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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Baker, Wilson, and Wood

From: Dave Bainbridge, General Counsel
Kevin Cornwall, Commission Counsel

Subject: Prenotice Discussion of Regulations Implementing SB 1439.

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Executive Summary

On September 29, 2022, the Governor signed SB 1439 into law. SB 1439 amends Section 84308 of the Political Reform Act and the amendments took effect on January 1, 2023. Section 84308 places limitations on certain public officials' ability to take part in licensing, permitting, and other use entitlement proceedings when a party or participant in the proceeding has contributed more than \$250 to the official; the statute also prohibits officials from receiving contributions exceeding \$250 during such a proceeding and for a defined period after a final decision in the proceeding. SB 1439 broadens the scope of Section 84308 to apply to local elected officials when serving in a position directly elected by the voters and extends the period in which a post-proceeding contribution of more than \$250 is prohibited from three months after the final decision to 12 months after the final decision. This proposal will provide necessary Commission rules for the implementation and application of SB 1439. Staff presents these proposed regulations for pre-notice discussion, with potential adoption proposed for the April 2023 Commission meeting.

Background

Previously, Section 84308 provided, in relevant part, that an officer is prohibited from taking part in a license, permit, or other entitlement for use proceeding if they have received a contribution in excess of \$250 within the preceding 12 months. They were also prohibited from accepting a contribution in excess of \$250 during the proceeding and for three months following the date a final decision is rendered in the proceeding. However, these requirements did not apply to local elected officials when taking part in a decision before the agency to which the official was directly elected. The prohibition applied to officers on appointed boards and commissions who also happened to be candidates for an elective position. For example, an appointed planning commissioner who was also a candidate for school board could not take part in a permit proceeding before the planning commissioner if the applicant gave a contribution in excess of \$250 to the officer's campaign for school board.

After taking effect on January 1, Section 84308 has been broadened and now applies to local elected officials regardless of whether the decision at issue is before the agency to which

the official is elected or another agency on which the official serves. Also, the period in which contributions in excess of \$250 are prohibited following a final decision is extended from three months to 12 months. In addition to expanding the reach of the law, SB 1439 also reorganizes some of Section 84308's subdivisions, necessitating the updating of any regulations referencing those subdivisions.

In anticipation of these changes, the FPPC has received numerous questions from the regulated community regarding how Section 84308 will apply, as amended. Staff has also consulted with the League of California Cities to identify common concerns and questions throughout the regulated community. Some of those questions were addressed in the *Kendrick* Opinion, No. O-22-022, issued in December 2022, but many questions and concerns raised through public comments were outside the scope of the requested opinion. Accordingly, staff has prepared several regulatory amendments for the Commission's consideration with the goal of supplementing the Commission's opinion and clarifying Section 84308's application.

Proposed Regulatory Actions

Adopt Regulation 18438 – Application of Government Code Section 84308

Section 84308 first went into effect on January 1, 1983. At that time, as today, the statute prohibited participation in entitlement for use proceedings where the applicable official had received a contribution exceeding \$250 from a party or participant in the proceeding within the preceding 12 months. The Commission soon after adopted Regulation 18438, specifying, “[t]he prohibitions and requirements of Government Code Section 84308 do not apply to contributions made or received prior to January 1, 1983.” Regulation 18438 was later repealed because the regulation was outdated and no longer served a purpose.

At the December 2022 Commission meeting, the Commission adopted the *Kendrick* Opinion, No. O-22-002, similarly concluding that Regulation 18438's amended provisions do not apply to contributions made or received, or proceedings participated in, prior to January 1, 2023. Proposed Regulation 18438 would codify that Opinion and serve the same purpose as Regulation 18438 initially served in 1983. The Commission could repeal the regulation once no longer necessary.

Amend Regulation 18438.1 - Officers and Agencies Under Government Code Section 84308

Staff proposes amending Regulation 18438.1 in four substantive ways.

First, because officers of local governmental agencies who are directly elected by voters are no longer statutorily exempted, language in Section 18438.1(a)(1) and (b) referring to that exemption should be deleted.

Second, Section 84308 applies to all “officers of an agency.” The only statutory exceptions are for officials with an exempted agency, which includes courts or any agency in the judicial branch of government, the Legislature, the Board of Equalization, or constitutional officers. (Section 84308(a)(3).) However, subdivision (d)(2) in the existing regulation includes language specifying that a member of the Governor's Cabinet is not an officer under Section

84308 when the member is acting in the capacity of agency secretary. Accordingly, the subdivision provides an exception that is not supported by the statutory language. For this reason, staff is recommending deleting the exception.

Third, staff proposes amending the definition of “officer of an agency” to also include persons who:

- Serve in an elected position, including any official appointed to an elected position due to an interim vacancy or an election otherwise canceled because the official was the sole candidate for the position; or
- Have decisionmaking authority with respect to the proceeding involving a license, permit, or other entitlement for use and is also a candidate for elected office.

Current Regulation 18438.1(d) narrowly defines “officer of an agency” to include only “members of governmental boards and commissions” and “the head of an agency.” However, this definition, particularly in light of the statutory amendments, is arguably too narrow as it does not give effect to statutory language defining “officer” to include “any candidate for elective office in an agency” (Current and Former Section 84308(a)(4)).¹ As a result, the current regulation does not permit the application of Section 84308 to many officials who make, participate in making, and influence decisions on licenses, permits, and other entitlements. For example, a District Attorney or County Sheriff may be in a position to receive a contribution and approve or deny an entitlement for use, but the District Attorney and Sheriff do not serve on a board or commission and, because they serve under the County Board of Directors, neither is the head of an agency and therefore under the current regulations, Section 84308 would not apply to them.

Accordingly, staff finds the current regulatory definition fails to encompass the statutory language defining officer to include “any candidate for elective office in an agency.” (Section 84308(a)(4)). Moreover, considering the underlying intention of SB 1439 in applying pay-to-play restrictions to elected officials and candidates for elected office, staff recommends defining “officer of an agency” to include, at a minimum, all officials elected, or otherwise appointed to an elected position, and all candidates for elected positions that are also serving in a decisionmaking capacity.

Fourth, and finally, staff proposes amending Regulation 18438.1 to define “constitutional officer.” Section 84308(a)(3) exempts “constitutional officers” from its scope of the term “agency,” but does not expressly define the term “constitutional officer.” The FPPC recently received a request for clarification on the term “constitutional officer” and whether it applies to positions such as county assessors, district attorneys, and sheriffs, who are locally elected but are

¹ The term “office” is broadly defined elsewhere in the Government Code. Specifically, for purposes of Section 1099, a prohibition against holding incompatible offices, a public “office” includes “the right, authority, and duty, created and conferred by law – the tenure of which is not transient, occasional, or incidental – by which for a given period an individual is invested with power to perform a public function for public benefit.” (*People ex rel. Chapman v. Rapsey* (1940) 16 Cal.2d 636, 640.) Further, Attorney General’s Office has summarized the nature of a public office as: (1) a position in government; (2) that is created or authorized by the Constitution or by law; (3) the tenure of which is continuing and permanent, not occasional or temporary; and, (4) in which the incumbent performs a public function for the public benefit and exercises some of the sovereign powers of the state. (82 Ops.Cal.Atty.Gen. 83, 84 (1999).)

mandated to be included in county charters under the California Constitution. Staff proposes amending Regulation 18438.1 to define “constitutional officers” as “the Governor, Lieutenant Governor, Attorney General, Controller, Insurance Commissioner, Secretary of State, and Treasurer.”

The California Constitution provides that “[t]he Legislature shall provide for county powers, an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county.” (Cal. Const., Art. XI § 1(b).) However, it appears unlikely that Section 84308’s use of the term “constitutional officer” was intended to incorporate every position referenced in the California Constitution. For example, the California Constitution includes numerous provisions regarding the judicial branch, the Legislature, and the Board of Equalization. In defining the term “agency,” however, Section 84308 specifically exempts those groups. If the term “constitutional officer” was intended to incorporate to every position referenced in the California Constitution, there would be no need to include separate exemptions for those groups. Similarly, if “constitutional officer” was intended to have such a definition, the term would exempt county boards of supervisors, given that the constitution provides for “an elected governing body in each county.”

Given that a broad definition of “constitutional officer,” as an exception to inclusion under Section 84308, appears contrary to the Legislature’s intent in broadening the scope of Section 84308 by passing SB 1439, staff believes the term should be defined more narrowly. When faced with a similar question of whether another statute’s reference to “constitutional officer of this state” included positions such as sheriffs and assessors, the Attorney General similarly rejected a broad interpretation of the term. (82 Ops.Cal.Atty.Gen. 172 (1999).) Rather, the Attorney General interpreted the phrase to refer only to the Governor, Lieutenant Governor, Attorney General, Controller, Insurance Commissioner, Secretary of State, Treasurer, and members of the State Board of Equalization, as the Constitution refers to those positions as “state officers” (Cal. Const., Art. V § 14(f)) which the Attorney General treated as an analogous definition to “constitutional officer of this state.”²

Amend Regulation 18438.2 – Proceedings Under Section 84308

Staff proposes amending Regulation 18438.2 to address a distinction in Section 84308’s statutory language. Section 84308(b) prohibits an officer from accepting, soliciting, or directing a contribution of more than \$250 “[w]hile a proceeding . . . is pending,” and for 12 months after the final decision is rendered. In contrast, Section 84308(c) requires an officer to disclose contributions exceeding \$250 on the record “[p]rior to rendering any decision in a proceeding involving . . . [an] entitlement for use pending *before an agency*”

² We further note that Section 84308 was originally enacted with an exemption for “[s]tate constitutional officers who serve on a board or commission as a requirement of their constitutional office” In 1984, Section 84308 was substantially rewritten, resulting in the current shortened language referring to “constitutional officers.” However, notwithstanding the shortened language, the term has commonly been regarded to include only state constitutional officers and there is no indication that the 1984 revision of Section 84308 was intended to signal broad application of the exception merely because a position is referenced in the California Constitution.

Staff proposes that these phrases should be distinguished from one another due to canons of statutory construction as well as practical concerns that indicate the Legislature likely intended separate meanings.

First, “[w]hen the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the normal inference is that the Legislature intended a difference in meaning.” (*People v. Trevino* (2006) 26 Cal.4th 237, 242.)

Second, if “pending,” as used in Section 84308(b) was read to have the same meaning as “pending before an agency,” as used in Section 84308(c), the statute could potentially be interpreted to prohibit an officer from accepting, soliciting, or directing a contribution of more than \$250 from an individual when a proceeding is “pending before [the] agency,” and in most cases the officer would have no reason to know that the individual had a matter before the agency. For example, if subdivision (b) is read to include any proceeding before the agency, a county supervisor could inadvertently violate the prohibition by soliciting contributions despite the fact that the supervisor had not reason to know the potential contributor had an application currently pending before the county’s building department. Accordingly, staff recommends the proposed language to clarify Section 84308’s prohibitions and requirements.

Amend Regulation 18438.3 – Agents Under Section 84308

Recently, the Commission has received questions asking for clarification on who qualifies as an agent, specifically in the context of a business entity or non-profit organization applying for an entitlement for use. In such a situation, does every employee of the entity or organization qualify as an agent?

Staff proposes amending subsection (a) to amend the definition of “agent” and make clear that it is only persons who represent the party or participant, through methods such as appearing before or otherwise communicating with the governmental agency, that qualify as “agents” for purposes of Section 84308.

Staff also proposes reorganizing a portion of current subsection (a) into a separate subsection and removing current subsection (b), as aggregation will be fully addressed in Regulation 18438.5, discussed below.

Amend Regulation 18438.4 – Active Support or Opposition of a Decision Under Section 84308

Staff proposes non-substantive amendments to Regulation 18438.4.

Amend Regulation 18438.5 – Aggregated Contributions Under Section 84308

Currently, Regulations 18438.3 and 18438.5 both contain provisions relating to aggregation of contributions. Regulation 18438.3 pertains to aggregation of contributions by agents while Regulation 18438.5 addresses the aggregation of contributions by related business entities. Staff proposes amending subdivisions (a) and (b) to lay out the aggregation process more succinctly and within a single regulation.

Additionally, staff proposes amending subdivision (b) to specify that a “party,” “participant,” or “agent” also include parent and subsidiary entities, otherwise-related business entities, and individuals who direct or control those entities or the entities’ contributions. This is consistent with Section 82015.5, which provides that an entity’s contributions shall be aggregated with contributions of an individual who directs or controls the entity’s contributions, as well as contributions by any other entity that individual directs or controls. This would also avoid a loophole in which an official could permissibly accept, solicit, or direct from an individual or individuals controlling the party or participant in an entitlement for use proceeding pending before the officer.

Amend Regulation 18438.6 – Solicitation, Direction, and Receipt of Contributions Under Section 84308

Staff recommends amending Regulation 18438.6(b)’s definition of “solicits” to include scenarios where an officer or candidate directs a candidate to request a contribution to any other candidate, public official, or committee aside from the candidate’s own. This amendment would bring 18438.6 in line with Section 84308(b)’s statutory text, which prohibits an official from accepting, soliciting, or directing contributions exceeding \$250 from parties or participants on behalf of any candidate for office or committee. The proposed amendments would also revise the definition of “directs” to apply to scenarios in which an officer solicited the contribution made to a candidate or committee other than the officer’s own. Finally, staff proposes reorganizing current subdivision (b)—defining “making” a contribution—to subdivision (e) with clarification that the term specifically pertains to Section 84308(e)(2)

Amend Regulation 18438.7 - Prohibitions and Disqualification Under Government Code Section 84308

Three of the primary concerns Commission staff has heard expressed regarding SB 1439 are uncertainty in: (1) determining who qualifies as a “participant” for disqualification purposes; (2) understanding an officer’s duties regarding determining an individual’s potential financial interests; (3) understanding an officer’s duties regarding recusal once a disqualifying financial interest has been determined. Staff’s proposed amendments to Regulation 18438.7 aim to address these concerns.

Under Section 84308, an officer is prohibited from taking part in an entitlement for use proceeding where the officer has willfully or knowingly received a contribution of more than \$250 from a participant the officer knows or has reason to know has a financial interest in the decision. However, neither Section 84308 nor Commission regulations require an officer to probe or investigate whether an individual—including those who provide public comments during a proceeding—has a financial interest in a proceeding. Accordingly, whether an officer knows or has reason to know that a participant has a financial interest in the proceeding will largely depend on the information volunteered by the participant.

Determining whether an individual has a financial interest in a governmental decision is an inherently fact-specific, often complex determination—one that many public officials seek formal advice from the Commission regarding. Because Section 84308 ties a participant’s financial interest to Section 87100, determining whether a participant actually has a financial

interest in a decision will generally require numerous facts. Does the participant have an economic interest such as a business entity, real property, or source of income that would be affected by the decision? Is a material financial effect on that economic interest reasonably foreseeable? Do any exceptions to the Act's general rules apply?

Due to the complexity of these questions and the number of facts necessary to make a determination, in many circumstances, officers will not have received sufficient information such that they would "know or have reason to know" a participant has a financial interest that disqualifies the official from taking part in the proceeding. For example, one concern staff has heard expressed is a scenario in which a person provides public comment opposing a development, citing the effects the development would have on the person's nearby home. In such a scenario, whether the officer has reason to know the participant has a financial interest will depend on the facts known to the participant. If the participant merely stated they live "nearby," "in the neighborhood," or even "within 1,000 feet," the officer likely would not have sufficient information to have reason to know the participant has a financial interest in the decision. Even if the officer is aware of certain environmental impacts a project may have, the officer does not know, for example: (1) whether the participant rents or owns their residence; (2) if the participant rents, whether the lease is month-to-month, such that it does not qualify as a real property interest for purposes of the Act; (3) whether the same financial effect would be felt be experienced by the public generally and not uniquely affect the person's economic interests.

In some cases, however, an officer may receive sufficient facts such that they know or have reason to know that a participant has a financial interest in a decision. For example, if a public commenter states they own a home directly across the street from a project and the officer is aware the project will have significant environmental impacts on the small number of the jurisdiction's properties located near the project, such facts may be sufficient to establish that the officer has reason to know of a financial impact.

Because of the fact-specific nature of the determination, proposed subdivision (b) essentially provides guidelines for what officers must consider in making that determination. Officers uncertain about whether they have sufficient information to have "reason to know" a participant who has contributed more than \$250 has a financial interest are advised to err on the side of caution. In such scenarios, a board or commission (without the officer's participation) could: (1) choose to continue the item to a later time or date to provide sufficient time for the officer to determine whether a financial interest exists; (2) recuse; or (3) follow the process described in proposed subdivision (f), discussed below.

Under Regulation 18941, where an official has received a gift that would otherwise disqualify the official from taking part in a decision, but has not yet been returned, subdivision (d) provides a process by which the official may still take part in the decision, rather than be forced to recuse themselves, as long as the official discloses receipt of the gift on the public record, along with its value, and declare that the return, donation, or reimbursement will occur within two working days following the decision (and within 30 days of receipt of the gift), and proceeds to do so. After discussing SB 1439 and the need for regulatory amendments with CalCities, staff agrees with CalCities' suggestion that a similar provision in the context of Section 84308 would be beneficial, particularly given that officials may not practicably be able to anticipate whether a

contributor of more than \$250 will become a participant in an entitlement for use proceeding until the day of a public hearing or meeting. This proposed new provision is in subdivision (f), and allows the officer to take part in a decision by a governing board at a public meeting, in which the officer is otherwise disqualified under Section 84308, if all the following conditions are met:

- (1) The officer does not know or have reason to know about the contribution and the proceeding prior to the public meeting.
- (2) Prior to taking part in any discussion or decision, the officer discloses the fact of the disqualifying contribution on the record of the proceeding, as required by Section 84308, subdivision (c) and confirms that the return will occur within two working days.
- (3) The contribution is returned within the two working days.

Under Section 84308(c), an official is prohibited from “mak[ing], participat[ing] in making, or in any way attempt[ing] to use the officer’s position to influence the decision” in a proceeding if the officer has willfully or knowingly received a contribution of more than \$250 within the preceding 12 months from a party or a party’s agent, or from any participant or a participant’s agent if the officer knows or has reason to know that the participant has a financial interest in the decision. Consequently, staff also recommends adding subdivision (e) to clarify that Regulation 18704—pertaining to the definitions of “making, participating in making, or in any way attempting to use the officer’s position to influence a decision”—applies to officials disqualified under Section 84308, in addition to those typically disqualified under Section 87100.

Regulation 18438.8 – Disclosure Under Section 84308

Staff proposes non-substantive amendments to Regulation 18438.8.

Regulation 18705 – Legally Required Participation

Regulation 18705 establishes the process by which officials who would ordinarily be disqualified from taking part in a decision due to a conflict of interest under Section 87100 may nevertheless take part in a decision where their participation is legally required. The FPPC has received questions on whether Regulation 18705 will apply to officials otherwise disqualified under Section 84308. Staff proposes amending Regulation 18705 to clarify that its provisions *do* apply to officials otherwise disqualified under Section 84308.

Section 87101 provides, “Section 87100 does not prevent any public official from making or participating in the making of a governmental decision to the extent the official’s participation is legally required for the action or decision to be made.” Regulation 18705 interprets this statute and historically has applied to disqualification based on an *official’s* financial interest under Section 87100. Application to official’s disqualified under Section 84308 was largely unnecessary because, due to the exemption for local elected officials taking part in decisions before the agency to which the official was directly elected—that is, Section 84308’s previously very narrow scope and inapplicability to those with higher levels of decisionmaking

authority rendered the issue of the legally required participation exception essentially a non-factor.

Because Section 84308 now applies to those whose participation in a decision realistically may be required, staff proposes amending Regulation 18705 to expressly apply to officers otherwise disqualified under Section 84308. This application also comports with Section 87101, as disqualification from taking part in a decision under Section 84308 is based on a party having an inherent disqualifying financial interest as the party or subject of the proceeding and specifically refers to Section 87100 with respect to an officer knowing or having reason to know of a participant's financial interest.

Conclusion

In response to the various questions the FPPC has received regarding Section 84308's application now that SB 1439 has gone into effect, the Commission will likely want to consider several regulatory amendments to Regulations 18438.1 through 18438.8 and 18705, as well as adopting new Regulation 18438. In summary, staff proposes:

- Adopting Regulation 18438 to codify the *Kendrick* Opinion;
- Amending Regulation 18438.1's definition of "officer of an agency" and adding a definition to "constitutional officer;"
- Amending Regulation 18438.2 to differentiate the terms "pending" and "pending before an agency;"
- Amending Regulation 18438.3 to clarify the definition of "agent" and move the aggregation provisions to Regulation 18438.5;
- Amending Regulation 18438.4 non-substantively;
- Amending Regulation 18438.5 to consolidate aggregation provisions and include "individuals who direct and control" relevant entities in the definitions of "party," "participant," and "agent;"
- Amending Regulation 18438.6's definitions of "solicit" and "direct;"
- Amending Regulation 18438.7 to: (1) provide guidelines for determining whether an officer knows or has reason to know of a participant's financial interest; (2) clarifying Regulation 18704 applies to officers disqualified under Section 84308; and (3) establishing a process by which an officer may take part in a proceeding prior to returning a contribution;
- Amending Regulation 18438.8 non-substantively; and
- Amending Regulation 18705 to provide that the legally required participation procedures contained in the regulation apply to officers disqualified under Section 84308.

Staff has attached a copy of the proposed regulation package. Staff welcomes any input from the regulated community and is prepared to answer any questions the Commission may have.

Attachment

- Regulation Packet