



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Baker, Cardenas, Wilson, and Wood

From: Dave Bainbridge, General Counsel
Karen Harrison, Senior Commission Counsel

Subject: Prenotice Discussion of Proposed Regulation 18424.3. Behested Payment Reporting. Donor Advised Funds.

Date: August 9, 2021

Proposed Action

Staff presents proposed Regulation 18424.3 addressing payments involving a donor advised fund (“DAF”) related to the behested payment reporting requirements under the Act¹ for prenotice discussion so that the Commission may provide guidance and instruction to staff prior to staff presenting a final version for approval at a subsequent Commission meeting.

Summary

At the July 15, 2021 Commission meeting, the Commission directed staff to prepare a regulation addressing the reporting requirements when an official makes a behest for payment reportable under Section 84224 and the payment is made by a sponsoring organization from a donor’s DAF. A “sponsoring organization” is a noncommercial (community foundation) or a commercial (investment firm’s charitable account) 501(c)(3) organization that owns and administers this type of fund. A DAF is structured so that while a sponsoring organization has ownership of the fund, it is the donor that requests payment be made from the fund to a particular 501(c)(3) organization. In a behested payment situation, generally the official makes a behest for payment to the donor, the donor requests that the sponsoring organization make the payment from the donor’s DAF, and so long as it meets with the law governing charitable giving by DAFs, the sponsoring organization makes the payment from the DAF.

Proposed Regulation 18424.3 requires that when a DAF is involved the behested payment report must include, to the extent the information is known to the official, the names of the parties involved in making the payment: the sponsoring organization, the DAF, and the person who is the source of the DAF payment. The regulation places a duty on the official to

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.

report this information with as much specificity as the official knows or can ascertain from the sponsoring organization. The regulation addresses reporting when a sponsoring organization withholds the name of the DAF for a particular payment at the request of the donor. It also defines the terms “sponsoring organization,” “donor advised fund,” and “donor” for purposes of this regulation.

Behested Payment Reporting

Background: Law and Purpose

The Act regulates four categories of payments that involve elected officials: contributions,² income,³ gifts,⁴ and behested payments. These categories determine how a payment is reported under the Act and what, if any, limits apply. A “behested payment” is distinguished from a “contribution”⁵ and defined as a payment “made at the behest of the official”⁶ where “it is clear from the surrounding circumstances that the payment is made for purposes unrelated to the officer’s seeking or holding elective office.” (Section 82004.5(c).) Behested payments that are presumed to fall in this category include payments made principally for personal purposes and payments made principally for charitable, legislative, or governmental purposes. (Section 82004.5(c)(1), (4) and (5).) It is this latter category, payments made principally for charitable, legislative, or governmental purposes, that is subject to reporting under Section 84224.

² A “contribution” includes “a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, except to the extent that full and adequate consideration is received or it is clear from the surrounding circumstances that the payment is not made for political purposes.” (Section 82015(a).) A payment is made for political purposes if it is made “[f]or the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure,” or if the payment is received by or made at the behest of a candidate, a controlled committee, an official committee of a political party, or an organization formed primarily for political purposes. (Regulation 18215(a).) A behested payment is excluded from the definition of a contribution, but only as to the behesting committee or official. (Section 82015(c)(4).)

³ Income, is a payment received, including things such as salary, wages (including a community property interest in a spouse’s wages), and gifts. (Section 82030.)

⁴ Gift is a subset of “income.” (Section 82030.) A “gift” is “any payment that confers a personal benefit on the recipient, to the extent that consideration of equal or greater value is not received.” (Section 82028(a).) Gifts to a public official are reportable if more than \$50 in twelve months is received from a single source. (Section 87207(a)(1).) Gifts to officials are limited to \$520 from a single source in a calendar year, and \$10 in a calendar month from a lobbyist or lobbying firm. (Section 89503(a), Regulation 18940.2 and Section 86203.)

⁵ A behested payment is excluded from the definition of a contribution, but only as to the behesting committee or official. (Section 82015(c)(4).)

⁶ In defining when a payment is “made at the behest of” an official, the Legislature included a broad range of actions on the part of the official. Section 82041.3 states: “[m]ade 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.”

Behested Payment Reporting Requirements

Section 84224 requires elected officers and Public Utilities Commission members (referred to collectively herein as “official”), to report payments made at their behest and made principally for charitable, legislative, or governmental purposes when a single source makes payments that meet or exceed \$5,000 in a calendar year.

Specifically, Section 84224 imposes reporting requirements on behesting officials for payments that satisfy each of the following requirements: (1) The payment is made at the behest of the official; (2) The behesting official 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 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.” (Emphasis added.) The statute does not define key terms, however, including “payor.”

Section 84224(a) also requires that any additional payments made by that same single source must be reported within 30 days after the payment was made. Within 30 days after receipt of any such report, state agencies must forward a copy of the report to the Commission, and local agencies must send a copy to the local elections official. For transparency and accountability purposes, behested payments reported by state officials are posted on the Commission’s website.

Donor Advised Fund Issues Related to Behested Payment Reporting

The Act does not define the term “payor” for a behested payment report. Recently it has come to light that guidance on reporting a “payor” is needed when a DAF is used to make the behested payment, due to the structure of these payments. The Internal Revenue Service describes a DAF as follows:

Generally, a donor advised fund is a separately identified fund 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 the assets in the account.

(See <https://www.irs.gov/charities-non-profits/charitable-organizations/donor-advised-funds>. See also, 26 USCS § 4966(d), defining “donor advised fund” and “sponsoring organization.”)

Under this structure, when an official reports a behested payment that comes from a DAF the sponsoring organization has written the check for payment from the donor’s DAF at the direct request of the donor, or the donor’s appointed adviser. The sponsoring organization generally notifies the payee 501(c)(3) organization that the payment is from a DAF and may or may not provide the name of the DAF depending on whether the donor has requested anonymity in making the payment. Additionally, a DAF may be named in a manner that does not disclose the donor’s name. A DAF may have more than one donor and may have an appointed “advisor” to make requests for payments.

Section 84224 requires reporting that necessitates the official track a single source of payments and report when a threshold of \$5,000 in behested payments are made in a calendar year. As a result, merely reporting the name of the sponsoring organization as the “payor” does not provide a full disclosure of the parties involved in making the payment or reflect the “single source” of the payment. The Commission requested regulatory language defining a “payor” in the context of a DAF payment so that meaningful disclosure of the parties involved in the payment transaction is provided to the public, and officials are clear in understanding their reporting duties. The Commission also raised the need to address reporting when the sponsoring organization withholds the name of the DAF, at the request of the donor.

Commission Authority: Effectuate the Purpose of the Behested Payment Reporting Statutes

Under Section 83112, the Commission has the authority to adopt, amend and rescind rules and regulations to carry out the purposes and provisions of the Act, to the extent the regulations are not in conflict with the underlying statute, and reasonably necessary to effectuate its purpose. Generally, the purposes of the Act’s reporting requirements are to inform the public, avoid improper influences, disclose financial interests and avoid conflicts of interest, and inhibit improper practices from occurring. (See Section 81002.) The purpose of the behested payment reporting requirements is to capture payments that are not contributions or clear gifts to officials, but are payments in which the public would have an interest given the official’s role in the exchange.⁷ Specifically, the Act requires an official’s behested payment report to make known to the public the parties’ names, the payment amount, and the circumstances, use and timing involved in a significant behested payment. (See Section 84224.) The public trust is served by

⁷ See for example, *Duran* Advice Letter No. A-16-203; *In the Matter of Tony Rackauckas*, FPPC Case No. 16/612, p. 4, and *Jay* Advice Letter No. A-10-088, p. 6; the latter of which states: “The purpose of the ‘behested payment’ provision ... is to capture reporting for payments that are not direct contributions to elected officials, but that the public would want to see in periodic reports. That is, the purpose is to provide disclosure when there is a potential for influence over a public official.”

the reporting when accurate and timely reports are filed, and the public can understand the parties involved and can assess a potential for influence that may result from the payment.

Proposed Regulation

For Adoption: Proposed Regulation 184243. Behested Payment Reporting. Donor Advised Funds.

Proposed Regulation 18424.3 subdivision (a) states that the official must report, to the extent this information is known to the official, the following as the “name of payor” in a behested payment report when a DAF is involved: the name of the sponsoring organization, the name of the DAF, and in order to ascertain the name of the person requesting the DAF payment be made, the name of the “donor” and, if applicable, the name of the donor’s advisor. Subdivision (b) places the duty on the official to report this information with as much specificity as the official knows or can determine by inquiring with the sponsoring organization

To address situations where the sponsoring organization withholds the name of the donor and identifies only a specific anonymous DAF, subdivision (c) provides that the “single source” of the payment is the particular DAF, and the official must designate the “name of payor” using a unique identifier for the specific anonymous DAF. This is important for the official and the public’s tracking purposes, so that anonymous DAF payments from different funds are not lumped together for reporting. Subdivision (d) defines the terms “sponsoring organization,” “donor advised fund,” and “donor” for purposes of this regulation. The term “donor” is defined as the “person who established the donor advised fund and made the payment request, or the person who contributed to the donor advised fund and the contribution was for purposes of the reportable payment.” The term “donor’s advisor” is the person designated by the donor to make the recommendation for payment from the donor advised fund. The regulation references the Internal Revenue Service’s definition of “sponsoring organization” and “donor advised fund” in section 4966(d) of Title 26 of the United States Code.

The proposed language provides for the meaningful disclosure of the parties involved in a behested payment transaction, while limiting the reporting requirements to information the official either knows or can determine by inquiring with the sponsoring organization. The proposed language balances prompt, informative, and accurate public disclosure of behested payments by officials with the need to not discourage the important public service that these payments can provide. It is also consistent with staff’s informal advice on this issue. (See *Onishi* Advice Letter, No. I-21-084.) This letter advised that, for reporting purposes, an 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 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.

Summary

Proposed Regulation 18424.3 supports the Act's purpose of providing relevant disclosure in a behested payment report that the public would want to know to understand the transaction and the parties involved. Proposed Regulation 18424.3 provides guidance so that officials may better understand how to disclose the "name of payor" when a DAF is involved in a behested payment report. Staff welcomes the Commission's input and further direction.

Attachment:

For adoption:
Proposed Regulation 18424.3, Behested Payment Reporting. Donor Advised Funds.