Assembly Bill 1828 (Dodd)
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Program: Administration
Sponsor: BOE Member Fiona Ma
Government Code Section 15626
Effective: January 1, 2017

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Summary: Makes several changes to the Quentin L. Kopp Conflict of Interest Act of 1990 ("Kopp Act") related to contribution limits and disclosures applicable to Board of Equalization (BOE) Members.

Summary of Amendments: The amendments since the previous analysis define "suggest," modify the behested payment provisions to include only those $5,000 or more, and remove employee contributions from the proposed contribution limits and disclosures.

Purpose: To eliminate the perceived conflicts of interest associated with contributions and specified behested payments by parties, participants and their agents related to appeals before the BOE.

Fiscal Impact Summary: This bill would not directly affect state or local revenues.

Existing Law: The BOE consists of four elected members, one from each equalization district, and the State Controller. Among other things, the BOE hears appeals relating to all of the taxes and fees it administers, as well as disputes arising from certain Franchise Tax Board (FTB) actions.

Under existing law, the Quentin L. Kopp Conflict of Interest Act of 1990 ("Kopp Act") [1] requires that, prior to rendering any decision in any adjudicatory proceeding before the BOE, each BOE Member who knows or has reason to know that he or she received a contribution of $250 or more within the preceding 12 months from a party or participant, or his or her agent, shall disclose that fact on the record of the proceeding, as specified. Further, the Kopp Act prohibits each BOE Member from participating in the decision or using his or her position to influence the decision if a contribution was made, as specified.

The Kopp Act defines "party," "participant," and "agent" as follows:

- "Party" is the subject of an adjudicatory proceeding pending before the BOE.
- "Participant" is any person who is not a party but who actively supports or opposes a particular decision in an adjudicatory proceeding pending before the board and who has a financial interest in the decision
- "Agent" is any person who represents a party to or participant in an adjudicatory proceeding pending before the board. If a person acting as an agent is also acting as an employee or member of a law, accounting, consulting, or other firm, or a similar entity or corporation, the Kopp Act provides that both the entity or corporation and the person are agents.

The Kopp Act also provides that a party or a participant is required to disclose for the record whether they have contributed to a BOE Member an amount of $250 or more in the preceding 12 months. The Act further requires BOE staff to inquire and report to the BOE whether any such contributions have been made. Any person who knowingly or willfully violates any of those provisions is guilty of a misdemeanor.

A political action committee (PAC) is not included within the Kopp Act's definition of a "party," "participant," or "agent." Therefore, a PAC's contribution to a BOE Member requires neither disclosure nor disqualification of the affected BOE Member.

[1] Government Code Section 15626.

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the BOE's formal position.

Generally, many states, including California, restrict the amount of contributions that any one individual can contribute to a candidate's campaign. These limits are typically dependent upon the office the candidate seeks. In California, the Fair Political Practices Commission (FPPC) is primarily responsible for administering the Political Reform Act,[2] which regulates campaign financing, conflicts of interest, lobbying, and governmental ethics. The Act[3] limits the allowable contributions to BOE members, and requires the FPPC to adjust the limits according to the CPI.[4] Currently (through December 31, 2016) the contribution limit for BOE Members is $7,000 per person (including business entities and PACs) per election, and $14,100 per "small contributor committee,[5]" per election.

Under existing law, payments to third parties made at the behest of BOE Members are not subject to the Kopp Act and therefore do not interfere with a BOE Member's participation in adjudicatory proceedings. The Political Reform Act only requires a BOE Member to report to the FPPC within 30 days of the payment any behested payments totaling $5,000 or more from a single source in a calendar year.[6]

Under the law,[7] the BOE is required to, among other things, prescribe rules for its own governance and the transaction of its business. Under the BOE's Regulation 5550, *Quorum,* any three members of the BOE present at a meeting constitute a quorum, except under specified circumstances, and that a quorum's majority vote is required for all BOE's decisions or actions. Therefore, under current rules of practice, a majority of the quorum – two Members – can approve or disapprove taxpayer appeals and other matters coming before them. When a BOE Member is disqualified from participating in a decision under the contribution disclosure provisions (described above) or the Political Reform Act's[8] conflict of interest provisions, the BOE Member may not be counted for a quorum. However, when the BOE lacks a quorum due to these disqualifications and the BOE is legally required to make a decision, it may bring back, through random selection or other impartial selection means, as many disqualified Members as necessary to establish a quorum.

Proposed Law: This bill does all the following:

- Deletes the $250 disclosure threshold, so that BOE Members would be subject to disclosure and prohibitions in decisions for *any* contribution he or she receives.
- Prohibits BOE Members from requesting or suggesting a contribution, as specified, from a party, his or her agent, or any participant in an adjudicatory proceeding before the BOE within 12 months *subsequent* to any decision in the adjudicatory proceeding.
- Specifies that if a Member receives a contribution within the 12-month period subsequent to a decision and returns that contribution within 30 days from the date he or she has knowledge of the contribution, his or her acceptance of the contribution shall be deemed lawful.
- Requires a party to or participant in an adjudicatory proceeding to disclose within 30 days *any* contribution made to a BOE Member within 12 months *subsequent* to any BOE decision in the adjudicatory proceeding.
- Within 12 months subsequent to a BOE decision in an adjudicatory proceeding, requires a party or participant to disclose any payment or payments of $5,000 in the aggregate made at the behest of a BOE Member principally for legislative, governmental, or charitable purposes, within 30 days of that payment.
- Requires the BOE to make publicly available on its website, contributions disclosed by a party or participant in an adjudicatory proceeding pending before the BOE within the preceding 12 months, or subsequent 12 months, of any BOE decision in the adjudicatory proceeding.

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[2] Government Code Title 9 (commencing with Section 81000).
[3] Government Code Sections 85300-85321.
[4] Government Code Section 83124.
[5] A committee that has been in existence for at least six months, receives contributions from 100 or more persons in amounts of not more than $200 per person, and makes contributions to five or more candidates (Government Code Section 85203).
[6] Government Code Section 82015.
[7] Government Code Section 15606.
[8] Government Code Sections 81000, et seq.

- Revises the definition of "contribution" to include payments made "at the behest of," as defined, a BOE Member principally for legislative, governmental, or charitable purposes, when that payment (or payments) by a party, participant, or their agents is $5,000 or more in the aggregate.

Commentary:

1. **Effect of the bill.** Within 12 months before or after an adjudicatory proceeding, this bill prohibits BOE Members from participating in that adjudicatory proceeding when he or she receives any contribution from a party, participant, or their agent, or in situations where payments aggregating $5,000 or more by a party, participant, or agent are made at the behest of a BOE Member principally for legislative, governmental, or charitable purposes. Also prohibits BOE Members from requesting or suggesting a contribution from a party, participant or their agent within 12 months subsequent to an adjudicatory proceeding.

2. **The April 4, 2016 amendments** define "suggest" for purposes of clarifying when a BOE Member suggests a contribution to address an issue raised in the BOE's previous analysis. Amendments also modify the behested payment provisions to include only those $5,000 or more in the aggregate, and remove employee contributions from the proposed contribution limits.

3. **Proposed behested payment limitation provisions explained.** The bill provides that a payment or payments of $5,000 or more in the aggregate by a party, participant, or their agent principally for legislative, governmental, or charitable purposes is a "contribution" when that payment is 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 a BOE member. The BOE's legal staff has reviewed these provisions in concert with existing FPPC interpretations relative to behested payments, and offers the following:

   Examples of behested payments that would likely *disqualify* a BOE Member from participating in an adjudicatory matter under this legislation include:

   - A party, participant, or their agent makes a $5,000 payment pursuant to a BOE member's solicitation to help financially support a member's district event or a nonprofit outreach activity that has a charitable, governmental, or legislative purpose, or
   - If the above payment was made pursuant to a nonprofit organization's fundraising letter signed by a BOE member or his or her chief of staff, or that "features" the BOE member with the member's consent in accordance with FPPC provisions. "Features" is clarified through FPPC regulations and the Government Code as follows:
     - "Features an elected officer" means that the item mailed includes the elected officer's photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color.[9]
     - An elected officer or PUC member is also featured in a solicitation if the roster or letterhead listing the governing body contains a majority of elected officers.[10]
   - When an elected officer is a sponsor, co-sponsor, or a host for an event (***i.e., coordinating with a nonprofit co-sponsor in arranging or planning the outreach event/conference***) that has a legislative, governmental, or charitable purpose, the FPPC has advised that the elected officer will have behested payment reporting obligations for any payments or in-kind donations that are <u>made by a private person or entity</u> *(including corporations, businesses, and nonprofit organizations, but not governmental agencies)* to defray the cost of the event, and that those payments would be considered to be made at the elected officer's behest.

[9] FPPC Reg. 18215.3(b)(1) and (2) and Regulation18901(c)(2).
[10] FPPC Reg. 18215.3.

Examples of behested payments that would likely *not disqualify* a BOE Member from participating in an adjudicatory matter under this legislation include:

- According to the FPPC *Filchev* Advice Letter, No. I-09-073, a party's, participant's, or their agents' donation to a charitable organization would not necessarily constitute a "behested payment," and therefore disqualify a BOE member, merely because the official serves on the board of directors, advisory council, or the organization's fundraising committee, even if the fundraising letter identifies the official in the letterhead; so long as the BOE member is not "featured" in a solicitation letter as described in FPPC Regulation 18215.3, or
- When a BOE Member is solely an "invited guest" and is not a co-sponsor and did not, and will not, coordinate with any co-sponsors in arranging or planning the event (other than when he or she will speak or appear).

4. **Tracking potentially disqualifying behested payments could increase the complexity of the due diligence required under the Kopp Act.** This is especially true for Members who regularly coordinate events with, and support the fundraising activities of, nonprofit organizations. For instance, tracking a party, participant, or agent's contributions/behested payments to a BOE member 12 months before or after an adjudicatory proceeding would require a level of recall, recording and tracking not previously required of a party, participant, or agent.

   Moreover, FPPC rules require an elected officer to track and report a behested payment if the behested payment(s) totals $5,000 or more from a single source *in a calendar year*. By including behested payments in the definition of "contribution," this bill would require BOE members to track behested payments made 12 months before and after the adjudicatory meeting, requiring a separate tracking than that required under the FPPC calendar year reporting obligation.

5. **Bill could be problematic for charitable organization donations.** It is unclear whether the bill requires a BOE Member to return a contribution, including a behested payment or payments aggregating $5,000 or more, within 30 days from the date he or she has knowledge of that contribution in order to prevent a BOE Member's disqualification from an adjudicatory proceeding. If the intent is that a BOE Member return a behested payment(s), it is unclear how a Member would actually return that payment, which already has been received by another organization. This could pose challenges for the organization that may have used the donation for its activities or is otherwise unable to return the contribution. It could also be challenging for a Member in situations where the organization is dissolved or disbanded.

6. **How current law applies to multiple small contributions.** A party's and his or her agent's contributions are aggregated for purposes of determining whether the total contribution is $250 or more. A participant's and his or her agent's contributions are also aggregated for purposes of determining if the total contribution is $250 or more. The contributions of a party and a participant are not aggregated. If an agent is also acting as an employee or member of a law, accounting, consulting, or other similar firm, both the agent and the firm are considered agents, and their contributions are aggregated with those of the party or participant. Other firm members' contributions, such as employees, are not disclosable unless they are or were involved in representing the taxpayer on the matter before the BOE, or were responsible for bringing the client to the firm/company. Therefore, if a BOE Member receives multiple contributions of amounts less than $250 from such persons, the BOE Member is not disqualified from participating in the adjudicatory proceeding.

7. **How this bill applies to multiple small contributions.** For contributions other than behested payments, this bill requires no aggregation for purposes of determining whether a contribution meets or exceeds a limit, as this bill requires that *any* contribution be disclosed 12 months before or after the adjudicatory proceeding. This includes both monetary donations of a penny or more, as well as any property donation, regardless of its value.

8. **Legislative findings misstate current law.** Proposed subdivision (g) (page 3, lines 29 through 35), states that a loophole exists allowing parties before the BOE as well as parties' agents to aggregate multiple contributions that individually fall below the $250 limit. Current law[11] actually states the following, "To determine whether a contribution of $250 or more has been made by a person or his or her agent, contributions made by that person within the preceding 12 months shall be aggregated with those made by his or her agent within the preceding 12 months or the period of the agency relationship, whichever is shorter. Contributions from other employees or members of the agent's law, accounting, or consulting firm, or similar entity, or contributions from participants, shall not be aggregated with those of the party and his or her agent."

9. **What are the contribution rules for judges and other officials involved in adjudicatory processes?** A judge is disqualified if he or she receives a contribution in excess of $1,500 from any party or lawyer in a proceeding that is before the court, and either (1) the contribution was received in support of the judge's last election, if the last election was within the last six years; or, (2) the contribution was received in anticipation of an upcoming election.
In addition, a judge is disqualified when receiving campaign contributions of lesser amounts if the judge believes the contribution would compromise his or her impartiality or if a person aware of the contribution might reasonably entertain a doubt that the judge could be impartial.[12]

   With respect to other state and local boards and agencies and proceedings on licenses, permits, and other entitlements for use, the law[13] provides the following:

   - Covered officials are prohibited from receiving or soliciting campaign contributions of more than $250 from parties or other financially interested persons during the pendency of the proceeding and for three months after its conclusion. However, local ordinances may impose limits on campaign contributions that are lower than $250. (Government Code Section 85703 et seq.)
   - Covered officials must disqualify themselves from participating in the proceeding if they have received contributions of more than $250 during the previous 12 months from a party or a person who is financially interested in the outcome of the proceeding.
   - At the time parties initiate proceedings, they must list all contributions to covered officials within the previous 12 months.
   - Elected state and local officials are expressly exempted except when they serve in a capacity other than that for which they were directly elected.

10. **Consequences for a BOE Members' noncompliance.** Since creation of the 1990 Kopp Act, existing law has provided that if a BOE Member *knowingly or willfully* violates any of those provisions, he or she is guilty of a misdemeanor. This misdemeanor provision would apply to this bill's proposed Kopp Act revisions.

11. **Political action committee (PAC) contributions (including behested payments) are unaffected by this bill**. As stated earlier, a PAC is not included within the Kopp Act's definition of a "party," "participant," or "agent." Therefore, a PAC's contribution to a BOE Member requires neither disclosure nor disqualification of the affected BOE Member.

Administrative Costs: The BOE will incur administrative costs related to notifying taxpayers, participants and agents, programming costs related to creation of on-line fillable contribution disclosure forms for ease of compliance, tracking and updating the BOE's website with contributions disclosed before and after the adjudicatory proceeding, revising contribution forms, and revising affected contribution disclosure regulations found at 18 C.C.R. §§ 7001-7011. A cost estimate is pending.

Revenue Impact: This bill would not directly affect state or local revenues.

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[11] Government Code Section 7005(b).
[12] Code of Civil Procedure Section 170.1.
[13] Government Code Section 84308.