

Attachment 3
Consideration of **August 10** Draft Ordinance on Behested Payments
Update to Attachment 1
August 11, 2022

This document provides an update to the [Staff memo published on August 8](#). In that memo, nine proposals were presented from the legislation, of those nine, Staff recommended the Commission support modifying seven of the proposals and reject two of the proposals. On August 10, a [new version of the behested payments legislation](#), developed by Supervisor Peskin and the Mayor's office, was shared with the Commission. This August 10 ordinance incorporates all of the Staff recommendations from the August 8 memo, with the exception of two. An update to Attachment 1 of the August 8 memo is provided below covering these two proposals, plus an update based on engagement with the SFPUC on a third proposal.

For public accessibility, this document and the August 10 Draft Ordinance have been added as new attachments on the Commission's website at its [August 12, 2022 Meeting Agenda page](#) under Agenda Item No. 6.

July 26 Proposal: #4

Creation of an exception for competitively secured program solicitations

Description of Change: This change would create a new exception that would allow solicitations to interested parties, as long as they are 'made under and authorized program for charitable donations...to nonprofit 501(c)(3) organizations and schools.' This change is intended to allow the San Francisco Public Utilities Commission's (SFPUC) Social Impact Partnership (SIP) program and similar programs to continue operating as they had prior to January 23, 2022. If the Board of Supervisors does not adopt an ordinance authorizing such programs before December 31, 2024, they would not be allowed to continue operating until they are authorized by the Board. The new exception is proposed to read as follows:

(d) EXCEPTION – COMPETITIVELY SECURED PROGRAM SOLICITATIONS. *This Section 3.620 shall not apply to solicitations made under an authorized program for charitable donations of time and/or money from interested parties to nonprofit 501(c)(3) organizations or public schools. For purposes of this subsection (d), an authorized program is a process for soliciting donations through a competitively procured contract, which program either (i) existed on or before January 23, 2022, such as the San Francisco Public Utilities Commission Social Impact Partnership program, or (ii) is authorized by the Board of Supervisors by ordinance. For a contract that includes an authorized program excepted under this subsection (d), all solicitations under such program related to the award, approval, execution, administration, modification, or enforcement of that contract by City officers or employees are likewise excepted. Any program under (i) above may proceed as it existed on or before January 23, 2022 until the earlier of (A) the Board of Supervisors adopts an ordinance authorizing a program involving donations through a competitively procured contract, as provided by (ii) above, or (B) December 31, 2024.*

Impact: Staff agrees that preventing the operation of City programs, such as the SIP program, which generate charitable donations to nonprofit organizations and schools as one element of a competitively procured contract is not the intent of the City's behested payment rules. In concept, the continued operation of the SIP program, and similar programs, is not at odds with the City's behested payment rules. Staff agree that the language of the behested payments law should be amended for improved clarity.

The language stating 'all solicitations under such program related to the award, approval, execution, administration, modification, or enforcement of that contract by City officers or employees are likewise excepted' can be read to be overly broad and potentially redundant to what is already described earlier in the exception.

Additionally, it is unclear why existing programs need to be excused from authorization by the Board of Supervisors until the end of 2024. The SIP program is currently paused, and it is unclear what harm would be associated with leaving it paused until the Board of Supervisors can pass an ordinance to authorize the program.

Recommendation: Support the addition of an exception for competitively secured program solicitations if changes are made to clarify the exception and existing programs are not automatically approved. The revised draft language below would accomplish this recommendation.

- **Draft change to Section 3.620(d):**

(d) EXCEPTION – COMPETITIVELY SECURED PROGRAM SOLICITATIONS. This Section 3.620 shall not apply to solicitations made under an authorized program for charitable donations of time and/or money from interested parties to nonprofit 501(c)(3) organizations or public schools. For purposes of this subsection(d), an authorized program is a process for soliciting donations through a competitively procured contract, including the award, approval, execution, administration, modification, or enforcement of that contract by City officers or employees, which program is authorized by the Board of Supervisors by ordinance.

August 10 Update:

The August 10 draft legislation incorporates the modifications recommended above regarding the PUC's exception for competitively secured program solicitations. This modification includes removing the aspect of the exception that would have automatically authorized these programs until either the Board authorized them or the end of 2024.

A representative from the PUC has indicated that department will likely request that this grace period be added back in so that their program would be automatically authorized and they could include SIP requirements in some large contracts they have planned for later this year.

If the Commission were to desire to add back in a temporary automatic authorization for these programs, Staff would recommend that the provision state that the Board has until the end of calendar year 2022 to officially authorize the programs rather than 2024 as originally proposed.

This would balance enabling the PUC to include the SIP program in their contracts this year while also promoting swift action by the Board to permanently authorize the programs if the Board desires to do so.

July 26 Proposal: #6

Creation of a waiver process

Description of Change: This change would create an exception if the Board of Supervisors approves a waiver by resolution. The new exception is proposed to read as follows:

(f) EXCEPTION – WAIVER. The Board of Supervisors may issue an advance waiver of the requirements of this Section 3.620, by resolution. A proposed resolution that seeks a waiver shall summarize the purpose of the solicitation(s) and shall endeavor to identify any interested parties to whom the solicitation(s) would be directed and a statement as to why those persons are believed to qualify as interested parties to the officers and designated employees in question. The Board of Supervisors may grant a waiver under this subsection (f) only upon finding that the waiver would not create an appearance of impropriety and would be in the public interest. Waivers granted under this subsection (f) shall apply prospectively for six months, unless the approving resolution specifies a shorter duration, and shall have no effect as to past solicitations.

Impact: This change would allow the Board of Supervisors to exempt solicitations that would otherwise be prohibited under City law. While a potential overuse of this waiver process is partially mitigated by the public nature of Board resolutions, there are still several aspects of this proposal that raise concerns.

As drafted, the Board would only be required to ‘endeavor to identify’ any interested parties that may be solicited as a result of the waiver. This language is very broad and would have the effect of providing a free pass to City officials to solicit payments from any of their interested parties, without any guarantee of transparency.

The exception as drafted states that waivers granted using this exception ‘shall have no effect as to past solicitations.’ Staff understands this to mean that waivers cannot be issued retroactively, but this should be further clarified. Not allowing retroactive waiver approvals is important to keeping the City’s behested payment rules strong, as retroactive waivers would severely undermine the incentives City officials have to comply with these rules. Retroactive approvals are not uncommon with the Board of Supervisors, as Staff documented in the Commission’s [report on Gifts to City Departments](#). More than half of Board accept-and-expend requests are approved retroactively. This would suggest that if allowed, many waivers would likely be requested and potentially approved retroactively, at which point public input would likely have a diminished impact.

Additionally, while the Board’s resolutions are public documents, that does not mean they are easily accessible by the public. As documented in the Commission’s [report on Gifts to City Departments](#), finding Board resolutions, such as those regarding the accept-and-expend process,

requires the public to navigate a legislative tracking website that can be challenging and to know exactly which search terms to use.

Recommendation: Support the waiver exception only if it is changed to:

- 1) require the interested parties to be identified prior to the solicitation;
- 2) more explicitly state that the waivers cannot be issued retroactively after the solicitation has already occurred; and
- 3) add a requirement that the Board of Supervisors shall publicly disclose all such waivers on DataSF within 30 days of approval.

○ **Draft change to Section 3.620(f):**

(f) EXCEPTION – WAIVER. The Board of Supervisors may issue an advance waiver of the requirements of this Section 3.620, by resolution. A proposed resolution that seeks a waiver shall summarize the purpose of the solicitation(s) and shall identify any interested parties to whom the solicitation(s) would be directed and a statement as to why those persons are believed to qualify as interested parties to the officers and designated employees in question. The Board of Supervisors may grant a waiver under this subsection (f) only upon finding that the waiver would not create an appearance of impropriety and would be in the public interest. Waivers granted under this subsection (f) shall apply prospectively for six months, unless the approving resolution specifies a shorter duration, shall have no effect as to past solicitations, and may not be approved retroactively after the solicitations have occurred. Within 30 days of being approved by the Board of Supervisors, the Clerk of the Board shall publish information regarding the resolution to a dataset of all approved waiver resolutions on DataSF.

August 10 Update:

The August 10 Ordinance draft incorporates the second and third modifications as recommended above.

Regarding the first modification, instead of requiring the specific interested parties solicited to be identified in the waiver resolution, the August 10 draft states that the waiver resolution “*shall identify the type of interested parties or the specific interested parties, when the identity is known.*”

This language would not achieve the higher level of transparency as recommended above. At the same time, the provision would signal a legislative intent for the waiver process to disclose as much as possible about *known* interested parties that would be potentially solicited when the waiver process is used. Considering this, and given the other transparency provisions added, on balance Staff is not opposed to this language.

July 26 Proposal: #9

Change to exempt all payments less than \$1,000

Description of Change: This change would amend the definition of ‘payment’ so that the rule is narrowed to only apply to behested payments valued at \$1,000 or more within a 12-month period. The revised definition would read as follows:

“Payment” shall mean a monetary payment or the delivery of goods or services with a value of \$1,000 or more, or a series of payments within a 12-month period that in the aggregate total \$1,000 or more.

Impact: Under current law, there is no value limitation on what constitutes a payment. This change would allow a City officer or designated employee to solicit a behested payment from an interested party, so long as the aggregate total value of such payment does not exceed \$1,000 in a 12-month period. Such solicitations are currently prohibited, regardless of the value of the payment.

This change would substantially weaken the City’s existing behested payment rules. Primarily, it would do little to address the appearance of impropriety, as it remains troubling anytime a City official is soliciting payments from an interested party, regardless of the value of that solicitation. These smaller payments can also still add up across different interested parties, such that they could appear to be influencing the City officials that are soliciting such payments. For example, as observed in the [federal complaint against Bernard Curran](#), persons seeking favorable inspection approvals from Curran were encouraged to make donations to Curran’s favored non-profit athletic association. These checks to the athletic association were typically for amounts of \$500 to \$1,500, placing some of them below the proposed \$1,000 limit. If a City official were to be regularly soliciting behested payments of \$999 from different interested parties, that official could end up raising a large quantity of money from these interested parties in a short amount of time.

Much of the concerns regarding the current behested payment rules are based on the perception that they are limiting the ability of City departments to raise funds necessary to perform vital City functions, due to the funders being interested parties. This change would not address that concern, as payments less than \$1,000 are not likely meaningful for most City programs that operate with much larger budgets.

Additionally, this change would potentially unduly complicate compliance and generate confusion among City officials and the public. City officials would need to track these small dollar behested payment solicitations to interested parties and monitor them to avoid crossing this \$1,000 threshold. Having a clear prohibition on these types of solicitations, regardless of amount, is simpler for compliance. As feedback by City officials has repeatedly underscored, unnecessary recordkeeping requirements can be overly burdensome and do not always promote the goals the requirements are intended to achieve.

Recommendation: Reject changing the definition of payment to limit it to payments greater than \$1,000.

August 10 Update:

The August 10 draft ordinance retains the \$1,000 de minimis originally proposed in Supervisor Peskin and the Mayor's July 26 draft ordinance.

Staff continue to recommend against amending the behested payments rules to include a de minimis provision for the reasons stated above.

However, if the Commission desired to move forward with including a de minimis exception, Staff would recommend that lowering it from \$1,000 to \$250, for example, could be a viable option. This approach would balance the goal of allowing the smaller scale fundraising the Mayor's Office has identified as a concern, while also preserving tighter rules to prevent against the type of inappropriate solicitations observed in the federal complaint against Bernard Curran, where amounts solicited were in the \$500-\$1,500 range.