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April 17, 2023

SENT VIA E-MAIL

Kevin Cornwall, Senior Commission Counsel
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811
kcornwall@fppc.ca.gov

Re: *Fair Political Practices Commission Interested Persons Meeting, April 21, 2023, Relating to Regulatory Amendments under Government Code Section 84308 (Levine Act)*

Dear Mr. Cornwall:

In connection with the Interested Persons meeting scheduled for April 21, 2023, the Office of the County Counsel for the County of Santa Clara ("Santa Clara") submits this letter to provide our input on the proposed regulations that the Fair Political Practices Commission (FPPC) staff will be recommending for adoption at the FPPC's meeting on May 18, 2023. The regulations concern Government Code Section 84308, the Levine Act.

As the sixth most populous county in California, with a population of 1.9 million as of the 2020 Census; and a large government entity, with employee ranks numbering nearly 24,000 and an annual budget topping $10 billion, Santa Clara encounters an enormous volume and variety of governmental actions in its day-to-day business—from contracts and other business transactions to regulatory actions to land use entitlement decisions to quasi-judicial proceedings. Santa Clara's governing body, the Board of Supervisors, meets twice each month as a full body and also carries out a broad range of other business through its five standing policy subcommittees and a variety of appointed commissions. In short, Santa Clara has vast experience with navigating the Political Reform Act in the context of its daily work.

Against that backdrop, Santa Clara believes the FPPC's proposed amendments will, as a whole, bring much-needed clarity to the Levine Act's application to agencies with directly elected members, such as Santa Clara's Board of Supervisors. For example, the amendments to Regulation 18438.2 provide helpful clarification as to the definition of a "proceeding" that will assist in reviewing and providing guidance regarding public meeting agendas. Similarly, the proposed amendments to Regulation 18438.3 helpfully elucidate which persons qualify as "agents" for purposes of the Levine Act's rules relating to aggregation of contributions.

Santa Clara submits these comments to offer input on two subsections of the proposed new Regulation 18438.7 (which FPPC staff recommends fully repealing and re-adopting with entirely new text) where we believe the draft language could be clarified and improved. Thereafter, we also comment on a subsection of Regulation 18438.2 on which FPPC staff specifically offered two alternative options for review and input.

1. Santa Clara's Comments on Proposed Regulation 18438.7[1]

A. 18438.7(a): Officer's Knowledge of a Participant's Financial Interest\

The proposed new text of Regulation 18438.7(a) seeks to define when an officer is deemed to have knowledge of a participant's financial interest in a proceeding. Based on Santa Clara's experience analyzing and applying the financial interest requirements of the Political Reform Act, we believe that the proposed text will be confusing and difficult to implement.

Currently, Regulation 18438.7(a)(2) provides that "[a]n officer knows or has reason to know that a [participant] has a financial interest in the decision in a proceeding" covered by the Levine Act if the participant "reveals facts in a written or oral support or opposition before the agency which make the person's financial interest apparent." And the Levine Act defines a "financial interest" straightforwardly: as an interest "described in Article 1 (commencing with Section 87100) of Chapter 7" of the Political Reform Act. (Gov. Code, § 84308, subd. (a)(2); see also *id.*, § 84308, subds. (b), (c).) Coupled with the clear and well-established statutory definition, the current Regulation 18438.7(a)(2) provides sufficient general guidance on how to determine whether a participant has disclosed facts on the record demonstrating a financial interest, as the latter term has long been defined under the Political Reform Act.

The proposed *new* text of Regulation 18438.7(a), however, adds several more steps by which an officer must evaluate whether a participant has a financial interest in a proceeding. The proposed regulation does this by importing portions of the tests used for evaluating materiality

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[1] See https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Regulations/ip-meeting/18438.7-ADA.pdf.

under the Political Reform Act's general financial interest regulations.[2] It also includes other proposed tests, such as an assessment whether "[t]he participant has an economic interest in a business entity that may see a significant increase or decrease in customers as a result of the proceeding," and an assessment whether "[t]he participant has a business relationship with the applicant that may result in additional services provided to the applicant," that have no analogue in the financial interest regulations and appear newly drafted solely for Levine Act purposes.

The latest March 27, 2023 proposed version of Regulation 18438.7(a) reduces the level of technical detail as compared to the prior January 31, 2023 version. Nonetheless, Santa Clara believes the proposed text will be practically difficult to implement given the types of facts a participant may or may not disclose, resulting in further questions and potential delays in deliberating on and finalizing governmental decisions. The latter point is particularly troubling given that the proposed new text of Regulation 18438.7(a) does not limit the analysis solely to what a participant proactively discloses on the record, but rather indicates that "all relevant facts known by the official at the time of the decision must be considered," and "an official has reason to know of a participant's potential financial interest *and must inquire into any additional facts necessary to determine if it is reasonably foreseeable the decision will have a material financial effect on the interest*" if the participant makes certain factual statements during the proceeding. Indeed, these proposed requirements do not square with the FPPC's own recent fact sheet on the 2023 Changes to Section 84308, which specifically advises that officers *do not* "have a duty to proactively determine whether a participant has a financial interest in a decision."[3]

In sum, proposed Regulation 18438.7(a) adds a layer of unnecessarily technical analysis that we do not believe would be practicable to implement during a governmental body's consideration of a Levine-Act-covered proceeding. We worry that the proposed language would introduce confusion and delay without bringing significant benefit. Therefore, we recommend that the FPPC retain the *current* test provided in Regulation 18438.7(a)(2) with respect to officers' knowledge of participants' financial interests.

B. 18438.7(d): Timeline for Return of Contributions

The proposed new text of Regulation 18438.7(d) recognizes that an officer who would otherwise be disqualified from participating in a matter because they have received a contribution of more than $250 from a party or participant may nonetheless participate in that proceeding *prior to* returning the contribution, if (1) the decision is occurring at a publicly agendized meeting of the governing body; (2) the officer did not know or have reason to know of

[2] See, e.g., 2 Cal. Code Regs., § 18702.2. Materiality Standard: Financial Interest in Real Property.

[3] See https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/Changes_to_Section_84308_Final.pdf, at p. 2, Common Question #2.

the contribution until fewer than two working days before the meeting; (3) the officer discloses the contribution on the record prior to discussing or making a decision on the item and confirms they will return the contribution within two working days; and (4) the contribution is indeed returned within two working days after the public meeting.

The proposed regulatory text aligns with Santa Clara's reading of the Levine Act's requirement to return contributions (Gov. Code, § 84308, subd. (d)(1)) in one important respect: it confirms that an officer may take part in an item *prior to* returning an otherwise disqualifying contribution, provided the return is made in compliance with all statutory requirements relating to timing and knowledge. However, the regulation's addition of a two-working-day limitation on (1) the officer's prior knowledge of the contribution, and (2) the officer's return of the contribution following participation, is more restrictive than—and therefore inconsistent with—the 30-day time period for returning contributions that the Legislature set forth in the Levine Act. (See *id.*, § 84308, subd. (d)(1) [stating that "[i]f an officer receives a contribution which would otherwise require disqualification . . . , and returns the contribution within 30 days from the time the officer knows, or should have known, about the contribution and the proceeding . . . the officer shall be permitted to participate in the proceeding"].) The Political Reform Act expressly requires that any FPPC regulations adopted "to carry out the purposes and provisions" of the statute "shall be consistent with" all statutory requirements. (*Id.*, § 83112.) Because the proposed two-day limitations are inconsistent with clear statutory timelines, Santa Clara recommends that the FPPC omit those timelines from the proposal.

2. Santa Clara's Comments on Proposed Amended Regulation 18438.2[4]

By way of introduction to Santa Clara's comments concerning the proposed amendments to Regulation 18438.2, we note that the proposed text of Regulation 18438.7(c), concerning an officer's ability to return a contribution if they received it prior to knowing of a pending proceeding involving the donor, is very helpful in clarifying that for purposes of that subsection an officer "knows or has reason to know a proceeding involving the party has commenced" *only* if "the proceeding has been noticed on the agenda for a public meeting of the body or board." This proposed text provides a clear, easily administrable bright line.

Relatedly, in the proposed amendments to Regulation 18438.2, FPPC staff offered two options for a proposed rewrite of the *general* definition (separate from the return-specific definition in Regulation 18438.7(c)) of when a Levine Act-covered proceeding is deemed "pending." Santa Clara strongly urges the FPPC to adopt Option 1. This option preserves the important principle, embodied in the current Regulation 18438.7(b)(1)-(2), and also proposed to be embodied in the new Regulation 18438.7(c), that the Levine Act's limitations on accepting

[4] See https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/Regulations/ip-meeting/18438.2-ADA.pdf.

contributions and/or taking part in covered proceedings are triggered only when an officer can be charged with *knowledge* that a proceeding is pending before their agency. Under the proposed text of Option 1, an officer has the requisite knowledge either because the proceeding has been specifically placed before the officer for their consideration—including through placement on a public meeting agenda of a governing body—or because it is reasonably foreseeable that the item will come before the officer in their decision-making capacity and the officer knows or has reason to know of that fact.

Option 1, which we find to be sufficiently clear and implementable, provides a critical backstop to what would otherwise be an unworkably broad rule. By contrast, Option 2—which omits any mention that an officer must *know* of a proceeding for it to be deemed "pending," would be virtually impossible for public agencies to administer. If, as Option 2 contemplates, a proceeding were deemed "pending" merely when an application for a license, permit, or other entitlement for use is filed, or an issue is otherwise "within the jurisdiction of *the agency*" generically (and not "the officer" more specifically), Santa Clara's officers could be charged with observing the Levine Act's restrictions with respect to thousands of small transactions that never come before them for decision, and that, in the ordinary course of business, they do not know or have any occasion to learn about. Along with its practical unworkability, this option would be inconsistent with Santa Clara's understanding of the Levine Act's legislative intent that an officer must have *knowledge* of a proceeding pending before the agency.

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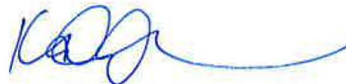
We thank the FPPC staff for their preparation of thorough and thoughtful proposed regulatory amendments to assist public agencies in interpreting and applying the Levine Act, and the FPPC for considering Santa Clara's input as part of its assessment of the proposed amendments.

Very truly yours,

JAMES R. WILLIAMS
County Counsel



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