



February 15, 2023

Chair Richard C. Miadich
Commissioner Catherine Baker
Commissioner E. Dotson Wilson
Commissioner Abby Wood
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

Sent Via Email: CommAsst@fppc.ca.gov

RE: Comment letter on February 16, 2023, Agenda Item 5 - Prenotice Discussion of Levine Act Regulations

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

I write today on behalf of the FPPC Committee¹ of the City Attorneys Department of the League of California Cities (Cal Cities).² The FPPC Committee respectfully requests consideration of the following comments on the proposed new and amended regulations interpreting and implementing Government Code Section 84308³ as the result of the passage of SB 1439 in 2022.

As explained in the Staff Memo dated February 6, 2023, the passage of SB 1439 has raised substantial questions from the regulated community regarding how Section 84308 will apply, as amended. We appreciate staff's work on the new regulations to address many of those issues; however, several questions remain. The remaining ambiguity should be addressed so the regulated community clearly understands the requirements of Section 84308.

¹ The FPPC Committee is comprised of city attorneys who provide Political Reform Act guidance to public officials on a regular basis. Pursuant to the City Attorneys Department [bylaws](#), the Committee is responsible for monitoring FPPC proceedings and advising the FPPC of city concerns and practical implications of proposed policies.

² Cal Cities is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities monitors state and federal legislation of concern to cities and identifies legislation, including proposed rules and regulations, that have statewide significance.

³ All future references to Section 84308 are to Government Code Section 84308.

Overarching Comment

"Proceeding" is not defined and could be confusing, as the dictionary definition of the word has a dual meaning - it can refer to either a "hearing" OR a series of steps in an adjudicatory or administrative process. The regulations should clearly define the term "proceeding."

Regulation 18438 – Application of Government Code Section 84308

The FPPC Committee members believe Regulation 18438 is intended to apply only to new obligations imposed by SB 1439; however, it currently reads as a broad amnesty provision for any violation of Section 84308 that occurred prior to January 1, 2023. The regulation should be amended to accurately reflect the intent.

Regulation 18438.1 - Officers and Agencies Under Government Code Section 84308

Regulation 18438.1, subd. (c)(4) should be amended to read: "Have decisionmaking authority with respect to the proceeding involving a license, permit, or other entitlement for use and is also a candidate for elected office [for the agency.](#)"

Regulation 18438.2 – Proceedings Under Section 84308

The phrase "this includes" in Regulation 18438.2, subd. (b)(1) should be amended to read "this means," because "includes" suggests an exemplary, not exclusive, list.

Regulation 18438.2, subd.(b)(2) should be amended to read: "The officer knows or has reason to know that an application has been filed, or a proceeding before the agency has commenced, and that it is [reasonably](#) foreseeable the decision will come before the officer in the officer's decisionmaking capacity."

Regulation 18438.3 – Agents Under Section 84308

The FPPC Committee is concerned that, in practice, public officials will not always be apprised of when a person is acting as an agent of a party or participant, making compliance impossible. The FPPC Committee believes there should be a requirement that agents identify themselves as such, i.e. make it clear when they are communicating on behalf of a party or participant.



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

Recognizing this is not a substantively new regulation, the FPPC Committee members note that the definition of "lobbies in person" in Regulation 18438.4, subd. (a) is odd - normally "in person" means physically in person, not communicating in writing. Written communication should instead be included under "otherwise acts to influence" in Regulation 18438.4, subd. (c).

Regulation 18438.5 – Aggregated Contributions Under Section 84308

Regulation 18438.5 seems to assume that a public official knows, or has reason to know, that a donor was acting as an agent for another party, or that there is a parent/subsidiary relationship between two entities. This is not always the case. The regulations should address these factual realities.

The FPPC Committee recommends that Regulation 18438.5, subd. (a)(2) be amended to read:

(2) All contributions made by an agent of the party or participant, as that term is defined in Regulation 18438.3 and subdivision (b) of this Regulation, during the 12-month period or ~~subsequent to~~ from the date on which the agent was first ~~employed~~ engaged by the party or participant, whichever is shorter.

These amendments are necessary as the use of the phrase "subsequent to" could be interpreted as omitting the first day and use of the term "employed" suggests that the agent must be an employee as opposed to a consultant or unpaid volunteer agent.

The FPPC Committee recommends that Regulation 18438.5, subd. (b) be amended to read:

(b) A "party," "participant," or "agent" includes any parent or subsidiary entity, otherwise-related business entity, or individual who directs or controls the entity or the entity's contributions. All contributions by these entities and individuals during the applicable period shall be aggregated with the party's, participant's, or agent's other contributions when determining the total contribution pursuant to subd. (a).

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

Regulation 18438.6, subd. (a) should be amended because, as drafted, it is unclear whether “a committee controlled by the officer” is intended to mean a committee controlled by the officer for their own candidacy, or any committee controlled by the officer (e.g. for a different candidate or ballot measure).

In addition, Regulation 18438.6 alternates between using “an officer” and “an officer or candidate.” It is unclear whether this distinction is intentional, and if so, what the purpose is. It appears that the change may have been made to track statutory language, but for clarity, the wording should be changed so that it is consistent throughout the regulation.

Finally, a comma should be added at the end of line 24: “participant, and that the....”

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

The FPPC Committee members believe the standards in Regulation 18438.7, subd. (b) relate to a bigger issue of what is “knowing and willful” under subd. (c) of Section 84308. The FPPC Committee members urge the Commission to adopt a regulation that defines “knowing and willful” for subd. (c) of Section 84308. Such a definition is essential for implementing the statute.

In addition, “or” on line 8 in Regulation 18438.7, subd. (a)(2) should be amended to “and.” For example, a person may have communicated the relevant facts to agency staff, but the public official may be unaware of those communications.

Next, the Regulation 18438.7, subd. (f) should be amended to read:

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



A public official will always know about the proceeding prior to the meeting because they will have received the agenda prior to the meeting.

Finally, this regulation should be amended to account for the fact that an official may realize there has been a disqualifying contribution in the middle of a proceeding (for example, this is likely to happen during public comment when a participant provides opposition or support). The regulation must allow an official to cure in that situation, even though the official had previously taken part in the discussion.

Regulation 18438.8 – Disclosure Under Section 84308

Regulation 18438.8, subd. (a) should be amended to account for the common factual scenario that a public official may not know a conflict exists until after the agenda item is called during the public hearing, for example where a contributor speaks at public comment and that is the first time the official realizes that the contributor is a participant.

Regulation 18438.8, subd. (b) should be amended to account for the fact that a party may not know that a proceeding has commenced until after the application is filed. The disclosure obligation should be tied to when the party has a reason to know about the proceeding.

The striking of “as defined in Government Code section 84308(a)(4)” in Regulation 18438.8, subd. (b) appears to have the effect of making Regulation 18438.8, subd. (b) applicable to all contributions, not just those prohibited by the statute. The regulation should be amended to disabuse this impression.

Regulation 18705 – Legally Required Participation

Regulation 18705, sub. (b)(1)(B) should be amended to address the fact that public officials do not always have specific contribution information readily available during public meetings. The committee suggests that instead of providing specific information, officials could be required to disclose that they received more than \$250 within the past 12 months, or provide an estimated amount and time frame.

Regulation 18705, subd. (b)(4)(A) should be amended to address the fact an official might not realize that he or she is disqualified until a member of the public speaks at public comment and the official realizes that he or she received a contribution from that member of the public. The FPPC Committee



suggests it may be helpful to clarify that the official can disclose a conflict as soon as he or she becomes aware of the conflict, even if it is in the middle of the hearing on the item. It is also important to recognize that, in a complex proceeding, it could be that some decisions were already made before it became clear that an official had a disqualifying interest.

Conclusion

We appreciate the opportunity to provide comments on these proposed and amended regulations, and the Commission's efforts to date. We welcome the opportunity to discuss these issues further as the rulemaking process continues. Please do not hesitate to contact me at aleary@calcities.org if you have any questions.

Respectfully,

A handwritten signature in black ink, appearing to read "Alison Leary".

Alison Leary
Senior Deputy General Counsel
League of California Cities