Government Agencies](#), at 6 (2012):

Generally, a donation will be made “at the behest” if it is requested, solicited, or suggested by the elected officer, or otherwise made to a person in cooperation, consultation, coordination with, or at the consent of, the elected officer. This includes payments behested on behalf of the official by his or her agent or employee. Behested payments totaling \$5,000 or more from a single source in a calendar year must be disclosed by the official on a Form 803, which is filed with the official’s agency within 30 days of the date of the payment(s). (Section 82015.)

¹¹ See Staff Memo, Adoption of Proposed Regulation 18215.3 (August 25, 2011) at 3.

¹² See 2 Cal. Code Regs. § 18215.3(b).

¹³ See 2 Cal. Code Regs. § 18215.3(b)(1).

¹⁴ See 2 Cal. Code Regs. § 18215.3(b)(1).

¹⁵ See 2 Cal. Code Regs. § 18215.3(b)(2).

¹⁶ See 2 Cal. Code Regs. § 18215.3(c).

¹⁷ See *Huffman Advice Letter*, No. A-10-078 (2010); *Romero Advice Letter*, No. I-09-044 (2009).

¹⁸ *Stone Advice Letter*, No. A-06-127 (2006); see also *Sundberg Advice Letter* No. A-05-087 (2005); *Bagley Advice Letter*, No. A-97-221 (1997).

¹⁹ *Ewin Advice Letter*, No. I-09-127 (2009).

²⁰ *Ewin Advice Letter*, No. I-09-127 (2009). See also *Holland Advice Letter*, A-07-176 (2008).

²¹ See *O’Shea Advice Letter*, I-90-593 (1990), cited in *Priamos Advice Letter*, A-04-191 (2004).

²² *Priamos Advice Letter*, A-04-191 (2004).

²³ *Priamos Advice Letter*, A-04-247 (2004). See also *Battersby Advice Letter*, A-05-137 (2005).

²⁴ *Sundberg Advice Letter*, No. A-05-087 (2005).

²⁵ See *Sutton Advice Letter*, No. A-05-256 (2005).

²⁶ See *Steele Advice Letter*, No. A-06-091 (2006).

²⁷ See *Stoen Advice Letter*, No. A-03-185 (2003).

²⁸ Cal. Gov’t Code § 82015(b)(2)(B)(iii) (Behested payments “shall be reported within 30 days following the date on which the payment or payments equal or exceed five thousand dollars (\$5,000) in the aggregate from the same source in the same calendar year in which they are made.”).

²⁹ Cal. Gov’t Code § 82015(b)(2)(B)(iii) (“The report shall contain the following information: name of payor, address of payor, amount of the payment, 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.”).

³⁰ See Cal. Gov’t Code § 82015(b)(2)(B)(iii); Fair Political Practices Commission, [Limitations and Restrictions on Gifts, Honoraria, Travel and Loans: A Fact Sheet for Local Elected Officers and Candidates for Local Elective Offices, Local Officials Specified in Government Code Section 87200, Judicial Candidates, Designated Employees of Local Government Agencies](#), at 6 (2012).

³¹ See Cal. Gov’t Code § 82015(b)(2)(B)(iii); Fair Political Practices Commission, [Limitations and Restrictions on Gifts, Honoraria, Travel and Loans: A Fact Sheet for Local Elected Officers and Candidates for Local Elective Offices, Local Officials Specified in Government Code Section 87200, Judicial Candidates, Designated Employees of Local Government Agencies](#), at 6 (2012).

³² Cal. Gov’t Code § 82015(b)(2)(B)(iii) (Behested payments “shall be reported within 30 days following the date on which the payment or payments equal or exceed five thousand dollars (\$5,000) in the aggregate from the same source in the same calendar year in which they are made”—emphasis added). See also [Form 803](#)—Instructions Section.

³³ See *Gloria & Emerald Advice Letter*, No. A-09-273 (2009); *Taylor Advice Letter* No. A-03-085 (2003).

³⁴ See *Bell Advice Letter*, No. I-07-169 (2007).

³⁵ See *Sutton Advice Letter*, No. A-05-256 (2005); *Steele Advice Letter*, No. A-06-091 (2006).