



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

From: Dave Bainbridge, General Counsel
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Subject: Prenotice Discussion of Amendments to Regulation 18202

Date: September 11, 2023

Executive Summary

Proposed amendment to Regulation 18202 makes clear that actions taken by the California Citizen Redistricting Commission (CRC) in drawing district lines are quasi-legislative administrative actions, which in effect clarifies that attempts to influence the CRC may constitute lobbying under the Political Reform Act (Act). Proposed amended Regulation 18202 is presented for the Commission’s consideration and recommendations. It is anticipated that the Regulation will be presented to the Commission at the November 16th, 2023, meeting for adoption.

Reason for Proposed Actions

It was brought to the attention of staff that there may be uncertainty within the regulated community as to whether the Act’s lobbying provisions applied to attempts to influence the actions of the CRC. This regulation is intended to clarify that the CRC performs “administrative action” under the Act and therefore attempts to influence the CRC are subject to the Act’s lobbying requirements and prohibitions. Explicitly stating this in regulation is particularly helpful in this instance because of the infrequency of the redistricting process.

Background

The California Citizens Redistricting Commission

Every 10 years, after the federal government publishes updated census information, California must redraw the boundaries of its Congressional, State Senate, State Assembly and State Board of Equalization districts, so that the districts correctly reflect the state’s population. The CRC was established in November 2008, when voters passed the “Voters FIRST Act.” The Voters FIRST Act authorized the CRC to draw new district lines for state offices, a duty previously held by the California Legislature. In 2010, the “Voters FIRST Act for Congress” added the responsibility of drawing Congressional districts to the CRC.

The CRC is made up of 14 members – five members of the Democratic Party, five members of the Republican Party, and four members not affiliated with either the Democratic or Republican parties. The initial and supplemental applications to be appointed to the CRC are reviewed by three independent auditors from the California State Auditor, 120 applicants are

picked to be interviewed, then 60 applicants are presented to the State Legislature. The State Legislature has the option of removing 24 applicants (8 from each category). The State Auditor then draws three members of the Democratic Party, three members of the Republican Party, and two not affiliated names at random, picking the first eight members of the CRC. The first eight members then select the final six.

The CRC has one year to complete and vote on district maps. During this time the CRC will draw district lines, research and analyze pertinent data to their decision making, hire support staff, and prepare legal defense if needed. Additionally, the CRC is required to hold public meetings and accept public comment.

As with any state agency, the CRC is required to adopt and promulgate a conflict of interest code and designated officials of the agency, including the Commissioners for the CRC, are required to file Statements of Economic Interest (Form 700). The FPPC approved the CRC's Conflict of Interest Code in 2015 and has provided advice to current and prospective CRC commissioners numerous times on their obligation to file Statements of Economic Interest. The State Auditor required the last round of applicants for the CRC to submit a Form 700 as part of the application process, similar to a candidate for office.

Quasi-Legislative Administrative Action and Lobbying

A lobbyist is any person who receives \$2,000 or more in a calendar month, or whose principal duties as an employee are, to communicate with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action. (Section 82039(a)(1).) "Influencing administrative action" is defined as "promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means." (Section 82032.) Administrative action is "the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking proceeding *or any quasi-legislative proceeding.*" (Section 82002(a)(1), [emphasis added].)

Any person qualifying as a lobbyist, as well as lobbyist firms and lobbyist employers are subject to the lobbyist provisions in Sections 86100 through 86300 of the Act, which includes requiring registration as a lobbyist and imposing various financial reporting requirements and limits on gifts and payments to public officials. The express purpose of regulating lobbyists is that "[t]he activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials." (Section 81002(b).)

Under the definition of state agency provided in Section 82049, a state agency is "every state office, department, division, bureau, board and commission, and the Legislature." As a state established commission, the CRC is a state agency. An agency official is "any member, officer, employee, or consultant of any state agency who as part of that person's official responsibilities participates in any administrative action in other than a purely clerical, secretarial, or ministerial capacity." (Section 82004.) Commissioners for the CRC are members of a state agency who participate in administrative action beyond a purely clerical capacity and therefore are "agency officials" under the Act. The final determination as to whether lobbying rules apply to attempts to influence the CRC is whether the CRC conducts quasi-legislative proceedings.

While the Act does not define quasi-legislative, California courts have often defined the term in the context of judicial review. Courts have found that “quasi-legislative acts involve the adoption of rules of general application on the basis of broad public policy.” (*Save Civita Because Sudberry Won’t v. City of San Diego* (2021) 72 Cal.App.5th 957, 983 [An agency amendment of planning documents was determined to be a quasi-legislative act.].) For example, courts have repeatedly determined that decisions surrounding drawing lines for zoning constitute quasi-legislative action. (*Tracy Rural County Fire Protection Dist. v. Local Agency Formation Com. of San Joaquin County* (2022) 84 Cal.App.5th 91; *Las Virgenes Homeowners Fed’n v. County of L.A.* (1986) 177 Cal.App.3d 300; *Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302 [The court noted that “the rezoning of property, even a single parcel, is generally a quasi-legislative act.”].)

For purposes of the Act, Regulation 18202 further defines quasi-legislative proceedings by clarifying what is not quasi-legislative. While there are many exclusions listed in the Regulation, including exclusions for quasi-judicial and ministerial proceedings, none encompass a generally applicable action applying throughout the state such as the redistricting decisions.

Turning to the duties of the CRC, the CRC is required to hold public meetings and accept public comment and ultimately draws new district lines, a duty previously performed by the State Legislature. The lines drawn by the CRC will have a significant impact on the citizens of California and the democratic process. Applying the definitions of quasi-legislative above, the CRC’s decisions will apply generally on the basis of broad public policy. Further, we can analogize the drawing of lines in the zoning process to the drawing of district lines and determine that the actions performed by the CRC are similarly quasi-legislative actions. As the CRC performs quasi-legislative proceedings which fall within the definition of administrative action, any attempt to influence that action is lobbying. Persons lobbying the CRC who qualify as lobbyists under the Act are required to comply with the lobbying provisions in Sections 86100 through 86300.

Proposed Regulatory Actions

Proposed amended Regulation 18202 makes clear that the actions performed by the CRC are quasi-legislative by adding subdivision (b) which states: “Actions taken by the California Citizens Redistricting Commission as part of the process to draw district lines are quasi-legislative administrative actions.” This provision memorializing the Commission’s interpretation of the Act’s lobbying provisions as they relate to the CRC will provide clear guidance when redistricting occurs after the 2030 census, and presumably in subsequent decades.

Conclusion

Proposed amendment to Regulation 18202 will memorialize the Commission’s determination that lobbying rules apply to actions taken by the CRC as it makes clear that the CRC performs a quasi-legislative function. Staff seeks feedback and recommendations from the Commission and will bring back the proposed amendment for adoption at a later date.

Attachment:
Proposed Amendment to Regulation 18202/18239