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To: Chair Miadich, Commissioners Baker, Wilson, and Wood

From: Dave Bainbridge, General Counsel
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Subject: Proposed Adoption of Section 84308 Regulations Implementing SB 1439

Date: June 5, 2023

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.

At the February 2023 Commission meeting, proposed regulations were presented to provide necessary Commission rules for the implementation and application of SB 1439. The proposed regulations generated significant interest and feedback from the regulated community. In April, staff conducted an Interested Persons ("IP") meeting to obtain additional input from the public regarding the revised regulatory language prior to consideration for adoption. Staff received several helpful written and oral comments prior to and during the IP meeting and has made several revisions to the proposed regulations to address many of the comments and incorporate suggestions. For the reasons discussed below, staff recommends the Commission adopt the proposed regulations.

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 the officer has received a contribution in excess of $250 within the preceding 12 months. The officer was 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 only 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 a 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 (CalCities) to identify common concerns and questions throughout the regulated community. Some of those questions were addressed in the *Kendrick* Opinion, No. O-22-002, issued in December 2022, but many questions and concerns raised through public comments were outside the scope of the requested opinion. Accordingly, staff prepared several regulatory amendments for the Commission's consideration with the goal of supplementing the Commission's opinion and clarifying Section 84308's application.

Throughout the regulatory process, staff has received a significant number of questions and comments regarding SB 1439, Section 84308, and the proposed regulations pertaining to Section 84308. In many cases, the input received was particularly detailed, focused on specific issues, and highlighted some of the challenges implementation of SB 1439 may present for governmental agencies and officers. Accordingly, staff has attempted to not only explain the reasoning behind the proposed regulations, but also how it addresses much of the feedback from the public.

Proposed Regulatory Actions

Adopt Regulation 18438 – Application of Government Code Section 84308

Proposed Regulation 18438 would specify that Section 84308's amended provisions do not apply to contributions made or received, or proceedings participated in, prior to January 1, 2023. As discussed at the February Commission meeting, this would essentially codify the Commission's *Kendrick* Opinion, No. O-22-002. The Commission could eventually repeal the regulation once it is no longer necessary.

In a letter submitted prior to the February Commission meeting, CalCities expressed the concern that the proposed language "currently reads as a broad amnesty provision for any violation of Section 84308 that occurred prior to January 1, 2023." Accordingly, staff has updated the proposed language of Regulation 18438 to better reflect the intended application.

Ahead of the IP meeting, CalCities also recommended that old versions of the regulations be kept on our website for officials who are still subject to the prior version of Section 84308.

Staff agrees this would be helpful and plans to maintain copies of the regulations currently in effect on a separate webpage until no longer necessary.

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

Section 84308(a) defines several terms used throughout the statute, including "agency" and "officer." Regulation 18438.1 further defines these terms, including clarifying when officers of an exempt agency are exempt from a proceeding, defining the term "officer of an agency" to include candidates concurrently serving in a decisionmaking governmental position, and defining "constitutional officers.

Since presenting Regulation 18438.1 at the February meeting, staff has further revised subdivision (a) and proposes removing subsections (1) and (2), given that those sections previously applied in the context of former Section 84308 exempting local elected officials. However, it is no longer necessary to specify the circumstances in which an exemption applies to an entire governing body of an agency as opposed to a subgroup within that body, as officers are subject to Section 84308 regardless of whether they are acting as a complete body or subgroup of the governing body.

Staff also proposes re-organizing and restating Regulation 18438.1's exception relating to members of the Governor's Cabinet into subdivision (b). Previously, staff proposed removing this exception, finding insufficient support in the statutory language for current Regulation 18438.1's exclusion of Cabinet members from the definition of "officer." In researching and considering the exception more, however, staff believes the intent of the exception was likely related to the understanding that members of the Governor's Cabinet, when acting in that capacity, are operating as an extension of the Governor, a statutorily exempted "constitutional officer."

Staff has also revised the proposed language defining "officer of an agency" to include those who "[h]ave decisionmaking authority with respect to the proceeding involving a license, permit, or other entitlement for use and is also a candidate for elected office *or has been a candidate within the 12 months prior to the governmental decision at issue*." (Emphasis added.) This is intended to clarify that Section 84308 applies even in the scenario where an officer has already lost an election.

Staff also proposes defining "officer of an agency" to refer to either: (1) officers who may make, take part in making, or attempt to use their official position to influence a decision in the license, permit or other entitlement for use proceeding; or (2) officers who exercise authority or budgetary control over the agency of officers who may do so. This would ensure that a wide range of officers are encompassed within the scope of Section 84308, which the Legislature intended to broaden. However, it would also exclude officers wholly unrelated to a proceeding, who the Legislature likely did not intend to prevent parties and participants from making contributions to. For example, if a participant has taken part in an entitlement for use proceeding before a city planning commission, the participant would understandably be prohibited from contributing to a planning commissioner while the proceeding is pending. However, a participant may want to make a contribution to a member of the city's library board, an office wholly unrelated to and whose officers have no influence or control over the planning commission

proceeding. Because the planning commissioner and library board member are both officers of the city, they could both be interpreted as "officers of the agency" for purposes of Section 84308, but it seems unlikely the Legislature intended Section 84308 to apply in such a sweeping manner, particularly in the context of large local jurisdictions. Accordingly, staff proposes defining the term "officer of an agency" to avoid such an application.

Additionally, following the postponement of the May 2023 Commission Meeting, staff had the opportunity to discuss the proposed regulations with legal staff at the Los Angeles County Metropolitan Transportation Authority ("LA Metro") and the Los Angeles County Counsel's Office. Responding to a request for clarification on whether the "officer" definition's reference to "head of an agency" was intended to include department and division heads, staff revised the proposed language to specify that "officer" includes the chief executive (such as a chief executive officer or city manager) of a state agency, or county, city, or district of any kind. This clarifies that department heads are not officers of an agency subject to Section 84308 unless they qualify as a candidate for elective office.

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." As discussed prior to the February Commission meeting, staff believes the analysis by the Attorney General, faced with a similar question, is sound and recommends adopting a similar definition. (See 82 Ops.Cal.Atty.Gen. 172 (1999).) However, in further researching the issue, staff also identified the Superintendent of Public Instruction as an additional elected state office recognized in the California Constitution and, consequently, recommends including the position in the regulatory definition of "constitutional officer."

Amend Regulation 18438.2 – Proceedings Under Section 84308

Whether and how Section 84308's provisions apply to a party, participant, or officer largely depend on the point at which a proceeding is considered "pending." For example, Section 84308(b) prohibits an officer from accepting, soliciting, or directing a contribution of more than $250 from a party while a proceeding involving a license, permit, or other entitlement for use involving the party is "pending." Similarly, under Section 84308(e)(2), a party is prohibited from contributing to an officer of an agency more than $250 while the proceeding is "pending before any agency." Accordingly, Regulation 18438.2 specifies the circumstances in which a proceeding is considered "pending."

In their letter submitted for the February Commission meeting, CalCities noted that "proceeding" was not sufficiently defined and recommended that FPPC regulations clearly define the term to avoid confusion. The California Political Attorneys Association also noted that the regulations did not address what constitutes a "license, permit, or other entitlement for use" under Section 84308(a)(5). Commission staff has also received questions on whether certain contracts qualify as a "labor contract," and what constitutes a "competitively bid contract," for purposes of Section 84308's exceptions. Consequently, the revised version of Regulation 18438.2 aims to address these questions and concerns and describe with greater specificity the types of proceedings that constitute a "proceeding involving a license, permit or other entitlement for use."

With respect to "competitively bid contracts," the proposed definition is consistent with prior Commission advice letters interpreting the phrase to apply to contracts where the agency is required to select the lowest qualified bidder. (See, e.g., *Collins* Advice Letter, No. A-20-138.) For the sake of providing greater specificity than simply referring to "qualified" bidders, staff proposes language similar to language used in the Public Contract Code and the Department of General Services' State Contracting Manual—that is, requiring "competitively bid contracts" be awarded to a responsible bidder with the lowest responsive bid. (See Cal. Pub. Contract Code Sections 1103, 10182, 10301, 20162; see also Department of General Services, State Contracting Manual, "Determining Responsive Bid and Responsible Bidder – 1404.2," available online.) The language is also similar to language used in many municipal codes. (See *Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209, 233-234 (writing, regarding the technical meaning of the phrase "competitive bidding" in the context of public procurement, "[v]irtually all authorities on government procurement and public contract law define the competitive sealed bidding process employed by the County in this case as one in which 'the award is made to the responsible bidder having the lowest responsive bid.'").) After speaking with LA County Counsel and LA Metro, staff revised the proposed definition to clarify that a competitively bid contract is a contract *required by law* to be awarded to the lowest responsible bidder with a responsive bid, not simply any contract awarded to the lowest bidder.

As drafted, Regulation 18438.2 would clarify that a "proceeding involving a license, permit, or other entitlement for use" is a proceeding involving an entitlement for use that is either (1) applied for by the party, (2) formally or informally requested by the party; or (3) a contract between the agency and the party or a franchise granted by the agency to the party, except for those types of contracts exempted under Section 84308. While subdivisions (a)(1) and (a)(2) would often involve overlap, staff's intent was to encompass scenarios where, for example, an agency, rather than a party, initiated a proceeding, but thereafter and during the proceeding the party makes a request for an entitlement for use.

Since the February Commission meeting, staff has also revised the proposed language that would define the term "pending." Prior to the IP meeting, staff had prepared two options for the Commission's consideration, largely based on feedback we had received from the regulated community. Options 1 and 2 present two approaches to defining "pending" that would result in significantly different applications of Section 84308. After considering the various comments received prior to and during the IP meeting, staff has drafted a third option, intended to address the concerns raised with respect to both Options 1 and 2.

Option 1

Under Option 1, a proceeding would be considered "pending" if the decision was before the officer for the officer's consideration, or if it is *reasonably foreseeable* the decision will come before the officer in the officer's decisionmaking capacity and the officer knows or has reason to know the application has been filed or the issue is otherwise within the agency's jurisdiction for its determination.

Option 1 proposes a greater divergence from the current regulatory language, which provides (in summary) that an entitlement for use proceeding is "pending before" an agency when: (1) the application has been filed; (2) the matter has been submitted to the officers of the

agency for their decision; and (3) the decision will not be purely ministerial. In contrast to these provisions, Option 1 would instead require either that the decision is before the officer for the officer's consideration or that it is reasonably foreseeable the decision will come before the officer in the officer's decisionmaking capacity and the officer knows or has reason to know that the issue is within the jurisdiction of the agency for its determination. In other words, under Option 1, a proceeding would not be considered "pending," for purposes of triggering Section 84308 and its restrictions related to contributions exceeding $250, in instances where a governmental decision is neither before the officer for the officer's consideration nor where it is not reasonably foreseeable the decision will come before the officer or the officer does not know or have reason to know of the proceeding.

While Option 1 represents a more substantial departure from the current regulatory language, it is aimed at addressing the new reality that with Section 84308's broadened scope, certain agencies have such large jurisdictions involving various departments and divisions within those departments that, in certain instances, an officer may be part of the same overall "agency" that an application has been submitted to, but has no practical reason or way of knowing of the application. Previously, this was not a significant issue because Section 84308's exemption of local elected officers effectively meant that proceedings involving licenses, permits, and other entitlements for use triggered Section 84308 considerations for a much smaller pool of officers more closely associated with the application.

Now that Section 84308 applies to local elected officers as well, it complicates application of that approach. Although many such officers could conceivably become involved in an application at some point in its procedural history, that is not always the case, nor do such officers necessarily have a realistic way of cross-referencing every application submitted to the various departments within the agency, particularly when dealing with large agencies such as counties or large cities. For example, ahead of the IP meeting, the Tulare County Administrative Office expressed preference for Option 1, writing:

> In contrast to Option 2, Option 1 provides a brighter line for when a matter is likely to be heard by the particular officer or board. This is because a matter can be within the jurisdiction of the agency without being within the jurisdiction of the officer.
>
> For example, when a Planning Commission decision is appealed to the Board of Supervisors, the Clerk receives the appropriate information regarding the parties and participants and can forward that to the members of the Board of Supervisors, long before the agenda item is scheduled to be heard. But many matters within the jurisdiction of the County which might be heard by the Planning Commission are never heard by the Board of Supervisors, either because they are resolved at the staff level with no involvement by any board, or because the Planning Commission decision is not appealed to the Board of Supervisors.
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> Under Option 2, the Board of Supervisors would be required to know when every development application is filed with the department in order to know whether an item "within the jurisdiction of the County" has been filed.

(Emphasis in original.)

Option 2

Under Option 2, an officer would be prohibited from participating in or voting on a matter if they have received a contribution in excess of $250 from a party, participant, or agent within the 12 months prior to a vote on the matter *or* while the matter is pending before an agency (i.e., not just pending before the officer).

Ahead of the IP meeting, California Common Cause commented in support of Option 2 and explained its concerns about perceived deficiencies with Option 1, writing :

> For example, [under Option 1] a special interest entity seeking a waste management contract could make a contribution of over $250 to a city councilmember after submitting a proposal to the city's public works department, knowing that the city's processes are such that it will be over one year before the proposal gets to the city council. Similarly, parties for large development projects, which can take well over 12 months to receive final approval, could ingratiate themselves to councilmembers or other [elected officers] and candidates by giving them large campaign contributions with the knowledge that their project is not likely to come before the councilmembers or other [elected officers] and candidates for at least a year.

Consequently, Common Cause argued that "Option 2 would prevent exploitation of the law that could occur under Option One."

Staff agrees that because Option 2 would more broadly define the term "pending," and therefore apply in a greater number of instances, Option 2 would potentially prevent a greater number of "pay-to-play" practices compared to Option 1. However, this is counterbalanced by legitimate concerns regarding the logistical difficulties of such an approach, which could lead to violations of Section 84308 despite some officers' best intentions and efforts. For example, a member of the Los Angeles County Board of Supervisors could receive $25 per month from the owner of a company that has submitted a building permit application to the County Building Department and have no practical way of identifying a prohibited contribution because (1) the issue has not come before the Supervisor; (2) the contributions are of a relatively small value that the Supervisor would not typically be aware of the contributions offhand; and (3) even if the Supervisor was aware of a permit application submitted to the County Building Department by a construction company, the Supervisor may not reasonably be aware of the identity of the owner of the construction company, such that the Supervisor could reject or return a contribution by the owner in time to avoid violating Section 84308.

While the above example illustrates some of the logistical issues officers could face with respect to a single contributor, the difficulties could be compounded when considering the volume of proceedings going on in a city, county, or other local government agency at a given time. Ahead of the IP meeting, the Santa Clara County Counsel wrote;

> 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 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.

(Emphasis in original.)

Option 3

In reviewing the various public comments received regarding Options 1 and 2, the primary concerns seem to be defining the term pending "pending" in a manner that: (1) is feasible to implement and adhere to; and (2) is effective in curbing "pay-to-play" practices as intended by the Legislature. Recognizing the value in both of these considerations, staff drafted Option 3 to address these concerns.

Option 3 would significantly differ from Options 1 and 2 by defining the term "pending" with a context-specific approach, rather than attempting to find a "one size fits all" solution. Many of the comments staff received regarding Options 1 and 2 focused on what conduct is reasonable based on what is known, or should be known, by an officer, party, participant, or agent, at the time. The difficulty with applying a standard that applies the same to all of these individuals, however, is that it does not take into account the fact that knowledge of a proceeding, and contributions made throughout that proceeding, is largely asymmetric. In other words, a Los Angeles County Supervisor might not have reason to know about a particular building permit application recently submitted to the County Building Department, but the party who submitted the application, or the participant who by definition has already taken part in the proceeding, certainly does.

With the above in mind, Option 3 would define a proceeding as "pending" based on the context. Option 3 would define proceeding as "pending" for a party or participant similar to Option 2—that is, once the entitlement for use decision is within the jurisdiction of the agency (e.g., once the application has been filed). Consequently, to borrow Common Cause's example, a special interest entity seeking a waste management contract would be prohibited from making a contribution of over $250 to a city councilmember after submitting a proposal to the city's public works department, despite knowing that the city's processes are such that it will be over one year before the proposal gets to the city council.

With respect to officers, Option 3 would define a proceeding as "pending" in the same way as Option 1—in short, when (1) the decision is before the officer or (2) it is reasonably foreseeable the decision will come before the officer and the officer knows or has reason to know the decision is within the jurisdiction of the agency.

In combination, Option 3 would mean parties and participants would refrain from making contributions exceeding $250 to an officer, even in instances where a decision has not yet come before the officer. However, officers would not be at risk of violating Section 84308 by accepting a contribution from a party or participant in instances where the officer does not know or have any reason to know about the proceeding. In effect, this would prevent a greater number of "pay-to-play" contributions, similar to Option 2, but would also take into consideration the circumstances in which an officer has reason to know about a proceeding and avoid potentially infeasible diversions of government resources for the purposes of tracking contributions and proceedings regarding decisions that may never come before the officer.

For the above reasons, although Options 1 through 3 each represent reasonable interpretations of Section 84308, staff recommends Option 3 as the solution that offers the greatest, logistically feasible protection against "pay-to-play" practices.

Amend Regulation 18438.3 – Agents Under Section 84308

Under Section 84308, the same rules regarding a party or participant's contributions exceeding $250 apply to the contributions of an agent of the party or participant. For example, a party and the party's agent could each permissibly contribute $100 to an officer in a proceeding, for an aggregate contribution of $200, but they would be prohibited from each contributing $150, as the aggregate $300 contribution would exceed the $250 amount Section 84308 permits. Although Section 84308 defines the terms "party" and "participant," it does not attempt to define the term "agent." Regulation 18438.3 fills that gap and defines the term for purposes of Section 84308.

As discussed during the February Commission meeting, staff proposes amending subdivision (a)'s definition of "agent" to clarify that it includes only persons who represent the party or participant in the proceeding, through methods such as appearing before or otherwise communicating with the governmental agency, that qualify as "agents" for purposes of Section 84308.

Following the February Commission meeting, staff has further revised subdivision (a)'s language to expressly require that the person acting as the representative of a party or participant in a proceeding also be compensated in order to constitute an agent. Staff believes this more accurately reflects the Legislature's intent to apply Section 84308 to those with a financial interest in the proceeding, as opposed to, say, those who simply volunteer to help a party or participant.

After the IP meeting, staff further revised subdivision (a)'s language to require that, to qualify as an agent, an individual's communications with an agency be "for the purpose of influencing" the proceeding, rather than merely "in connection with" the proceeding. This would help clarify that solely non-persuasive communications, such as a law firm assistant forwarding a communication by an attorney, do not qualify an individual as an agent. Staff also proposes new subdivision (c), which would further define communications "for the purpose of influencing" for purposes of the regulation and would specify that certain communications involving objective data are not considered "for the purpose of influencing" a proceeding.

Most recently, LA County Counsel and LA Metro requested the proposed definition of "agent" be revised to refer to a "pending proceeding," as opposed to a "proceeding" generally, to harmonize with the proposed language in other regulations that make reference to "pending proceedings." In considering the request, staff concluded that reference to a "pending proceeding" in the definition of "agent" would not have a substantive impact on the circumstances in which an individual is considered an agent and, consequently, has included the suggested language for the sake of consistency throughout the proposed regulations.

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 – Participants Under Section 84308

Section 84308(a)(2) defines the term "participant" as "any person who is not a party but who actively supports or opposes a particular decision in a proceeding involving a license, permit, or other entitlement for use and who has a financial interest in the decision . . . ." The same subdivision further explains that "[a] person actively supports or opposes a particular decision in a proceeding if that person lobbies in person the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence officers of the agency." Regulation 18438.4 further clarifies who constitutes a participant by defining the terms "lobbies in person," "testifies in person before the agency," and "otherwise acts to influence officers of the agency."

At the February meeting, the Commission suggested that Regulation 18438.4—which currently refers to communications made "directly, either in person or in writing," should be revised to also incorporate teleconferences, given their prevalence today. The Commission also noted that communications made "in writing" would fit more appropriately into the regulation's definition of "otherwise acts to influence," rather than its definition of "lobbies in person," given that "lobbying in person" typically implies face-to-face, rather than written, communication.

Staff has revised Regulation 18438.4 accordingly. Rather than amend the regulation to specifically refer to teleconferences, staff proposes removing the references to communicating directly "in person or in writing," such that the regulation's definition of "lobbies in person" would simply encompass direct communication generally, and a person would "otherwise act to influence" an officer when they communicate in some other manner for the purpose of influencing the decision in a proceeding.

Finally, in response to Common Cause's suggested clarification, staff has revised subdivision (c)(1) to refer to communications with an "officer or employee of the agency," rather than just an "employee of the agency."

Amend Regulation 18438.5 – Aggregated Contributions Under Section 84308

As noted above, contributions made by a party and a party's agent, or a participant and a participant's agent, are aggregated for purposes of Section 84308's $250 limit. Regulation 18438.5 establishes and clarifies requirements relating to aggregation.

Because current Regulations 18438.3 and 18438.5 both contain provisions relating to aggregation of contributions, staff proposes amending Regulation 18438.5 to lay out the aggregation process more succinctly and within a single regulation.

Since the February meeting, staff has revised the proposed language to better clarify the aggregation process. Prior to the February Commission meeting, the Commission also received a comment from CalCities recommending that the previously proposed language be revised to clarify the relevant period in which contributions made by an agent are to be aggregated with those made by a party or participant. Staff agrees with the need for clarification. Consequently, staff proposes defining the period as the shorter of either the previous 12 month period or "the period beginning on the date the party or participant first hired the agent as either a paid employee, contractor, or consultant."

At the IP meeting, staff also received a comment from attorney Lacey Keys suggesting the proposed language be further amended to harmonize with Section 82015.5—the statute in the Act addressing aggregation of contributions generally. Staff agrees the regulation would benefit from this change and has amended the proposed language to clarify Section 82015.5 applies to contributions by parties, participants, and their agents, with the exception of uncompensated officers of nonprofit organizations. The Commission received several comments prior to the February meeting raising concerns about Section 84308's potential impact on non-profit volunteers, including board members, who do not have a financial interest in entitlement for use proceedings. The Legislative history indicates the Legislature was concerned with pay-to-play or *quid pro quo* practices. In the context of volunteer nonprofit board members who do not stand to personally gain as a result of a governmental decision outcome, staff agrees that treating their contributions as the directors and controllers of the nonprofit as equivalent to contributions *by* the nonprofit does not reflect or further the purposes of Section 84308. Accordingly, staff has included the aforementioned language excepting uncompensated officers from the aggregation process.

Since the IP Meeting, staff has also revised Regulation 18438.5 to include a new subdivision (b), which would clarify that an officer does not violate Section 84308(b)-(d) by accepting, soliciting, or directing a contribution from an individual or entity required to be aggregated under Section 82015.5 where: (1) the party, participant, or agent has not disclosed the contribution and (2) the officer does not otherwise know the contribution must be aggregated pursuant to Section 82015.5 and Regulation 18438.5. Staff has received multiple comments expressing concern about an officer's ability to immediately identify contributions that should be aggregated in circumstances where the officer does not have reason to know about a contributor's connection to a party, participant, or agent. In many cases, complex corporate structures, company names, organizational charts, and other obstacles may impede an officer's ability to adhere to Section 84308, despite their best efforts. The proposed subdivision is intended to avoid circumstances in which an officer violates Section 84308 by accepting a contribution the officer had no reason to suspect was impermissible or in any way related to a proceeding pending before them. Staff is also proposing amending Regulation 18438.8 to specify parties are required to disclose all contributions required to be aggregated under Section 82015.5. Thus, an officer would not violate Section 84308 by accepting a contribution from a related business entity prior to knowing of the relationship between the entity and the party or participant. Once the officer *knows* of the relationship, the officer would be prohibited from any

additional contributions and would also have the opportunity to return the portion of any the contribution exceeding $250 or recuse themselves from the proceeding.

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

As noted above, while a proceeding is pending and for 12 months thereafter, an officer is prohibited from receiving, soliciting, or directing a contribution exceeding $250 from a party to the proceeding or a participant if the officer knows or has reason to know the participant has a financial interest in the proceeding. Likewise, parties and participants are prohibited from making such a contribution during the same period. Regulation 18438.6 defines when a person "makes" and when an officer "accepts," "receives," "solicits," or "directs" a contribution.

Ahead of the February meeting, the Commission received a comment from Tyler Bonanno-Curley, the Manager of Government Affairs for the City of Long Beach, expressing uncertainty as to whether the Levine Act applies to officeholder accounts, given that such accounts were not referenced in Regulation 18438.6. Currently, Regulation 18438.6 simply refers to contributions made to a person's "own candidacy or own controlled committee." CalCities also recommended amending the proposed regulatory language because the scope of the phrase "committee controlled by the officer" was unclear. Staff has revised the proposed language for Regulation 18438.6 to clarify that the term "controlled committee" incorporates various types of committees, including officeholder controlled committees formed pursuant to Section 85316(b) and Regulation 18531.62—that is, the "officeholder accounts" Mr. Bonanno-Curley was referring to.

Additionally, as suggested by Commissioner Wood, references to "an officer or candidate" have been revised to simply refer to "an officer," given that the term "officer" is defined by Section 84308 to include candidates.

Staff also proposes 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 Regulation 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. Since the February meeting, staff has revised the proposed language to state the standards more succinctly. Staff has also incorporated Common Cause's recommendation that the standard for soliciting not be limited to "personal[] requests" made "either orally or in writing." Staff agrees that such language could lead to loopholes in how an officer requests a contribution from a party or participant and eliminating the specification that a solicitation be made "orally or in writing" would be consistent with staff's proposed amendment to Regulation 18438.4—that is, applying the provisions to communications generally, rather than needing to specify, for instance, whether the regulation prohibits solicitations made by teleconference.

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).

Repeal and Adopt Regulation 18438.7 - Prohibitions and Disqualification Under Government Code Section 84308

Under Section 84308(b), when an officer knows or has reason to know that a participant has a financial interest in a proceeding, the officer is prohibited from accepting, soliciting, or directing a contribution exceeding $250 from the participant. Likewise, an officer is prohibited from taking part in a proceeding if, within the preceding 12 months, the officer has willingly or knowingly received a contribution exceeding $250 from a party or party's agent, or participant or participant's agent if the officer knows or has reason to know of the participant's financial interest in the decision. Additionally, an officer is permitted to return an otherwise disqualifying contribution if, within 30 days from the time the officer knows, or should have known, about the contribution and the proceeding. Regulation 18438.7 specifies when an officer has reason to know of a participant's financial interest, when the officer knows or should have known about a proceeding, and when the officer knows or should have known about a contribution.

Staff's proposed language for Regulation 18438.7 presents several changes both to the current regulatory language and the language proposed at the February meeting. Given the extent of proposed changes to the current regulatory language, staff proposes repealing and adopting the regulation, rather than amending it.

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 has amended Regulation 18438.7 to address these concerns.

Proposed subdivision (a) provides the standards by which an officer is considered to know or have reason to know that a participant has a financial interest in a proceeding. At the February meeting, staff proposed language detailing various types of facts that officers should consider in determining whether they know or have reason to know of a participant's financial interest. However, this ultimately resulted in a somewhat unwieldy regulation that could run the risk of unintentionally suggesting that factors not specified in what was intended as a non-exhaustive list do not need to be considered by officers. Accordingly, staff has revised the proposed language to clarify that officers must consider all relevant facts known to them at the time of the decision, while stating in a more succinct fashion certain broad types of facts that officers should consider.

In addition to the broad requirement of considering all known, relevant facts, staff is also proposing language in subdivision (a)(2) that would essentially establish certain "bright line" rules that would define circumstances in which an officer is deemed to have reason to know of a participant's financial interest and consequently may not take part in a proceeding unless additional information known to the officer establishes clear and convincing evidence it is not reasonably foreseeable the decision will have a material financial effect on the participant's

economic interests. This is very similar to the approach the Commission has taken with conflict of interest regulations.

Similar language was included in a draft of the regulation discussed at the IP meeting, but public comments indicated that staff's intent was not effectively conveyed. The purpose of establishing bright line standards for these particular scenarios is that Section 84308 prohibits officers from accepting contributions exceeding $250 from participants where the officer has reason to know of the participant's financial interest in the decision. In staff's experience with conflicts of interest, the scenarios included in subdivision (a)(2) are instances that frequently and consistently indicate a financial interest in a decision in the absence of clear and convincing evidence to the contrary. Accordingly, while these are not the only instances in which an officer may have "reason to know" about a participant's financial interest, they are clear examples in which an officer should be deemed to have "reason to know" of an interest in the absence of clear and convincing evidence to the contrary.

Proposed subdivision (b),"Willful or Knowing Receipt of a Contribution," reorganizes current subdivision (c) and would further establish that an officer willfully or knowingly receives a contribution when the officer is aware of certain facts that should prompt the officer to investigate whether the party or participant has made a contribution exceeding $250 within the previous 12 months.

Under subdivision (b)(2), staff has proposed two options for the Commission's consideration. The Commission may want to consider adopting one or both options, as they are not mutually exclusive. Option 1 would provide that an officer, lacking actual knowledge of a contribution, does not have "reason to know" of a contribution based solely on the fact that the contribution was previously reported under the Act's reporting provisions. Option 2 would state that an officer *does* have reason to know of a contribution previously reported under the Act's reporting provisions made by a party in a proceeding noticed on an agenda for a public meeting before the body or board or, for officers not on a body or board, where the proceeding is otherwise before the officer in the officer's decisionmaking capacity.

Option 1 is intended to address the idea that although a contribution by a party or participant may have been properly reported in the officer's campaign statements, an officer cannot reasonably be expected to commit each contribution to memory. For example, when an individual comments during a public meeting for the first time and establishes themselves as a participant with a financial interest, an officer just learning of this participant's involvement in the proceeding cannot reasonably be expected to immediately know that the participant contributed $300 to the officer's campaign seven months ago. This is particularly true given that Section 84308 does not require participants and their agents to disclose their contributions, as the statute requires of parties and their agents. However, an alternative solution would be for officers to maintain a list of contributors that the officers can refer to during proceedings, which they could use to cross-reference with parties, participants, and agents who take part in the proceeding.

Option 2 is intended to address the idea that although Section 84308 requires parties and their agents to disclose their contributions exceeding $250, officers should not solely rely on that

requirement for purposes of taking part in or recusing themselves from a proceeding. In the instance where an officer has received notice of a party's involvement in a proceeding ahead of a public meeting, the officer has adequate opportunity to determine whether that party has made a disqualifying contribution under Section 84308.

Recognizing the prospect of cross-referencing contributor lists in real-time during public meetings could pose logistical challenges that might interfere with effective governance and officers' efforts to adhere to Section 84308's requirements, staff recommends adopting both Options 1 and 2.

In proposed subdivision (c), staff proposes more clearly establishing the standards under which an officer can return a contribution. Currently, Regulation 18438.7(b) establishes when an officer "knows, or should have known, about a proceeding pending before the agency . . . ." However, under Section 84308, this fact is only relevant in the context of the officer's ability to return a contribution. Accordingly, staff proposes the language presented in subdivision (c),"Return of Contribution," to clarify the relevant standards for returning a contribution. The proposed language would also clarify that an officer may return a contribution from a participant prior to the officer knowing or having reason to know that the participant has a financial interest in the proceeding.

In subdivision (d), staff proposes establishing a standard by which an otherwise disqualified officer can take part in a proceeding prior to returning a contribution under certain conditions. Staff has revised the proposed language such that it would allow an officer to take part in a decision at a public meeting if they: (1) have known, or should have known, about the contribution and proceeding for fewer than 30 days; (2) disclose the disqualifying contribution and confirm the return will occur within 30 days from the time the officer knew, or should have known, about the contribution and proceeding; and (3) the contribution is, in fact, returned within that timeframe.

Proposed subdivision (d) contrasts with a provision proposed at the February Commission meeting, which would have provided the officer with two working days to return the contribution, similar to another regulatory provision pertaining to the return of certain gifts. After additional review of the statutory language and consideration of public comments, however, staff proposes tying in this provision to the general 30-day return timeline under Section 84308(d)(1), which does not expressly require that a contribution be returned prior to the officer taking part in the proceeding, as long as it is returned within the 30 day timeframe.

Regulation 18438.8 – Disclosure Under Section 84308

Section 84308(c) requires that an officer who has received a contribution exceeding $250 from a party, participant, or agent thereof, within the preceding 12 months disclose that fact on the record of the proceeding and recuse themselves from taking part in the proceeding. Likewise, Section 84308(e)(1) requires that a party disclose on the record of the proceeding any contribution exceeding $250 made by the party or the party's agent within the preceding 12 months. Regulation 18438.8 clarifies the disclosure process.

At the February Commission meeting, staff proposed non-substantive amendments to Regulation 18438.8. However, comments received prior to and during the meeting, including those made by CalCities, highlighted the need to address circumstances where an officer learns of a contribution during, rather than prior to, an entitlement for use proceeding. Accordingly, staff has amended subdivisions (a) and (b) in recognition of such circumstances allowing an officer to make the necessary disclosure after learning of a contribution during a meeting but prior to continuing to take part in the proceeding. Staff also recommends amending the requirement so that, where no public meeting is held, disclosures be made in "the agency's official records." This is similar to language used with respect to disclosures made under Section 1090 and also responds to a request made by public comment suggesting that the current language, "the written record of the proceeding," is unnecessarily ambiguous.

As discussed above, staff has further amended the proposed language to specify that parties are required to disclose all contributions required to be aggregated under Section 82015.5. Staff believes this requirement is appropriate, as contributions by related entities are treated as contributions by the party and Section 84308(e)(1) requires parties to disclose any contribution exceeding $250 made within the preceding 12 months by the party or the party's agent. Further, parties are in a better position to determine the contributions that must be aggregated due to access to information related to corporate structure, control, ownership, etc. that may not be readily available to officers.

After discussing the issues with LA County Counsel and LA Metro, staff has also revised Regulation 18438.8 to provide that disclosure may be made by the officer or an employee of the agency on behalf of the officer and such disclosure may be made orally or in writing at a meeting, such as a list of relevant contributions provided as part of a meeting agenda. Given the wide range of agencies and the numerous differences between them (e.g., jurisdiction size, meeting process, meeting length), staff believes the amendment is appropriate, as the regulation would still ensure disclosure is provided and transparency is maintained, but would provide flexibility that would allow meetings to run effectively and efficiently.

Staff also proposes removing subdivision (c) and inserting the relevant disclosure requirements for officers and parties into subdivisions (a) and (b), respectively.

Regulation 18705 – Legally Required Participation

Section 87101 provides that "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 provides the standards in which an otherwise disqualified official is permitted to take part in a decision because the official's participation is legally required. Because disqualification under Section 84308 is premised on an official's disqualification based on a party or participant's financial interest under Section 87100, staff proposes amending Regulation 18705 to encompass disqualifications under Section 84308.

As discussed at the February Commission meeting, staff proposes amending Regulation 18705 to apply to permit officials to take part in decisions they would otherwise be disqualified

from taking part in where their participation is legally required. Since the February meeting, staff has revised the proposed language in response to a comment by CalCities pointing out that, in instances where an officer becomes aware, during a meeting, of a contribution that requires disclosure, an officer may not feasibly be able to provide the previously proposed details regarding the contribution. Staff agrees and has revised the proposed language to require the provision of more basic details regarding the contribution, which would still provide adequate disclosure and allow others to obtain additional details regarding the contributions.

For the same reasons discussed with respect to Regulation 18438.8, staff also proposes amending Regulation 18705 to provide that disclosure in the context of legally required participation may be made by the officer (referred to as "official" or "public official" here, due to the broader scope of the regulation) or an employee of the agency on behalf of the officer, and may be made orally or in writing.

Education and Outreach Efforts

Upon adoption of the regulations, Commission staff will update the Section 84308 fact sheet, as well as other educational materials. Staff also plan on creating a comprehensive Section 84308 training and offering the training to government agencies and officials. Staff will also distribute the amended regulation to interested parties via the Newly Adopted, Amended or Repealed Regulations email list and update the "Newly Adopted, Amended or Repealed Regulations" page on the Commission's website.

Conclusion

Since first discussing the proposed regulations at the February Commission meeting, and after additional discussion at the IP meeting held in April and Law and Policy Committee meeting in May, staff has taken into consideration the questions, comments, concerns, and recommendations of the regulated community and interested persons, as well as the Commission's feedback. Staff has endeavored to incorporate this input into the text of the proposed regulatory language for the purposes of implementing, interpreting, and making specific the Legislature's intent in amending Section 84308. Staff also recognizes and has addressed many of the regulated community's concerns, both technical and practical, with respect to the changes brought on by SB 1439. Staff recommends the Commission adopt the proposed regulations, notwithstanding any additional revisions the Commission may elect to make. Staff thanks the regulated community for the significant level of feedback received throughout the regulatory process, and is prepared to answer any questions the Commission may have.

Attachment

- Regulation Packet (Regulations 18438-18438.8, 18705)