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VIA E-MAIL

David Bainbridge, General Counsel
Fair Political Practices Commission
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Sacramento, California 95811
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**Re: Comment Letter on Proposed Amended Levine Act
Regulations**

Dear General Counsel Bainbridge:

The County of Los Angeles ("County") Office of the County Counsel thanks the Fair Political Practices Commission ("Commission") for both its work in amending regulations pertaining to Government Code section 84308 ("Section 84308"), and for accepting additional public comment in advance of the Commission's future meeting to consider adopting the regulations. We respectfully request the Commission consider the comments below, which focus both on clarifying the applicability of the law to officers and various types of proceedings, as well as practical concerns with the proposed regulations.

Regulation 18438.1. Officers and Agencies Under Section 84308

We urge the Commission to add language explicitly exempting heads of County departments from Section 84308. Although the Commission has indicated in its previously issued staff memo dated February 6, 2023, and has advised in at least one advice letter¹ that appointed heads of County departments are not subject to Section 84308, it has also arguably advised the opposite.² Furthermore, Section 84308, subdivision (a)(3) defines "agency" by incorporating

¹ See *Sanders* Advice Letter, A-99-197.

² See *Andrus* Advice Letter, A-85-079.

Government Code section 82003, which defines an agency as a state or local government agency. The Political Reform Act's definition of a "local government agency" includes a county or any department, division, bureau or office of a county.³ This area is ripe for confusion without a regulation that explicitly excludes individuals appointed to non-elective department head positions.

Regulation 18438.2. Proceedings Under Section 84308

We thank the Commission for refining the definition of "competitively bid", "labor", and "personal employment" contracts. We ask that the Commission also include a definition of "entitlement for use" in this regulation. The types of decisions that may come before a county board of supervisors is vast. Some of these decisions do not appear to raise pay-to-play concerns, such as contracts that do not involve the payment or exchange of funds, and contracts or other entitlements between public agencies. Some other types of decisions may directly impact both identifiable individuals or entities and the broader public. We believe that regulatory guidance on what constitutes an entitlement for use will assist local officers comply with Section 84308.

We also ask that the Commission further clarify its definition of "competitively bid contract." According to the May 8, 2023 staff memo, the definition of "competitively bid contract" reflects past Commission advice that exempt contracts are those where the agency is "required" to select the lowest qualified bidder. Yet proposed Regulation 18438.2 does not include the word "required." Thus, the regulation on its face is unclear as to whether the contract must be "required" to be awarded to the lowest bidder, or whether contracts that are *in fact* awarded to the lowest bidder, regardless of any requirement, are exempt.

We also believe further guidance on what it means to be "required" to award to the lowest bidder would be helpful. Contracting requirements may be found in State law, local ordinance, or the policy of the local jurisdiction or the contracting department. We ask that the regulations clarify whether the requirement must be found in the law, or if requirements in a jurisdiction's or a department's policy are sufficient.

Regarding the definition of "pending," we join the Los Angeles County Metropolitan Transportation Authority ("Metro") in asking that the Commission reject Option 2. For a jurisdiction the size of the County, Option 2 presents significant practical and logistical difficulties because of the significant volume of

³ Gov. Code section 82041.

licenses, permits, and other entitlements for use that come before the County as a whole.

We also ask that the Commission clarify that the definition of "pending" in this regulation applies for both subdivisions (b) and (c) of Section 84308. The February 6, 2023 staff memo distinguished the use of "is pending" in subdivision (b) of Section 84308 from the use of "pending before the agency." For practical reasons, we prefer to have a uniform standard to determine whether a proceeding is pending.

Regulation 18438.3. Agents Under Section 84308

The express requirement for a representative to receive compensation to be considered an "agent" poses significant practical concerns for local officers. Other than inquiring with the agent, party, or participant, and relying on those voluntary disclosures, an officer has no other reasonable means to determine whether an agent receives compensation in exchange for appearing before or communicating with an agency about a proceeding. Apart from the logistical difficulties in obtaining this information, this will likely lead to inadvertent violations of Section 84308. For example, an officer may violate this section if they are affirmatively, but incorrectly informed, that an agent was not compensated. Alternatively, an officer may violate this section if they were unable to ascertain that an agent was compensated despite efforts to do so.

For regulatory consistency, we join in Metro's proposal that Regulation 18438.3, subdivision (a) include the word "pending" before "proceeding."

Regulation 18438.5. Aggregated Contributions Under Section 84308

Similar to the requirement that an agent be compensated, this proposed regulation excludes contributions from uncompensated board members of a non-profit organization from being aggregated. Practically, it will be difficult for an officer to determine which members of a non-profit board receive compensation. This regulation may arguably place upon the officer a duty to ascertain compensation of non-profit board members, adding to the significant burden Section 84308 already places upon local elected and appointed officials determine who are parties, participants, and agents.

We concur with Metro's concern regarding the aggregation of contributions from entities, which places yet another significant burden on local officers and their staff to ascertain information that is difficult, if not impossible, to acquire. For example, the proposed regulation now requires contributions

made by an agent during the shorter of the previous 12-month period or the period beginning on the date the party or participant first hired the agent. A local officer most likely would have no knowledge of the date an agent was hired, and will likely aggregate all contributions made from an agent in the previous 12-month period in an abundance of caution.

Regulation 18438.7 Prohibitions and Disqualifications Under Section 84308

We join in Metro's request that the Commission adopt Option 1 for subdivision (b)(2) of this regulation. We ask that the Commission decline to adopt Option 2, and decline to adopt both Option 1 and Option 2.

Under the Brown Act, agendas for a regular meeting must be posted a minimum of 72 hours in advance of the meeting.⁴ For other types of meetings, such as special or emergency meetings, notice may be 24 hours or less.⁵ Given varying time requirements for posting agendas, the heavy volume of business conducted at some meetings, and the sheer amount of contributions that officers in larger jurisdictions may receive, a blanket rule based on the presumption that local officers have sufficient time to search for contributions from parties identified in an agenda fails to adequately reflect the practical impact on local government agencies.

Regulation 18438.8. Disclosure Under Section 84308

Currently, the regulation arguably requires the officer themselves to disclose receipt of a contribution. However, Regulation 18705, Legally Required Participation, permits the officer, or another officer or employee of the agency, to make some of the required disclosures to allow an otherwise disqualified officer to participate in a decision. We would ask that Regulation 18438.8 explicitly permit the officer, or another officer or employee of the agency, to disclose the receipt of a contribution.

Regulation 18705. Legally Required Participation

As noted above, subdivisions (b)(2) and (b)(3) of Regulation 18705 permit the officer, or another officer or employee of the agency, to provide some of the required disclosures before an otherwise disqualified official may participate in a decision. For consistency and practical ease of implication, and in

⁴ Gov. Code section 54954.2.

⁵ Gov. Code sections 54956, 54956.5.

acknowledgement that different jurisdictions may wish to handle recusals differently, we ask the Commission to amend subdivision (b) of this regulation to also permit another officer or employee to state the existence of the conflict of interest on the record.

Conclusion

Thank you for considering our comments. Please do not hesitate to contact me at ssylvester@counsel.lacounty.gov if you or your staff would like to discuss our comment, or if you have any questions.

Very truly yours,

DAWYN R. HARRISON
County Counsel



By

SHANTE SYLVESTER
Senior Deputy County Counsel
Board Liaison Division

SS:jm

Attachment