

Date of Hearing: August 24, 2015

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Sebastian Ridley-Thomas, Chair

AB 1544 (Cooley and Jones) – As Amended August 20, 2015

SUBJECT: Political Reform Act of 1974: behested payments.

SUMMARY: Provides that a payment made by a state, local, or federal governmental agency that is made principally for legislative or governmental purposes does not need to be reported as a behested payment, as specified. Specifically, **this bill:**

- 1) Specifies that a payment by a state, local, or federal governmental agency that is made principally for a legislative or governmental purpose is not subject to the behested payment reporting requirements described below.
- 2) Contains an urgency clause, allowing this bill to take effect immediately upon enactment. Provides that the urgency clause is necessary for the following reasons:
 - a) It is a core principle of representative government that an elected official's duties include advocacy of government agencies in favor of expenditures that benefit constituents or public purposes generally.
 - b) It is also well-established that a government agency may not expend public funds for purposes unrelated to the business of that agency.
 - c) To that end, government expenditures are subject to a myriad of laws designed to protect the public interest and promote transparency, including laws relating to open meetings, the appropriate use of public resources, conflicts of interests, and disbursement practices.
 - d) Therefore, it is necessary for this bill to take effect immediately in order to provide clarity for elected officials, in conformity with the Legislature's intent that reporting requirements for behested payments not apply with respect to the payments made by a government agency at the behest of an elected official for a legislative or governmental purpose.
- 3) Contains double-jointing language to avoid chaptering problems with AB 10 (Gatto) of the current legislative session.

EXISTING LAW:

- 1) Creates the Fair Political Practices Commission (FPPC), and makes it responsible for the impartial, effective administration and implementation of the Political Reform Act (PRA).
- 2) Provides that a payment made at the behest of a candidate is a contribution unless at least one of the following criteria are satisfied:
 - a) Full and adequate consideration is received from the candidate; or

- b) It is clear from the surrounding circumstances that the payment was made for purposes unrelated to the candidate's candidacy for elective office. Provides that 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 PRA, as specified;
 - 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; or,
 - iii) A payment that is made principally for legislative, governmental, or charitable purposes, in which case it is neither a gift nor a contribution.
- 3) Requires a candidate who is an elected officer to report a payment made at the behest of that officer, made principally for legislative, governmental, or charitable purposes, 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. Requires this report to be filed with the elected officer's agency and to contain all of the following:
 - a) The name and address of the payor;
 - b) The amount of the payment;
 - c) The date or dates that the payment or payments were made;
 - d) The name and address of the payee;
 - e) A brief description of the goods or services provided or purchased, if any; and,
 - f) A description of the specific purpose or event for which the payment or payments were made.

FISCAL EFFECT: None. This bill is keyed non-fiscal by the Legislative Counsel.

COMMENTS:

- 1) **Purpose of the Bill:** According to the author:

AB 1544 provides specific guidance for elected officers who request or provide support for an agency action as part of the public procedures of duly constituted state, local or federal agencies for purposes of the behested payment provisions of the Political Reform Act.

Government Code Section 82015 generally provides that a payment made at the “behest” of an elected officer is a campaign contribution to that officer. However,

Section 82015 also provides that a “behested” payment made by a government agency is presumed not to be a contribution. In another provision, Section 82015 requires that elected officers file what is known as a “behested payment report” for payments made for a legislative, governmental or charitable purpose that they “behest” from others. These provisions are ambiguous on whether payments made by government agencies must be covered in these reports.

Government expenditures are subject to many laws designed to protect the public interest, promote transparency, and ensure the appropriate use of public resources. It is illegal for a government agency to spend its funds unless the expenditure relates to the agency’s official function. It is a core principle of representative government that an elected officer’s duties include advocating to government agencies on matters of consequence to benefit their constituents, which can include funding of various types.

This bill would clarify that a payment made at the behest of an elected officer by a state, local, or federal governmental agency that is made principally for legislative or governmental purposes is exempt from “behested payment” reporting.

- 2) **Behested Payments and Previous Legislation:** In 1996, the FPPC amended its regulatory definition of the term "contribution" to include any payment made "at the behest" of a candidate, regardless of whether that payment was for a political purpose. As a result, payments made by a third party at the request or direction of an elected officer were required to be reported as campaign contributions, even if those payments were made for governmental or charitable purposes.

The change in regulations by the FPPC, along with a number of advice letters issued by the FPPC interpreting the new definition of "contribution," limited the ability of elected officers to co-sponsor governmental and charitable events. In one advice letter, the FPPC concluded that a member of the Legislature would be deemed to have accepted a campaign contribution if, at his behest, a third party paid for the airfare and lodging for witnesses to testify at a legislative hearing.

In response to the FPPC's modified definition of "contribution," the Legislature enacted SB 124 (Karnette), Chapter 450, Statutes of 1997, which provided that a payment made at the behest of a candidate for purposes unrelated to the candidate's candidacy for elective office is not a contribution. SB 124 specifically provided that a payment made at the behest of a candidate principally for a legislative, governmental, or charitable purpose is not considered a contribution or a gift. However, SB 124 also required that such payments made at the behest of a candidate who is also an elected officer, when aggregating \$5,000 or more in a calendar year from a single source, be reported to the elected officer's agency. The elected officer must report such a payment within 30 days.

Examples of payments made at the behest of an elected officer that have to be reported under this provision of law include charitable donations made in response to a solicitation sent out by an elected officer or donations of supplies and refreshments made by a third party for a health fair that was sponsored by an elected officer.

Because SB 124 was enacted in response to the FPPC's modified regulatory definition of the term "contribution," the rules governing behested payments—including the requirement that certain behested payments be publicly reported—are found within the provision of state statute that defines the term "contribution." The language added by SB 124 specifically provides that a payment made at the behest of a candidate is *not* a contribution if it is "clear from the surrounding circumstances that the payment was made for purposes unrelated to his or her candidacy for elective office." SB 124 additionally enumerates three types of payments that are "presumed to be for purposes unrelated to a candidate's candidacy for elective office": (1) payments made principally for personal purposes (which may be gifts under the PRA); (2) payments made by governmental agencies or by nonprofit organizations that are exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code; and (3) payments made principally for legislative, governmental, or charitable purposes. It is the third type of payments—those made principally for legislative, governmental, or charitable purposes—that are potentially required to be reported when made at the behest of a public official.

Notwithstanding the fact that payments by governmental agencies are covered by the second enumerated type of payments that are presumed to be for purposes unrelated to a candidate's candidacy, the FPPC nonetheless has advised that such payments also may be covered by the third enumerated type of payments (those made principally for legislative, governmental, or charitable purposes), and thus may be required to be reported as behested payments.

- 3) **Behested Payments by Governmental Agencies and FPPC Advice:** In 2013, the FPPC was asked to provide advice on whether a member of the Legislature would have reporting requirements under the behested payment rules if the member communicated with a local, state, or federal government agency to express his or her support for a payment to be made to a local government agency within the legislator's district. In its response (*Harrison Advice Letter*, No. I-13-106), the FPPC concluded that such payments were not required to be reported by the member of the Legislature as behested payments. In reaching that conclusion, the FPPC noted that regulations it adopted to implement the behested payment rules provided that a payment behested by an elected officer and made by a local, state, or federal government agency is not subject to reporting if "that payment will be used in the regular course of official agency business of the elected officer[']s agency[.]" The FPPC noted that legislators "have traditionally been expected to assist local agencies within their legislative districts in obtaining government funding for local government agency projects," and as such, "when a legislator acts to achieve this purpose, he or she is acting in the regular course of legislative business and bringing benefits, through the affected local government agency, to the state citizens whom he or she represents as constituents." In the same response, however, the FPPC stated that "not all payments an elected officer 'behests' from a government agency" would be exempt from reporting, mentioning specifically that "a payment from a government agency to a private individual or entity, such as through a government grant or contract," could have benefits to specific, identified private persons, and thus may not be exempt from reporting.

Earlier this year, in response to a request for advice from the Executive Officer of the California State Coastal Conservancy (SCC) (*Schuchat Advice Letter*, No. A-15-070), the

FPPC cited the *Harrison* Advice Letter in concluding that "[a]n elected official has a 'behested payment' reporting obligation when he or she provides a letter to the [SCC] expressing support for a grant of funds to be made by the Conservancy to a nonprofit 501(c)(3) organization to carry out a specific project." The FPPC letter indicated that "a key component of the SCC's work is to grant funds to public entities and...501(c)(3) nonprofit organizations to aid the grant recipients in carrying out projects that further the SCC goals," and acknowledged that the SCC "typically asks grant applicants to contact their local and state elected representatives to seek letters of support for their projects." Nonetheless, the FPPC concluded that grants made by the SCC to private nonprofit entities would "not be used in the regular course of official agency business of the elected officer" and therefore are subject to behested payment reporting.

This bill specifies that payments made by state, local, and federal governmental agencies that are made principally for legislative or governmental purposes are not subject to the behested payment reporting requirements, regardless of whether the beneficiary of the payments is another governmental agency or a private entity. In effect, this bill would overturn the *Schuchat* Advice Letter, and future payments made by governmental agencies that are made principally for legislative or governmental purposes would not be subject to behested payment reporting.

- 4) **Related Legislation:** AB 10 (Gatto), which is pending in the Senate Appropriations Committee, requires members of the Legislature and statewide elected officials to continue to publicly report behested payments for a year after leaving office, if certain conditions are met. This bill contains double-jointing language to avoid chaptering problems with AB 10.
- 5) **Political Reform Act of 1974:** California voters passed an initiative, Proposition 9, in 1974 that created the FPPC and codified significant restrictions and prohibitions on candidates, officeholders and lobbyists. That initiative is commonly known as the PRA. Amendments to the PRA that are not submitted to the voters, such as those contained in this bill, must further the purposes of the initiative and require a two-thirds vote of both houses of the Legislature.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

None on file.

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