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Via Email

David Bainbridge
General Counsel
California Fair Political Practices Commission
1102 Q Street
Sacramento, CA

May 17, 2023

Re: Comments on Gov. Code § 84308 Proposed Regulations

Mr. Bainbridge:

I am the Chief Ethics Officer for the Los Angeles County Metropolitan Transportation Authority ("Metro"). Reporting to the Board of Directors (twelve elected, and one unelected, officials throughout Los Angeles County), I provide advice and counsel to the Metro Board and agency on a wide array of ethics laws, rules, and policies. I am writing to provide comments on the proposed regulations that were originally scheduled to be considered by the Commission on May 18, 2023.

Currently, Metro has one of the largest capital construction and system expansion programs in the nation. Accordingly, Metro's procurement program is vast, fast-moving, and complex, to meet the needs of many significant projects that will transform life in Los Angeles County. In general, many state ethics authorities do not adequately address the specific concerns of a very large agency with massive contracting activities.

Although SB 1439 applied pay-to-play restrictions and standards to an expanded group of elected and appointed officials throughout the state on January 1, 2023, Government Code § 84308 has applied to the Metro Board for some time. Metro is in a unique position to comment on § 84308's practical application, and what works for a large organization with hundreds of active contracts.

Below, please see my comments on the proposed regulations. I have listed them in order of importance to Metro.

§ 18438.7 – Knowledge

Subsection (a): Nothing in the current proposed regulation addresses the scenario where an official's only knowledge of a proposer or applicant's financial interest occurs during review of an upcoming agenda or related documents therein.

Importantly, Metro employs a communications "blackout" period, where Board Members are prohibited from having any communications with proposers or agency staff, on a particular procurement, while a contract award is considered by agency evaluators. Thus, the Metro Board does not become aware of the identity of any proposers until agency staff

makes a public recommendation for award, near in time to a Board meeting where the contract item is agendized.

I urge the Commission to add language in subsection (a)(2) to make clear that actual knowledge occurs only when the official reviews an agenda or related documents, is briefed by their staff on the agenda or related documents, or in some other fashion becomes aware of a proposer's identity. If the agenda documents reveal the identity of certain proposers or applicants, then the official has actual knowledge of the financial interests of only those entities. This is consistent with past advice issued by the FPPC.[1]

Subsection (b): I strongly urge the Commission to adopt Option 1 and reject Option 2. Elected officials in a large metropolitan area like Los Angeles County, with large amounts of contributions and expenditures, employing a campaign staff to manage their accounts separate from their official staff, cannot have "actual knowledge" of a campaign contribution simply by a contributor's placement on a meeting agenda or being "before the officer" in a proceeding. Option 1 would also stay consistent with other proposed regulation language discussing actual knowledge of the contribution.

Certainly, given § 84308's expanded coverage, public officials will rely on private and agency counsel alike to inform them of their obligations under the law. Once advice is issued to them, explaining the nexus between a campaign contributor and a proceeding involving the contributor, the official can be said to have "actual knowledge" of both the proposer's financial interest and its campaign contribution. Campaign staff's involvement is not necessarily the appropriate path to compliance with the law.

§ 18438.4 – Participants

The thrust of this regulation seems to target individuals, like lobbyists, who may not have a direct affiliation with the proposer or applicant, but nevertheless stand to benefit financially from a proposer or applicant's potential contract award. Further, these individuals are compensated to advocate on behalf of a proposer or applicant, not *employees* of the proposer or applicant.

Thus, I urge the Commission to add further clarity to the proposed regulation, possibly under subsection (d), specifying that "participants" are not salaried employees of the proposer or applicant, who may be simply performing their day-to-day job duties with no added financial benefit tied to the success of a contract pursuit.

This clarity is consistent with other provisions of the regulations and the governing statute, properly targeting *owners* of a proposing or applicant firm as "parties."[2] In another context,

[1] *See e.g.*, Smart Advice Letter, I-92-249; Alperin Advice Letter, A-96-083.
[2] *See* Gov. Code §§ 84308(a)(1), 82015.5.

a state appeals court has also questioned whether salaried employees have requisite financial interests in public contracts to create conflicts under state law.[3]

§ 18438.2 – Proceedings

Subsection(b): For a large public agency with a procurement program as vast as Metro's, the definition of "pending" is significant. Thus, I strongly urge the Commission to reject Option 2.

Most often, Metro's procurement processes last months from RFP issuance until contract award. For transformative projects costing billions of dollars, these projects, and the corresponding contracts, can take a decade or more to complete.

At Metro, upon a firm's submission of a proposal, that is arguably "before" an agency at receipt, months or even a year can pass until the Board is ready to vote on a contract award. Expanding this period as a "pending proceeding" increases risk of violation even where an official may have no knowledge of the proposers or the status of the contract evaluation process. For these reasons, I concur with the opinions of the Santa Clara County Counsel explained in the FPPC's May 8, 2023 memorandum accompanying the draft proposed regulations. I assume many other public counsels in the state, particularly from agencies with ambitious agendas, also agree with these opinions.

§ 18438.8 – Disclosure

Metro is subject to two pay-to-play statutes.[4] The California Public Utilities Code places additional restrictions on Metro Board Members and contractors, although the statute does not contain a disclosure provision. There may be other agencies, cities, counties and municipalities that also have additional pay-to-play restrictions placed on their officials.

To avoid confusion and provide a uniform, easy to understand conflicts review process, I urge the Commission to permit within the regulation, written disclosure of any relevant conflicts under § 84308 *after* a public meeting.[5] This would not affect an official's ability to appropriately recuse themselves from any participation, while still providing transparency to the public. In sum, it should not matter exactly when the public disclosure is made, only that it happens and that the affected official recused.

As an agency counsel advising officials on these issues, I would incur many difficulties in requiring Board Members to decipher between those conflicts requiring public disclosure under § 84308, and those that do not. I am concerned that in attempting to comply with the new regulations, mistakes may be made.

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[3] Eden Township Healthcare Dist. v. Sutter Health, 202 Cal.App.4th 208 (2011) (under Gov. Code § 1090, an employee's salary alone does not constitute a "financial interest").
[4] The other, Metro-specific law is Pub. Util. Code § 130051.20.
[5] Currently, Metro discloses campaign contribution-based conflicts in a meeting "recap" posted within hours of a Board Meeting.

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Further, the proposed regulation does not explain whether the disclosure must be in written or oral form. At minimum, the regulation should permit written public disclosure to streamline operations of meetings with multiple members and a voluminous agenda.

§ 18438.3 – Agents

The proposed regulation attempts to carve out activities by lobbyists that would not trigger disqualification. I urge the Commission to go a step further and exempt activities that are not advocacy in nature, but rather administrative actions like setting up a client's meeting with an agency or an introduction of a client to an agency.

Additionally, the proposed regulation does not address whether the "proceeding" the agent is attempting to influence is "pending." To adequately square an agent's activities under the regulation with the movement of the potential contract award, the regulation should include "pending proceeding." This would also align with proposed Regulation § 18438.2.

§ 18438.5 – Aggregation

Currently, the proposed regulation does not address the situation where a multi-national, publicly traded corporation engages with an agency. In many cases, a parent or subsidiary entity seeking a contract award in Los Angeles County, has no connection to affiliated entities in other jurisdictions (*e.g.*, a related or affiliated business entity in Connecticut that may have a totally distinct business, product, or service line).

Requiring officials, or their counsels, to look out for contributions from entities that may have no business in California is overly burdensome. Further, it may require extensive research, based on limited public information, about complicated corporate structures. In practice, limiting § 84308's application to the entities that are pursuing a contract award, or have direct knowledge of that pursuit, would allow departments like mine to focus conflicts review on the business entities that actually seek to influence public agencies and compete for public dollars.

Thank you for your consideration. I am available to discuss any of these comments in detail or other matters related to my experience in advising a large, complex public agency under § 84308.

Sincerely,

Paul Solis
Chief Ethics Officer
LA Metro