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MEMORANDUM

TO: Members, San Francisco Public Utilities Commission
Dennis J. Herrera, General Manager San Francisco Public Utilities Commission

FROM: Andrew Shen /s/ AS
Sheryl L. Bregman /s/ SLB
Deputy City Attorneys

DATE: January 24, 2022

RE: New Behested Payment Legislation

At your request for written advice, we summarize below recently approved legislation (Board File No. 201132) restricting elected City officials, City commissioners, City department heads, and many other City employees from soliciting “behested payments” from “interested parties” (the “New Behested Payment Legislation”), including how the legislation will significantly change the law compared to the way it is now. In sum, before the New Behested Payment Legislation, no State or local law prohibited or limited the solicitation of behested payments. Instead, for a small number of City officials and above certain dollar thresholds, reporting obligations apply. But the New Behested Payment Legislation imposes strict prohibitions that apply broadly on the solicitation of behested payments from interested individuals. The Board of Supervisors approved the New Behested Payment Legislation on December 14, 2021. The Mayor returned this legislation, unsigned, on December 24, 2021. This legislation thus became effective on January 23, 2022. The general summary of the New Behested Payment Legislation is consistent with public advice we issued on January 19, 2022 to the Airport.

Also, we address specifically for the San Francisco Public Utilities Commission (“SFPUC”), the application of the New Behested Payment Legislation to the SFPUC Social Impact Program (“SIP”). As we discuss below, the New Behested Payment Legislation precludes the SIP as to new contracts going forward unless the Board of Supervisors adopts an ordinance authorizing the SIP and effectively creating an exception for the program under the New Behested Payment Legislation.

A. Pre-Existing Local and State Regulation of Behested Payments.

A “behested payment” is a “payment” made at “the behest of” a public official for “a legislative, governmental, or charitable purpose.” A payment can include either a monetary donation or a donation of goods or services. A public official may “behest” a payment by either directly or indirectly asking for or requesting a donation from a private person or entity, or by

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coordinating or suggesting such a donation. S.F. Campaign & Governmental Conduct Code § 3.600.

In practice, a donation (of funds, goods or services) by a private person or entity, made at the request of a public official, that benefits a nonprofit organization qualifies as a behested payment. Likewise, a donation by a private person or entity, made at the request of a public official, to a City department for any governmental purpose also qualifies as a behested payment.

Under pre-existing ethics laws that apply to individual City officials, a behested payment does not qualify as either a gift or a campaign contribution. Thus, an official does not need to report behested payments on a Form 700 Statement of Economic Interests or disclose them on a campaign finance-related form. But as we describe below there are separate local and State reporting requirements under pre-existing laws for behested payments.

1. State Reporting Obligations.

Under State law, City elected officials who solicit behested payments must file a report with the official's department once a single source has made a behested payment of \$5,000 or more during the calendar year. State law requires such reporting regardless of whether the source has any matters pending before the official's agency. Subsequent payments of any amount from that source must be reported as well. The required report, Fair Political Practices Commission ("FPPC") Form 803, is available on the FPPC's and the Ethics Commission's websites. The elected official must submit the report to the department within 30 days of the date on which the donation is made, and the department must then submit the form to the Ethics Commission within 30 days. Cal. Govt. Code §§ 82004.5, 84224.

On December 22, 2021, additional FPPC requirements regarding this reporting went into effect. Among other changes, the FPPC now requires additional disclosures if the official, the official's spouse, or an official's staff member controls or is an employee of a nonprofit organization receiving a behested payment, or if the source of a behested payment is involved in a proceeding before the official's agency at the time the behested payment is made or in the prior 12 months.

2. Local Reporting Obligations.

Before the New Behested Payment Legislation, local law required City commissioners and elected officials to file behested payment reports for solicitations of charitable contributions totaling \$1,000 or more from "interested parties" with certain matters before their commissions. These matters included proceedings regarding administrative enforcement, a license, a permit, or other entitlement for use before their boards and commissions. These reports were in addition to the State reporting requirements described above.

Commissioners and elected officials were required to file these reports when they solicit a behested payment from:

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- a party, participant, or agent of a party or participant in a proceeding while the matter is pending;
- a party, participant, or agent of a party or participant in a proceeding during the six months following the date a final decision is rendered in the matter; and
- a party, participant, or agent of a party or participant in the 12 months before a proceeding commenced, after the commissioner learns – or should have learned – that the source of the contribution became involved in a proceeding.

S.F. Campaign & Governmental Conduct Code § 3.610. These behested payment reports were not required for solicitations made through a “public appeal.” A “public appeal” is a broad request made through television, radio, billboards, a public message on an online platform, the distribution of 200 or more identical pieces of printed material, the distribution of a single email to 200 or more recipients, or a speech to a group of 20 or more individuals. S.F. Campaign & Governmental Conduct Code § 3.600.

Further, as of September 24, 2020, under the Mayor’s Executive Directive 20-02, City department heads also were required to comply with these same local disclosure mandates for behested payments. But because the New Behested Payment Legislation imposes obligations that extend to department heads, it effectively supersedes this portion of the Mayor’s Executive Directive.

B. Summary of Significant Changes Under the New Behested Payment Legislation.

The New Behested Payment Legislation makes a number of significant changes to the pre-existing local regulation of behested payments, including:

- instead of merely requiring reporting, the legislation strictly prohibits the direct or indirect solicitation of behested payments;
- these new prohibitions apply no matter the value of the behested payment;
- these new prohibitions apply to a much larger group of City officials – in addition to elected officials, commissioners, and department heads, these rules apply to all “designated employees” (*i.e.*, all employees who file FPPC Form 700);
- the legislation adds several new categories of “interested parties,” who are subject to behested payment restrictions, which apply for longer timeframes; and,
- it adds a definition for an “indirect” solicitation of a behested payment, which, like a direct solicitation, is strictly prohibited.

The New Behested Payment Legislation generally prohibits elected officials, commissioners, department heads, and designated employees from soliciting any behested

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payment of any value from an “interested party.” Significantly, all “designated employees,” defined as “any City employee who is required to file a Form 700 under Article III, Chapter 1 of this Code,” are now subject to behested payment rules for the first time.

The New Behested Payment Legislation expands “interested parties” to include:

- contractors and prospective contractors before an officer’s or employee’s department or commission, where the contract has an anticipated or actual value within a fiscal year equal to or in excess of \$100,000 and provides for:
 - the rendition of personal services (including most professional service, general service, and public works contracts),
 - the furnishing of any material, supplies or equipment,
 - the sale or lease of any land or building,
 - a grant, loan, or loan guarantee, or
 - a development agreement;
- persons who attempted to influence officers and employees in any legislative or administrative action (but there is a limited exception to the scope of “attempts to influence” by excluding oral or written public comment that becomes part of the record of a public hearing, speaking at a public forum or rally, or communications made via email, petition or social media);
- contact lobbyists or expenditure lobbyists who have registered as lobbyists with the Ethics Commission; and
- permit consultants who have registered with the Ethics Commission, if the permit consultant has reported any contacts with the designated employee’s or officer’s department to carry out permit consulting services during the prior 12 months.

“Interested party” continues to include parties, participants or agents of parties involved in proceedings regarding administrative enforcement, a license, a permit, or other entitlement for use.

But “interested party” does not include any of the following:

- a nonprofit organization that the City Charter has explicitly authorized to support one of the arts and culture departments established in Article V (*i.e.*, the nonprofits that support the Asian Art Museum and the Fine Arts Museums);
- any federal or State government agency;

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- an individual solely because the individual is an uncompensated board member of a nonprofit organization that is an interested party; or,
- for the purposes of the “contractor and prospective contractor” category listed above, “interested party” does not include a person providing a grant to the City or a City department (“grant” means an agreement with an entity to fund City projects or programs, which includes restrictions on the City’s spending of the grant funds).

Accordingly, under this strict prohibition against soliciting behested payments from interested parties, elected City officials, City department heads, City commissioners, and other designated City employees must not solicit behested payments of any amount in the following instances:

- from a party, participant, or agent of a party or participant in a proceeding while the matter is pending and for 12 months following the date on which a final decision is rendered;
- from contractors who are a party to or seeking a contract with their department, from the submission of a proposal until the later of either the termination of negotiations for the contract or 12 months after the end of the contract’s term;
- from persons who attempted to influence them in any legislative or administrative action, for 12 months following the date of each attempt to influence;
- from a registered contact or expenditure lobbyist, if the contact lobbyist or expenditure lobbyist is registered to lobby the designated employee’s or officer’s department; or
- from a registered permit consultant, if the permit consultant has reported any contacts with the designated employee’s or officer’s department to carry out permit consulting services during the prior 12 months.

The exception allowing behested payments made under a “public appeal” continues to apply.

The New Behested Payment Legislation adds a definition regarding what is an “indirect” solicitation. A City officer or employee is “indirectly soliciting” a behested payment when they direct or otherwise urge another person to solicit a behested payment from an identifiable interested party or parties. As a practical matter, this means that a Commissioner or designated employee cannot direct individuals not covered by the law to solicit a behested payment from an interested party. Also, a department employee who is not a “designated employee” still cannot solicit a behested payment if that action is being taken at the direction or urging of a “designated employee.”

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The New Behested Payment Legislation does not relieve City elected officials of their State law obligations to disclose behested payments of \$5,000 or more from any source. But because the New Behested Payment Legislation prohibits solicitations of behested payments from “interested parties,” it likely will curtail the extent of the reporting needed as solicitations from those sources will no longer be permitted.

Lastly, under the New Behested Payment Legislation, City officers or employees who violate these rules may face administrative enforcement proceedings before the Ethics Commission and potential administrative penalties of up to \$5,000 per violation.

C. The New Behested Payment Legislation as Applied to the SFPUC and the SFPUC Social Impact Program.

Under the New Behested Payment Legislation, SFPUC Commissioners and SFPUC employees may still solicit donations from any entity or individual through a public appeal (as described above). But other fundraising by Commissioners and most SFPUC employees from “interested parties” for charitable, legislative, or governmental purposes is now strictly prohibited.

The SFPUC Social Impact Partnership in its current form is a program that solicits charitable donations from interested parties – that is, prospective contractors competing for SFPUC contracts. The New Behested Payment Legislation thus precludes SFPUC Commissioners, the General Manager, and the many SFPUC designated employees involved in contracting from carrying out the SIP.

The SIP requests contractors to donate time, money or both to community-based organizations in one or more of four identified categories (job development; small business support; education; environment and community health) during the pendency of the contract. The SIP requires these community-based organizations to be located in San Francisco, and the community-based organizations that tend to benefit from the SIP are those operating near the SFPUC’s facilities in the City. The SFPUC includes the SIP in contract solicitation documents, such as Requests For Proposals (“RFPs”), for professional services and construction contracts valued at \$5 million or more. In the RFPs, participation in the program is described as voluntary. But a prospective contractor must submit an SIP plan to receive SIP points in the proposal evaluation.

In practice, we understand every viable contractor submits an SIP plan to obtain those points to increase its score. And indeed, as the City Controller and its outside auditor recently determined in the performance audit of the SIP program, issued December 9, 2021 (the “Controller’s Audit”), those SIP points can dictate the outcome of the competitive process. Each SIP plan offers a detailed description of the donations to be made as well as the identification of the community-based organizations that the prospective contractor intends to support. A separate panel evaluates each proposer’s SIP plan and assigns a score; the SIP score is then made

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a part of the overall score for each proposal; and the proposer receiving the highest overall score is then recommended for award of a contract. SFPUC staff – all of whom are designated employees – prepare the recommendations for contract award on proposals that incorporate these detailed SIP plans. The General Manager approves the staff recommendations and presents the same to the SFPUC Commission for award of the contract. If the successful proposer includes a SIP plan with its proposal, then the plan becomes an obligation under the resulting contract.

Under the New Behested Payment Legislation, a proposer seeking an SFPUC contract in a competitive selection process falls squarely in the definition of an “interested party.” Any donation made under the SIP likewise falls squarely in the definition of a “behested payment” under Campaign and Governmental Conduct Code § 3.600. The program’s incorporation into a competitive selection process also does not convert SIP contributions into something other than a “behested payment,” especially where all credible prospective contractors submit SIP plans.

The New Behested Payment Legislation provided only one exception to its restrictions, the public appeal exception, which would not apply here. While SFPUC RFPs are posted on the department’s website and may thus be “public message on an online platform,” and notices about RFPs may be sent out by email to more than 200 recipients, the SFPUC’s subsequent consideration of SIP plans takes this process outside of the “public appeal” exception. The program does not involve a simple “public appeal” with no further official action. Rather, in carrying out the SIP, SFPUC employees receive detailed SIP plans from “interested parties,” evaluate and score of each SIP plan (or oversee the evaluation and scoring process), recommend for award contracts that incorporate the specified SIP contributions, and finally manage those contracts.

As a result, the New Behested Payment Legislation prohibits the SFPUC Commission, the General Manager, and any SFPUC designated employees – many of whom are involved in the SFPUC’s contracting processes – from directly or indirectly encouraging participation in the SIP or the review or approval of SIP plans proposed by “interested parties.” Failure to abide by these rules may subject these SFPUC officials and employees to administrative enforcement proceedings and penalties.

To avoid violation of the New Behested Payment Legislation by any SFPUC official or employee, the SFPUC should not include the SIP in any solicitation issued after January 23, 2022 (when the legislation becomes operative) unless the RFP SIP program description is conditioned upon the Board of Supervisor’s adoption of an ordinance authorizing the SIP and effectively creating an exception for the program under the New Behested Payment Legislation. That need for a Board of Supervisors ordinance is consistent with our past advice and with the recommendation in the Controller’s Audit that the SFPUC move forward with plans to obtain Board of Supervisors approval of the SIP policy that includes requirements to standardize processes and practices and provide clear, consistent guidance for the program’s contractors.

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Also, if the proposed ballot measure for the June 2022 election incorporating the provisions of the New Behested Payment Legislation were to be approved by the voters in the measure's current form, the Ethics Commission and the Board of Supervisors would need to then take further action to authorize the SFPUC to use the SIP in the future.

The New Behested Payment Legislation does not impair contracts that currently include SIP obligations. But any material modification of those existing obligations may be precluded under the New Behested Payment Legislation and would require review of the particular facts and circumstances surrounding the modification.

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Please let us know if you should have any questions.

A.S. / S.L.B.