



## FACT SHEET REGARDING PAYMENTS BEHESTED BY ELECTED OFFICIALS

Under state and local law, a payment made by a private individual or entity for governmental, legislative, or charitable purposes at the behest of a governmental official is not considered a gift to that official. Nevertheless, when such payments total \$5,000 and are made at the behest of an elected official, they must be disclosed to the public. This fact sheet addresses the rules surrounding behested payments but should not be considered a substitute for the actual language contained within state law and the City's Ethics Ordinance.

### General Rules

- ❖ City officials are subject to a limit of \$590 for gifts from any one source during a calendar year. See the commission's fact sheet on gifts to city officials for more information regarding gift rules.
- ❖ One of the exceptions to the definition of "gift" is a payment made by a private individual or entity for a governmental, legislative, or charitable purpose at the behest of a governmental official. Such a payment is not considered a gift to that official and is not reportable on the official's Form 700 – statement of economic interests.
- ❖ There are special rules that apply when these types of payments are made at the behest of an elected official. If a single source donates \$5,000 or more during a calendar year at the behest of an elected official, the official must report the payment(s) on a Fair Political Practices Commission Form 803.
- ❖ For example, if the Mayor asks individuals and entities to make donations to restore a historic City building, the Mayor must identify on a Form 803 all donors who gave \$5,000 or more in response to that request.
- ❖ A payment is made at the behest of an elected official if the donor making the payment is doing so in response to the official's request, solicitation, or suggestion (formal or informal). A donation is also made at the behest of an elected official if it is made in cooperation, consultation, coordination with, or at the consent of, the official.
- ❖ A behested payment includes a payment that has been made at the behest of an agent or employee of an elected official on that official's behalf.
- ❖ A payment is not made at the behest of an elected official, and is not subject to reporting on a Form 803, if the official makes a request for a payment from a local, state, or federal governmental agency and that payment will be used in the regular course of official City business.

### Aggregation Rules

- ❖ Although a single payment that is less than \$5,000 will not, in and of itself, trigger the filing of a Form 803, the form will be required if the same donor makes additional payments at the behest of the official during the same calendar year such that the payments collectively reach the \$5,000 reporting threshold.

- ❖ While multiple payments must come from the same source to trigger a Form 803 filing requirement, such payments may be made to any number of different entities. For example, if Acme Industries donates \$2,500 to support a park beautification project and \$3,000 to a local charitable organization, and both donations were at the behest of the same Councilmember, then that Councilmember must report the payments on a Form 803.
- ❖ Once a donor has made a behested payment(s) of \$5,000 or more during the calendar year, subsequent payments of any amount from that donor must be reported on a Form 803.

### **Solicitations that Feature Elected Officials**

- ❖ Charitable organizations often engage in fundraising by featuring one or more elected officials in a solicitation letter, invitation, or flyer. If an elected official: (1) “behests” a payment through sending out the solicitation letter, invitation, or flyer and (2) is “featured” in fundraising materials, payments made in response to the solicitation will be considered made at the behest of that official, and must be reported on the Form 803 if the \$5,000 threshold is reached.
- ❖ If an elected official knows that he or she has been “featured” in a charitable organization’s fundraising communication, he or she must exercise due diligence in determining whether any subsequent donation to the organization will trigger the need to file a Form 803.
- ❖ Fundraising materials “feature” an elected official if they include the official’s photograph or signature, or single out the elected official by displaying the official’s name or office in headlines or captions, or in a prominent type size, typeface, or type color. Fundraising materials do not “feature” an elected official if they include the official’s name in a list of supporters without singling out the official in any manner.
- ❖ For example, a Councilmember allows her name to be included in a list of supporters that will appear in a letter soliciting donations benefitting a local charitable organization. Her name is printed in the same style and size as all other supporters in the list. Because she is not being “featured” in the letter, donations made in response to the letter are not considered made at the behest of the Councilmember. A different conclusion would be reached if her name was singled out by appearing separately or in a larger typeface.
- ❖ An elected official is also “featured” in a solicitation if the solicitation includes a listing of the members of the organization’s governing body, the elected official is a board member, and a majority of the members are elected officials.

### **Additional Disclosures on Form 803**

- ❖ Additional disclosure in a behested payment report is needed to address two circumstances that raise questions as to the payment’s purposes and potential for influence: (1) where the official has a relationship of control over, or is employed by, a payee nonprofit organization, and (2) where the payor of a behested payment is involved in a proceeding before the official’s agency at the time the behested payment is made or within the past 12 months.
- ❖ An official is not prohibited from having either type of relationship in a behested payment transaction. These are relationships that raise concerns about the transaction, the self-interest of the official and the possibility of undue influence or access for the payee or payor as a result of the payment. As such, these are relationships with a potential for influence or self-dealing that the public would want disclosed in behested payment reports. Such disclosure provides information allowing the public to better understand and assess the payment transaction, its “purposes” and the parties involved.

- ❖ Officials are required to describe if the official has: (1) decision-making authority within the organization; (2) salaried employment with the organization; (3) status as a founding member of the organization, and (4) a position on an honorary or advisory board of the organization. (Note: This information must be reported once the Form 803 is updated to reflect amendments effective as of that date.)
- ❖ An official also must describe any proceeding before the official's agency at the time of a reported payment, or within 12 months prior to the reported payment, in which the payor is the named party or subject of the decision.

### **Payments from Donor Advised Funds**

- ❖ A donor advised fund (“DAF”) is a charitable giving mechanism that presents certain challenges in identifying the “payor” and tracking the “single source” of a behested payment. A DAF is a separately identified fund that is maintained and operated by an Internal Revenue Code Section 501(c)(3) organization called a “sponsoring organization.” Each DAF account is composed of contributions made by individual donors. Once a donor makes a contribution, the sponsoring organization has legal control over it. However, the donor, or the donor’s representative, retains advisory privileges regarding how funds are distributed and the account’s assets are invested.
- ❖ When an official reports a behested payment from a DAF, the sponsoring organization has written the check for payment from the donor’s DAF at the request of the donor, or the donor’s appointed adviser. However, a donor may name the DAF in a manner that does not disclose the donor’s true identity. As a result, merely reporting the name of the sponsoring organization as the “payor” in a behested payment report does not provide a full disclosure of the parties involved in making the payment or reflect the “single source” of the payment.
- ❖ To adequately disclose the parties involved in making a payment involving a DAF, the official must report the name of the payor, to the extent this information is known to the official, as follows: (1) the name of the sponsoring organization, (2) the name of the donor advised fund, and (3) the name of the donor.
- ❖ The official has a duty to inquire with the sponsoring organization as to the parties’ identities. The term “single source” is defined for reporting purposes where there are multiple donors or anonymous donors, as well as the terms “sponsoring organization,” “donor advised fund,” “donor” and “donor’s advisor.”

### **Good Faith Estimate**

- ❖ Situations may arise where the official has a duty to report behested payments, but a payee has not promptly complied with an official’s request for payment information. In that case, an official may make a good faith estimate of the payment amount after the official makes reasonable efforts to obtain the information and is unable to do so before the 30-day filing date.
- ❖ The official must amend the report with accurate data within 10 days of receiving the required information from the payee.

### **Filing the Form 803**

- ❖ The Form 803 must be filed within 30 days of the date that the donor has reached the \$5,000 threshold, or within 30 days of any subsequent payments (in any amount) after the \$5,000 threshold has been reached. For example, an official must file the Form 803 within 30 days of a \$5,000

behested payment, or within 30 days of a \$2,000 behested payment if that donor made a \$3,000 behested payment earlier in the same calendar year.

- ❖ The Form 803 must identify the official's name, address, and contact information, as well as the name and address of the person making the payment, the name and address of the person receiving the payment, the date and amount of the payment using the fair market value for donated in-kind goods or services. The form must be dated and signed under penalty of perjury.
- ❖ The Form 803 is filed with the City Clerk's office, which will post the form on its website.

For additional information, please contact the ethics commission at (619) 533-3476.

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