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

From: Dave Bainbridge, General Counsel, Legal Division
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Subject: Proposed Adoption of Amendments to Regulations 18438, 18438.2, 18438.4, 18438.5, 18438.6, 18438.7, 18438.8, 18360.1, and 18705, and repeal of Regulation 18438.3

Date: March 10, 2025

Executive Summary

Following pre-notice discussion at the January Commission meeting, and in response to recently enacted statutory changes to Section 84308 of the Act,¹ staff submits proposed amendments to the following existing regulations for adoption:

- 18438 – Application of Government Code Section 84308
- 18438.2 – Proceedings Under Government Code Section 84308
- 18438.3 – Agents Under Government Code Section 84308 (repeal)
- 18438.4 – Participants Under Government Code Section 84308
- 18438.5 – Aggregated Contributions Under Government Code Section 84308
- 18438.6 – Solicitation, Direction, and Receipt of Contributions Under Government Code Section 84308
- 18438.7 – Prohibitions and Disqualification Under Government Code Section 84308
- 18438.8 – Disclosure Under Government Code Section 84308.
- 18360.1 – Eligibility Requirements and Considerations for Campaign Violations -- Streamline (Tiers One and Two), Warning Letters and the Political Reform Education Program (PREP)
- 18705 – Legally Required Participation

With certain amendments made after additional consideration and in response to comments received during and after the January meeting and clarifying changes to Regulation 18438.8, discussed in detail below, the above-proposed regulations are substantively similar to those discussed at the January Commission meeting.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

Reason for Proposed Regulatory Action

Recently enacted legislation—SB 1243 (Dodd) and SB 1181 (Glazer)—made numerous changes to Section 84308 of the Act. These statutory changes, which went into effect on January 1, 2025, resulted in staff identifying a number of necessary conforming changes to existing regulations, in addition to other issues requiring further clarification or clean-up.

Background

Section 84308 (the “Levine Act”)

The Act’s “pay to play” restrictions, contained in Section 84308,² aim to ensure that state and local government officers are not biased by significant campaign contributions from contributors who might appear before them in a proceeding involving a license, permit, or entitlement for use (an “entitlement for use proceeding”).

Section 84308 places two restrictions on “officers,” defined as any elected or appointed officer of an agency, any alternate to an elected or appointed officer of an agency, and any candidate for elective office in an agency.³ (Section 84308(a)(4).) First, officers are prohibited from soliciting, directing, or accepting contributions of more than \$500 (formerly \$250) from a party, participant, or their agent while an entitlement for use proceeding is pending before the officer’s agency, and for 12 months thereafter. (Section 84308(b).) Second, if an officer has received such a contribution in the preceding 12 months, the officer must disclose this fact on the record and recuse themselves from the proceeding. (Section 84308(c).) Section 84308(d) provides a mechanism for an officer who receives an otherwise disqualifying contribution to cure the violation or still participate in the proceeding, depending on the circumstances.

Section 84308 also prohibits parties and participants (and, until recently, their respective agents) in an entitlement for use proceeding from contributing more than \$500 (formerly \$250) to an officer of the agency the proceeding is before during a 12-month period. (Section 84308(e)(2).) A party—but not a participant—is also required to disclose any contributions exceeding an aggregate \$500 (formerly \$250) that the party and their agents have made to an officer of the agency within a certain timeframe, depending on when the party makes the contribution. (Section 84308(e).)

Recent Legislative Changes

SB 1181 and SB 1243 amended Section 84308 in a number of significant ways, including, in relevant part: raising the contribution threshold from \$250 to \$500; defining or

² Also commonly referred to as the “Levine Act,” after the legislation’s original author, former Assemblymember Mel Levine.

³ As of January 1, 2025, the definition of “officer” in Section 84308(a)(4) now also includes an exemption for a city attorney or county counsel providing legal advice to the agency, but who does not have authority to make a final decision in the proceeding.

redefining key terms, such as “pending,” “agent,” “license, permit, or other entitlement for use,” and what types of contract decisions fall within the law; specifying that contributions from agents are no longer aggregated with those of parties; expanding the circumstances in which a disqualifying contribution may be returned and extending the period for return from 14 to 30 days; and adding clarification to the time period during which a party to an entitlement for use proceeding must disclose that it made a contribution greater than \$500 (formerly \$250).

Recent Advice

Separate from these recent legislative changes, recent advice requests have highlighted other issues around Section 84308 that staff believes could benefit from clarification by regulation. As discussed in the memorandum submitted as part of pre-notice discussion at the January Commission meeting, these issues include: (1) entitlement for use proceedings initiated by an agency; (2) application of Section 84308 to central committee contributions; and (3) the applicable standards for determining whether a business entity or non-profit qualifies as a “participant” based on a financial interest in the proceeding.

Proposed Regulatory Amendments

Amend Regulation 18438 – Application of Government Code Section 84308

As part of pre-notice discussion at the January Commission meeting, staff received public comment from the League of California Cities (CalCities) and Los Angeles County Board of Supervisors, essentially requesting clarification on whether the recent legislative amendments to Section 84308 would apply “retroactively,” as similarly addressed in the Commission’s *Kendrick* Opinion, No. O-22-002. To clarify that the statutory changes would apply only proactively—that is, effective January 1, 2025—staff presents the proposed amendments to Regulation 18438 for potential adoption.

In 2023, Regulation 18438 was amended to clarify that the statutory amendments under then-recent SB 1249 would not apply “retroactively” to conduct (e.g., contributions received, proceedings participated in) that occurred before the effective date of the statutory amendments. Staff proposes amending that regulation with more general language to “future-proof” the regulation and clarify that, going forward, statutory amendments to Section 84308 do not apply to conduct that occurred before the effective date of the statutory amendments.

The proposed amendment is not statutorily required, but is recommended for the sake of clarity.

Amend Regulation 18438.2 – Proceedings Under Government Code Section 84308

Before January 1, 2025, subdivision (a) of Section 84308 defined key terms under the Levine Act, including: “party,” “participant,” “agency,” “officer,” “license, permit, or other entitlement for use,” and “contribution.” The newly enacted legislation makes changes to some of these definitions, including the definition of “license, permit, or other entitlement for use” in

subdivision (a), paragraph (5) of Section 84308. Newly enacted paragraph (7) also now defines when a proceeding involving a license, permit, or other entitlement for use is “pending.”

Staff recommends amending Regulation 18438.2 to insert updated statutory references and delete terms now codified in statute, namely “pending,” as well as language pertaining to “competitively bid contracts,” “labor agreements,” and “personal employment contracts.”

These recommended changes stem from the amended statutory language, which codifies language or otherwise addresses terms previously addressed by Regulation 18438.2.

Separately, based on recent advice letters discussed above, staff recommends clarifying that the term “proceeding involving a license, permit, or other entitlement for use” can also include situations where an action is initiated by an agency but implicates or targets a party, or limited number of parties (for example, a zoning change initiated by a city that would impact only one or two permit applicants whose permits are pending). This proposed change is not statutorily required, but is recommended for clarification and is consistent with case law and previous advice letters.

The letter the Commission received from CalCities requested “more precise guidance” in determining what qualifies as a “competitively bid contract,” as the proposed amendments would remove the regulation’s current definition of the term. A similar comment was received from the Los Angeles County Board of Supervisors. Competitively bid contracts are exempt from Section 84308, and the term previously was not defined by statute. Accordingly, the Commission had adopted a regulatory provision (current subdivision (a)(3)(A)) that defines the term as “a contract required by law to be awarded to the lowest responsible bidder with a responsive bid, or, if the successful bidder refuses or fails to execute the contract, to the next lowest bidder with a responsive bid.” However, unlike other regulatory provisions that the Legislature chose to codify when amending Section 84308, the Legislature chose to adopt a distinctly different and broader definition for the term. Whereas Section 84308 previously only exempted “competitively bid contracts,” the statute now more specifically exempts “competitively bid contracts that are required by law, agency policy, or agency rule to be awarded pursuant to a competitive process.”

The current statutory language is now specific enough that a clarifying regulatory provision is no longer necessary, and the Legislature has now defined the term more broadly than it is currently defined under Regulation 18438.2, affording more discretion and leeway to agencies that may employ different methods of competitive bidding for agency contracts. Consequently, staff still recommends removing the regulatory provisions relating to the term “competitively bid contracts.”

The Los Angeles County Board of Supervisors also requested clarification on the terms “development agreement,” and “periodic review or renewal,” as those phrases are used in Section 84308(a)(5)(B)(vii). The California Political Attorneys Association (CPAA) also requested definitions for the terms “material modification or amendment” and “non-material modification or amendment,” as used in Section 84308(a)(5)(B)(vii) and (viii). However, at this time, staff believes any necessary clarification on those terms would be better addressed via the FPPC’s formal advice process. These terms may apply to a broad range of facts and

circumstances, and establishing regulatory definitions prior to any opportunity to review and consider the different types of inquiries we receive regarding these terms may result in under- or over-inclusive definitions, or definitions general enough that they provide no greater guidance than the terms themselves. This proposed approach is consistent with case law, where courts have discussed terms like “material modification” without relying on a statutory definition. (See, e.g., *Gluskin v. Atlantic Savings & Loan Assn.* (1973) 32 Cal.App.3d 307, 315 [“If dispute results from an unconsented to modification it is of course a question of fact whether the modification materially affected the rights of the subordinated [party].”]; see also Cal. Gov. Code Sections 65864-65869.5 [establishing laws relating to development agreements without expressly defining the term “development agreement”].)

Amend Regulation 18438.3 – Agents Under Government Code Section 84308

Previously, the Act was silent on the definition of “agent” under Section 84308. Instead, Regulation 18438.3 was devoted to defining this term. With minor changes, newly enacted subdivision (h) of Section 84308 codifies the definition of “agent” as set forth by existing Regulation 18438.3. Therefore, staff recommends the repeal of Regulation 18438.3 since it is no longer necessary.

Amend Regulation 18438.4 – Participants Under Government Code Section 84308

Based on recent advice letters discussed above, staff recommends adding a new subdivision (e) to Regulation 18438.4, clarifying that where the participant is a business or nonprofit, the relevant “source of income” materiality standards in Regulation 18702.3 apply.

At the January Commission Meeting, the Commission requested clarification on this proposed amendment and whether it was based on recent statutory amendments or was recommended by staff for the purpose of clarification.

The proposed amendment is based both on the statutory language of Section 84308 and the need for clarification.

Under Section 84308, whether a person qualifies as a “participant” in an entitlement for use proceeding is determined based on two elements: (1) whether they are actively supporting or opposing a particular decision in the proceeding; and (2) whether they have a “financial interest” in the proceeding, as that term is described in the Act’s conflict of interest standards (beginning with Section 87100). Under the Act, whether a person has a financial interest is based on whether a governmental decision would have a reasonably foreseeable, material financial effect on one of the person’s economic interests, such as a source of income, or an investment in a business entity. (Sections 87100, 87103.) The standards for determining whether a financial effect is “reasonably foreseeable” and “material” are found in the Commission’s regulations.

The nuance the proposed amendment to Regulation 18438.4 addresses is that the Act’s conflict standards were drafted with individuals in mind, while Section 84308 applies to all persons, including businesses and other groups such as non-profits. (See Section 82047.) Consequently, it may not be immediately obvious to the regulated community how one should determine, or where to look to determine, whether a decision would “materially affect” such an

entity. Regulation 18702.3 is already in place and includes standards for determining the materiality of a financial effect on a business entity or non-profit organization, as such standards are necessary in the context of conflicts in order to determine a decision's effect on a public official's source of income. Consequently, the recommended language merely directs the regulated community to these standards that (1) are already in place; and (2) applicable per the statutory definition of "participant." (Section 84308(a)(2).)

Amend Regulation 18438.5 – Aggregated Contributions Under Government Code Section 84308

Under recently amended subdivision (g) of Section 84308, contributions from agents are no longer aggregated with those of parties. Staff therefore recommends removing paragraph (2) of subdivision (a) of Regulation 18438.5 and deleting the references to "agent" in subdivision (b) of the regulation.

As noted above, recent amendments to Section 84308 raise the contribution threshold from \$250 to \$500. Accordingly, staff proposes amending subdivision (a) of Regulation 18438.5 to reflect this change.

These recommended changes are necessary to harmonize the regulation with the recently amended statutory language.

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

Section 84308 defines "contribution" as including contributions to candidates and committees in federal, state, or local elections (Section 84308(a)(6). Further, Section 84308 prohibits an officer from "accepting, soliciting, or directing" contributions greater than \$500 from a party, participant, or agent while a proceeding is pending, creating a need to define and distinguish when each of those actions occur. (Section 84308(b)(1).) As noted above, we have advised that the disclosure and disqualification requirements of Section 84308 apply to contributions received as a candidate for county central committee. This is consistent with both the language and intent of Section 84308 and Regulation 18438.6, as it prevents a scenario where, for example, a sitting public officer who is also running for a seat on a central committee is influenced in their decisionmaking capacity by a party or participant who makes a large contribution to the officer's central committee campaign committee. Therefore, staff recommends amending Regulation 18438.6 to clarify that contributions to a candidate's central committee are subject to Section 84308's restrictions and limits.

At the January Commission meeting, staff was asked for clarification on why central committees were not initially included in the list contained in subdivision (a). The list contained in Regulation 18438.6(a) was not intended to be exhaustive, as indicated by the regulatory language stating it applied to committees "including, but not limited to" those listed in the subdivision. As staff explained at the Commission meeting, the committees included were intended to address the most common types of committees to which Section 84308 would apply, and staff now recommends adding central committees for the sake of further clarification.

Previously, staff proposed adding a new paragraph (6) to subdivision (a) of Regulation 18438.6 to address the issue of central committees. However, to better express the intended application and per CPAA's suggestion, staff now proposes revising paragraph (1) of subdivision (a) to clarify the regulation is referring to campaign committees for elections to central committees.

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

Paragraph (1) of Section 84308, subdivision (d) has now been amended to read:

If an officer receives a contribution ~~which~~ that would otherwise require disqualification under this section, and returns the contribution within 30 days from the time the officer makes any decision, or knows, or should have known, about the contribution and the proceeding involving a license, permit, or other entitlement for use, whichever comes last, the officer shall be permitted to participate in the proceeding.

Staff recommends revising the language of Regulation 18438.7(b) to address when an officer “knew or should have known” about a contribution, which has become more relevant now that disclosure by parties is no longer required upon initiation of the proceeding. Thus, Regulation 18438.7(b) would now address both Section 84308, subdivision (c), which pertains to an officer’s “willful or knowing receipt of a contribution,” and subdivision (d), which relates to when an officer “knows, or should have known” about a contribution.

This change is recommended to clarify the standard for determining when an officer “knew or should have known” about a contribution.

Additionally, as noted above, recent amendments to Section 84308 raise the contribution threshold from \$250 to \$500. Accordingly, staff proposes amending subdivisions (a)(2) and (b)(2)(B)(ii) of Regulation 18438.7 to reflect the statutory change from \$250 to \$500.

Following the January Commission meeting, staff received additional feedback from CalCities. CalCities noted a discrepancy between Regulation 18438.7 and amended Section 84308. Previously, Section 84308 did not expressly address whether or how an official could take part in a proceeding, despite having received a disqualifying contribution, if the official subsequently returned the disqualifying contribution. The Commission clarified that issue with Regulation 18438.7(d), which establishes criteria for such a return. However, Section 84308(d)(1) has been amended to more clearly indicate that an official can return a contribution after taking part in a decision. Consequently, staff recommends removing subdivision (d) from Regulation 18438.7, as it is no longer necessary and somewhat in conflict with amended Section 84308. As discussed below, the proposed regulatory amendments would still require officers who take part in a proceeding with the intention of subsequently returning a disqualifying contribution to disclose that intention, as well as confirmation of the return, but staff recommends including these provisions in Regulation 18438.8.

Similarly, staff also recommends removing subdivision (c) of Regulation 18438.7. That subdivision currently provides additional criteria that must be met in order for a public official to return a contribution under Section 84308(d)(1). As with subdivision (d), however, because Section 84308 now includes more express and lenient standards regarding returns, Regulation 18438.7(c) is no longer necessary and staff recommends its removal.

Amend Regulation 18438.8 – Disclosure Under Government Code Section 84308

Prior to the recent legislative changes, a party in an entitlement for use proceeding—but not a participant— was required to disclose on the record of the proceeding any contributions exceeding an aggregate \$250 that the party and their agents have made to an officer of the agency within the preceding 12 months. Current Regulation 18438.8 requires the disclosure to be made on the date the party files the application or other request initiating the proceeding. However, recent amendments to subdivision (e) of Section 84308 have changed this timeline to be “before the date that any decision is rendered by the agency.”

As discussed at the January Commission meeting, it is necessary to amend subdivision (b), paragraph (1) of existing Regulation 18438.8 to reflect the greater timeline for party disclosure now afforded by Section 84308. Initially, staff proposed a provision that would require disclosure at least 30 days before the date that the agency renders any decision. This was not mandated by statute, but was suggested for purposes of providing greater notice to the public and public officials. While staff believes such a provision would be supported by a reasonable interpretation of Section 84308(e)(1), CPAA submitted feedback arguing disclosure should be permitted at any point prior to the date that the agency renders any decision. Although staff disagrees with the idea that such a provision is required by the “plain language” of the statute, after additional discussion and consideration, staff now recommends this more general timeline for disclosure. Such a provision would avoid any disagreements regarding administrative authority or interpretation of statutory language. Additionally, as discussed above, Section 84308(d)(1) now expressly permits the return of excess contributions “within 30 days from the time the officer makes any decision, or knows, or should have known, about the contribution and the proceeding” Consequently, it appears disclosure in the days leading up to an agency decision would not present any greater risk of harm than disclosure made 30 days prior to an agency decision. In both instances, the public and public officials will be informed of disclosure prior to an agency decision and the public official will be able to take part in the proceeding as long as they return the contribution within 30 days from the time they knew, or should have known, about the contribution and the proceeding.

Additionally, staff proposes amending subdivisions (a) and (b) of Regulation 18438.8 to reflect the statutory change of the Section 84308 threshold from \$250 to \$500.

As discussed above, staff recommends removing Regulation 18438.7(d), pertaining to the criteria for returning a disqualifying contribution after a public official has already taken part in the proceeding, because that topic is now sufficiently addressed by Section 84308. However, Section 84308 does not address disclosure requirements in such a scenario and, consequently,

staff recommends addressing that topic in Regulation 18438.8. Under proposed subdivision (a)(2), those who return a contribution pursuant to Section 84308(d)(1) would be required to disclose confirmation of that return at a public meeting within 60 days of the return or, if no public meeting is held within that time, as a written disclose in the agency's official records within the same timeframe.

Amend Regulation 18360.1 – Eligibility Requirements and Considerations for Campaign Violations -- Streamline (Tiers One and Two), Warning Letters and the Political Reform Education Program (PREP)

As noted above, recent amendments to Section 84308 raise the contribution threshold from \$250 to \$500. With this in mind, staff has amended the Section 84308 Enforcement penalty criteria in Regulation 18360.1(e)(12) to reflect that change.

At the January Commission, some concern was expressed regarding the appropriateness Section 84308's inclusion in Regulation 18360.1, and whether the Section 84308 provisions of the regulation should be further amended or altogether removed. As Executive Director West noted at the meeting, however, the Regulation excludes more serious violations of Section 84308 from eligibility for lesser penalties under Regulation 18360.1 through express criteria permitting lesser penalties only for minor and technical violations without significant public harm. For example, considerations for a potential warning letter include whether an untimely disclosure was untimely by 30 days or fewer *and* made prior to a decision being rendered in the proceeding. In contrast, violations eligible for *possible* inclusion in PREP and Tier One Streamline include “[a]n untimely disclosure was made prior to a decision being rendered in the proceeding.” No similar provision for disclosures made *after* an agency decision is included with respect to potential Tier Two Streamline eligibility.

Staff believes that Section 84308's general inclusion in Regulation 18360.1 is appropriate for the sake of resolving minor, more technical violations of the statute. Given the specific criteria limiting eligibility for Section 84308 violations to those with minimal public harm, and the fact that this criteria was only recently added to Regulation 18360.1 in March 2024, staff recommends keeping the regulation's Section 84308 provisions substantively the same.

Staff also discussed with the Enforcement Division whether Section 84308 violations should be included in Regulation 18360.1 at all and, if so, whether the regulation should be further amended to specify the circumstances in which a Section 84308 violation would potentially be eligible for the FPPC's streamline enforcement program, a warning letter, or PREP. The Enforcement Division noted that it has not handled many Section 84308 cases, but indicated that the violations eligible for the streamline program are not of the high public harm variety. The specific scenarios eligible under Regulation 18360.1 were carefully considered and well thought out and there is no apparent reason to amend the regulation at this time. Consequently, the Enforcement Division supports the minor clean-up amendments staff has proposed.

Amend Regulation 18705 – Legally Required Participation

Regulation 18705 sets forth the standards under which an otherwise disqualified official is permitted to take part in a decision because the official’s participation is legally required. In 2023, the Commission amended Regulation 18705 to encompass disqualifications under Section 84308. For the same reasons as the proposed amendments to Regulation 18360.1 above, staff recommends amending Regulation 18705 to remove and update references to the now outdated \$250 limit in Regulation 18705(b)(1)(B).

Education/Outreach

Following the January Commission meeting, staff contacted CalCities, the California State Association of Counties, the California Special Districts Association, and the California Association of Joint Powers Authorities to invite public comment and ensure they were aware of the proposed regulatory amendments. As noted above, staff received feedback from CalCities and CPAA, some of which was implemented into the revised amendment proposals.

Staff will distribute the amended regulations to interested parties via the Newly Adopted, Amended, or Repealed Regulations email list, update the “Newly Adopted, Amended, or Repealed” page on the Commission’s website, and make necessary updates to training and educational materials resulting from the regulatory changes.

Conclusion

The proposed amendments would conform existing regulations with the recently amended statutory provisions of Section 84308, eliminate redundant or outdated language, and clean up other outstanding issues in need of clarification in light of recent advice letters. Therefore, staff presents them for the Commission’s consideration and potential adoption, subject to any additional changes the Commission would like to make.

Attachments:

Proposed Amendments to Regulations 18438, 18438.2, 18438.3, 18438.4, 18438.5, 18438.6, 18438.7, 18438.8, 18360.1 & 18705