

SAN BERNARDINO
COUNTY

COUNTY COUNSEL

Tom Bunton
County Counsel

Julie J. Surber
Principal Assistant
County Counsel
Direct dial 909-387-4119

March 14, 2023

Via email CommAsst@fppc.ca.gov; Advice@fppc.ca.gov and U.S. Mail

Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

RE: Comments on Draft Regulations re Senate Bill 1439

Dear Fair Political Practices Commission,

San Bernardino County respectfully submits these comments in response to the draft regulations promulgated by the Commission regarding Government Code section 84308 and discussed at the Commission's February 16, 2023, meeting.

18438.1(b) - If a member of a local agency, for example a Board of Supervisors, sits on a committee that is covered by section 84308, and the Board member appoints an alternate to serve on the committee in his absence, must the alternate make disclosures or recuse himself from voting based on contributions received by the Board member? In other words, are contributions received by the Board member imputed to the alternate?

18438.2(a) - Section 84308 excludes from the definition of a license, permit or other entitlement for use a "competitively bid, labor, or personal employment contracts." In FPPC advice letters, the term competitively bid has been narrowly defined to include only those contracts that are awarded to the lowest bidder, does that interpretation still apply? Additionally, would a contract with a temporary help agency for the placement of temporary employees fall within the definition of either a labor contract or a personal employment contract?

18438.2(b)(2)-What does "has reason to know" mean? Does that mean a local agency, such as the County, has an affirmative duty to prepare a list of every application or proceeding that may foreseeably come in front of the Board of Supervisors and provide that list to the Board members? Or is "reason to know" defined similar to 18438.(c) which states an officer knows, or should have known, about a proceeding when they receive "notice of the license, permit or other entitlement proceeding" which includes receipt of an agenda identifying the proceeding and the party or other persons affected by name.

Does the notice actually have to be received by the officer or is receipt by a staff member sufficient to put an officer on notice?

Does an officer have actual knowledge of a proceeding if his or her staff member has knowledge of the proceeding?

BOAR() OJ- SUI'L-R\JsOI{S

Cam PAUL Cook (Rn.)
Vice Chairman, First District

Jesse ARMENDARIZ
Second District

DAWN ROWE
Chairman, Third District

CURT HACMAN
Fourth District

JoE BACAL, JR.
Fifth District

Leonard X. Hernandez
Chief Executive Officer

18438.3(a) - Does this definition of "agent" include an employee of the "party" company if they appear before or communicate with the County? Under section (b) it seems to indicate "agent" is a third party.

18438.4 and 18438.7 - Is a labor union capable of having a financial interest that will cause the labor union to be considered a participant?

For example, a large development project comes before the Board of Supervisors for approval, and a local labor union appears at the Board meeting with multiple representatives speaking in favor of the development project, stating the project would create new jobs for members of the union. Is the financial benefit to the members of the union in obtaining employment a sufficient financial interest to consider the labor union a participant?

18438.4 - Where a contract is awarded after a request for proposals is released, are all of the proposers who responded to the request for proposals considered participants?

18438.5(b)- Under 84308 and 18438.5 does "party" include the officers of a party that is a corporation/LLC? For example, the Chief Executive Officer, the President, Chairman of the Board, or the Chief Financial Officer?

18438.5 - For purposes of aggregation, are contributions made by a Political Action Committee (PAC) subject to the aggregation rule? For example, if a corporation who is a party to a proceeding, is under the control and direction of the same individuals who control and direct a PAC, will the contributions from the corporation and the PAC be aggregated for purposes of 84308?

18438.5 - Can a non-profit organization be considered an "otherwise related entity"?

Cure provisions - Section 84308(b) prohibits the receipt, solicitation, and direction of a contribution "during a proceeding" and for 12 months after a decision has been reached. Subsection (d)(2)(A) allows for an officer to cure the acceptance, solicitation, or direction "during the 12 months after a final decision is rendered" by returning the funds within 14 days. Subdivision (d)(1) addresses the ability to cure the receipt of a contribution which would require disqualification under subsection (c) [addressing receipt of a contribution during the preceding 12 months] by returning the contribution within 30 days. Reading all those provisions together clarification in the regulations on the following is requested:

May the cure provisions under (d)(1) be utilized to cure a violation under subsection (b) for a contribution that is received while a matter is "pending"?

(d)(1) states: "If an officer receives a contribution which would otherwise require disqualification under this section, and returns the contribution within 30 days from the time the officer knows, or should have known, about the contribution and the proceeding involving a license, permit, or other entitlement for use, the officer shall be permitted to participate in the proceeding." Does the 2 working days identified in proposed regulation 18438.7(f) conflict with the 30-day time frame set forth in subsection 84308(d)(1)?

Under section 84308(b) it states for 12 months following the decision an officer shall not accept, solicit or direct a contribution of more than \$250 from a party or party's agent. Under the cure provisions in section 84308(d)(2)(A) how does an officer "cure" an improper "solicitation" if the officer is not receiving the contribution, or an improper directing of a contribution when the third party receives the contribution?

Under 18438.6(c)-What does "has reason to know" mean?

18438.7 - The added language addressing financial interest in some instances uses specific legal principles that will be difficult to apply in the average proceeding before a local agency. For example, 18438.7(b)(2) uses the terms "no clear and convincing evidence" the proceeding will not have a "measurable" impact on a participant's real

property interest or financial interest. In a typical proceeding to, for example, determine if a conditional use permit should be issued, there is no evidence of the financial impact of granting the permit on individuals who are potential participants. With participants in particular, the officer may only become aware of the participants' involvement at the time of the hearing on the matter, which would not provide time to consider the very detailed financial interest definition provided in the regulation. A more streamlined approach to determining financial interest in a way that could be effectively utilized by a local agency would be very helpful.

18438.7(f) - Under the proposed regulations an otherwise disqualified officer may take part in a proceeding prior to returning the contribution if the officer does not know or have reason to know about the contribution and the proceeding prior to public meeting. However, most of these meetings will be governed by the Brown Act and an agenda will be published before the meeting. If the intent is to give an officer the ability to still participate if the contribution is returned, a revision to the regulation to state the officer did not know about the proceeding prior to the publication of the agenda is required.

The proposed regulations do not address how the requirements of Section 84308 apply to an elected official who may have influence over issuance of a permit, contract, license, etc. but the final decision on such matters rests with a different legislative body, such as a county Board of Supervisors, or is approved by a separate department such as the purchasing department?

Thank you for your consideration of our comments.

Very Truly Yours,

TOM BUNTON
County Counsel

Principal Assistant County Counsel

JJS:agr
#2P03499