June 14, 2023

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

Sent Via Email: CommAsst@fppc.ca.gov

RE: June 15, 2023, FPPC Meeting – Discussion of Levine Act Regulations

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

California Common Cause would like to thank the Fair Political Practices Commission's (FPPC) Staff for preparing the proposed regulations for California Government Code Section 84308 in light of SB 1439's passage. It is clear that Staff have worked hard on crafting appropriate regulations while carefully considering stakeholder feedback. We agree with much of what FPPC Staff is proposing. We have a few recommendations outlined below that we hope the commission will consider.

As the primary supporter of SB 1439 (Glazer), California Common Cause is keenly aware of the intent and purpose of SB 1439's amendments to the Levine Act. We support regulations that provide clarity to the law without diminishing the law's intent and purpose, which is to improve public trust in government through checks on big-dollar donations from special interests to the government officials those interests seek favorable votes from.

With that in mind, we recommend the following.

Proposed Amendments to Reg. 18438.2. Proceedings Under Section 84308.

18438.2(a)(A): "Competitively Bid Contract"

If we are interpreting the newly proposed definition correctly, as we outline below, then California Common Cause supports Commission Staff's definition of "competitively bid contract," which appears consistent with previous FPPC Advice Letters regarding the Levine Act[1] and appears to address a potential loophole where local jurisdictions that do not require an agency to contract with the lowest responsive bidder for services[2] could bypass Sec. 84308 by soliciting bids for service contracts without contracting with the lowest responsive bidder. Under FPPC Staff's proposed definition, as we interpret it, all competitively bid contracts that are not required by law to be competitively bid (and consequently issued to the lowest responsible bidder) will not be exempt from Sec. 84308. This would include, as we interpret it, local services contracts

[1] *See* Smart Advice Letter, I-92-249; Thatch Advice Letter, I-89-222; Thatch Advice Letter, A-84-318; Greenwald Advice Letter, I-93-220; Keith Advice Letter, A-20-138, 2021.
[2] *For example, See* Alhambra Municipal Code, Chapter 3.38 (specifically, Sections 3.38.030 - 3.38.050); *See Also* San Gabriel Municipal Code Section 34.33.

that go out to bid where an agency may or may not accept the lowest responsive bid, thus plugging the loophole scenario outlined above. If this is the case, then California Common Cause supports the newly proposed definition of "competitively bid contract."

18438.2(b): When a Proceeding is Pending

We would like to thank Commission Staff for finding a reasonable compromise between Options 1 & 2 with the newly presented Option 3 of Reg. Sec. 18438.2(b). California Common Cause now **supports either Option 2 or 3 of Reg. Sec. 18438.2(b)**. We do not support Option 1 of Reg. Sec. 18438.2(b) for reasons outlined in our April 2023 letter to the Commission (see attachment). In short, Option 1, which is typically favored by those regulated under SB 1439, as evidenced in the letters submitted by local governments and the organizations that advocate on their behalf, opens the door to exploitation of the law. This is particularly true for major and significantly more consequential projects where much money is on the line that can take years to receive final approval. During this extended procurement period when an application, under option 1, is not actually before an officer, opportunities exist for interested parties who anticipate their application will go before certain officers to give contributions that can incur favor and impose implicit or "soft" obligation upon those officers. This is the antithesis of SB 1439. Accordingly, we request that Option 1 not be adopted by the Commission.

Proposed Amendments to Reg. 18438.5. Aggregated Contributions Under Government Code Section 84308.

18438.5(a)(2)(A): Aggregated Contributions while a Matter is Pending

Because a matter could be pending before/across an agency for longer than 12 months, as outlined in our April 2023 letter to the Commission (see attachment), we request the following bolded and underscored edits to 18438.5(a)(2)(A), which pertain to the aggregation of qualifying contributions:

> (a)(2) All contributions made by an agent of the party or participant, as that term is defined in Regulation 18438.3, during the shorter of:
>
> (A) The previous 12-month period **and while the matter is pending before an agency**.
>
> (B) The period beginning on the date the party or principal first employed the agent as

Proposed Amendments to Reg. 18438.7. Prohibitions and Disqualification Under Government Code Section 84308.

18438.7(b): When an Officer Knows or has Reason to Know of a Contribution

We support adopting both Options 1 & 2 under subdivision (b)(2), as recommended by FPPC Staff. Like Staff, we believe the options are not mutually exclusive. Furthermore, we believe that by adopting both, there will be a greater likelihood of due-diligence compliance without overly burdening officers or pigeonholing enforcement. We do not support only adopting Option 1 for reasons outlined in our April 2023 letter to the FPPC (see attachment).

In response to the multiple government agencies and the organizations that advocate on their behalf who support adopting only Option 1 because adopting Option 2 or adopting both Options 1 and 2 is too burdensome upon the regulated, we would like to note that no law is unburdensome. We are not unsympathetic to the demands of democratically elected representatives and the government agencies that assist them, but we do not believe that easing the burden of compliance with this good government law should come at the expense of the law's efficacy. Electeds and the government agencies who assist them have significantly more resources than members of the public do to ensure that actual or perceived pay-to-play corruption is not occurring. Any removed burden upon the regulated community to comply with SB 1439 will simply be placed upon the public and press, who for decades have been required to consume entire government meeting agendas upon short notice in order to effectively participate in and report on government business. Placing that additional burden upon the public, who typically do not have experts to assist them, is not the intent and purpose of SB 1439. For these reasons, we request that Option 1 alone not be adopted by the Commission.

Proposed Amendments to Reg. 18438.8. Disclosure Under Government Code Section 84308.

§ 18438.8. Disclosure Under Government Code Section 84308.

We support the language as currently drafted in clause (a) of Regulation 18438.8. We do not support an alteration of clause (a), as urged by the Metro Transportation Authority's request in their June 13, 2023 letter to the Commission, to allow "written disclosure of any relevant conflicts under § 84308 after a public meeting**"** based on the rationale that "it should not matter exactly when the public disclosure is made, only that it happens and that the affected official recused." We believe it *does* matter when exactly public disclosure is made, as it greatly affects the utility of transparency and accountability under the law. Disclosing the potentially unflattering reason for recusal before or during an open meeting is a check on the actions that resulted in the recusal, but that check is diminished if it is delayed. Disclosure is less likely to be publicly noticed if it occurs after an open meeting[3] where the public is afforded an opportunity to consume, deliberate, and comment on relevant conflicts by officials under the Levine Act *before* a matter is closed. Additionally, if amended as Metro requests, the regulation would likely result in officials recusing without the public knowing exactly why they are recusing or at least not

[3] As a matter of utility, most members of the public will not revisit records of a public meeting or hearing post factum, nor should they be obligated to do so to monitor for relevant information that should be readily disclosed before or during an open meeting in order for the public to consider and potentially comment on before a matter is heard or finalized.

knowing the extent of the relevant conflict, which is pertinent in the shaping of public opinion. Thus, allowing the option to disclose any relevant conflicts under the Levine Act after a meeting or hearing is not, in our opinion, in keeping with the intent and purpose of the law, and we worry that it could lead to discretional abuse that is motivated, in part, by convenience rather than impracticality. Therefore, we do not support allowing officials and their agencies to disclose relevant conflicts on the public record *after* a proceeding.

However, if the Commission believes there may be circumstances that warrant post-factum disclosure of relevant conflicts by presiding officials, then we request that language be narrowly tailored in the regulation to account for extraordinary circumstances without permitting unchecked discretion, which could result in most disclosure of relevant conflicts occurring after a proceeding and subsequently going unnoticed by much of the public.

18438.8(b): A Party's Obligation to Disclose Contributions that Shall be Aggregated

We support the newly proposed clause in Regulation 18438.8(b) that mandates on-the-record party disclosure of all contributions related to the party that must be aggregated under the law. This will assist with compliance and is appropriate since parties best know their corporate or business structures and the people and entities working on their behalf.

Regarding Section 84308 Applicability to Elected Agency Attorneys

We disagree with the Sutton Law firm's speculation, as outlined in their June 7, 2023, letter to the Commission, that Section 84308 does not or should not apply to elected city attorneys (or the publicly elected attorneys of any government agencies for that matter). As the primary supporters of SB 1439, we are certain that the law is now meant to cover *all* local candidates and electeds as the definition of "Officer" in Section 84308 now affirms.[4] To determine otherwise in the law's regulations would be tantamount to an amendment to the definition of "Officer" in the law itself, which requires approval by the state legislature or electorate.

Further, we disagree with the assertion that the law only applies to officers *rendering decisions* on applicable matters. While the first sentence of Section 84308(c), as cited in the Sutton Law firm's letter to the Commission, employs the verbiage "rending any decision in a proceeding," the very next sentence in the clause states, "An officer of an agency shall not make, participate in making, or in any way attempt to use the officer's official position to influence the decision in a proceeding involving a license, permit, or other entitlement for use pending before the agency…" [emphasis added]. Thus, we believe the law clearly applies not just to officials with final decision-making authority on an applicable matter, but also elected officials who are in a position *to influence the decision in a proceeding*. To this point, agency attorneys can certainly influence the final decision on a matter based on their advice, legal or otherwise, to officials

[4] *See* Cal. Gov. Code Sec. 84308(a)(4). ""Officer" means any elected or appointed officer of an agency, any alternate to an elected or appointed officer of an agency, and any candidate for elective office in an agency."

voting on the matter, which makes applicability of the law particularly salient to publicly elected agency attorneys. We are also skeptical of the Sutton Law firm's assumption that "rendering any decision in a proceeding" excludes decisions made or conclusions espoused by elected agency attorneys in their advisory capacity to voting officials during a proceeding.

Elected city attorneys, like other elected officials, are not immune to the potentially corrupting effects of money in politics and, therefore, should not be exempt from Section 84308.

Due Process and Future Regulatory Amendments

Regarding additional clarity on matters pertaining to Section 84308, it is appropriate for the Commission to revisit these regulations from time to time as issues arise that would benefit from direct recognition in the regulations. In the meantime, we know that the FPPC's very capable staff will issue opinions and advice letters on Section 84308 to assist both the individuals beholden to the law and the agencies and entities tasked with assisting those individuals with compliance of the law. Importantly, we are confident in the FPPC's due process, which is robust and fair. We know, as a matter of policy and practice, that the FPPC considers many factors when enforcing The PRA, such as intent, cooperation, experience with the Political Reform Act, clarity of the law and its regulations, first-time offenses, and other factors that may determine the extent of a penalty, if any. This same fair due process will be employed for Section 84308.

In conclusion, we thank the Commission and its Staff for their hard work on these important regulations and for their consideration of our recommendations. If something we are proposing is unclear to the Commission or its Staff, or if we are misinterpreting any portion of the regulations, we are happy to engage further on the matter. California Common Cause, as the primary supporter of SB 1439, is committed to working with Commission Staff and all interested parties to ensure that updates to the regulations for Government Code Section 84308 are clear and uphold the intent and purpose of the law.

Sincerely,

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ATTACHMENT

April 20, 2023

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

Sent Via Email: CommAsst@fppc.ca.gov

California Common Cause

RE: Comment letter for April 21, 2023, FPPC Interested Persons Meeting on regulations for Section 84308 (the Levine Act)

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

California Common Cause would like to thank the Fair Political Practices Commission's (FPPC) staff for preparing the proposed regulations for California Government Code Section 84308 in light of SB 1439's passage. It is clear that Staff have worked hard on crafting appropriate regulations while carefully considering stakeholder feedback. We, therefore, agree with much of what FPPC staff is proposing, but we still have some concerns that we hope will be addressed by implementing the recommendations we outline below.

As the primary supporter of SB 1439 (Glazer), California Common Cause is keenly aware of the intent and purpose of SB 1439's amendments to the Levine Act. We support regulations that provide clarity to the law without diminishing the law's intent and purpose, which is to improve public trust in government through checks on big-dollar donations from special interests to government officials when the possibility of corruption or the appearance of corruption is greatest, i.e. when those interests are seeking favorable votes from the officials they are donating to.

With that in mind, we recommend the following.

Proposed Amendments to Reg. 18438.2. Proceedings Under Section 84308.

18438.2(b): When a Proceeding is Pending

Under proposed Regulation 18438.2, the Commission is provided two options to consider in subsection (b) as to when a proceeding is "pending" before an agency. This is an extremely important decision with ramifications for the intent, purpose, and effectiveness of the law. It also affects other regulations for Section 84308, as discussed later in this letter.

Option One defines a matter as pending only when it comes before the officer and/or their governing body for consideration. Under this option, an officer of a governing body would be able to accept a contribution from a party, their agents, and participants if an application of interest is pending before some part of the officer's agency but not the officer directly. For example, a special interest entity seeking a waste management contract could make a

contribution of over $250 to a city councilmember after submitting a proposal to the city's public works department, knowing that the city's processes are such that it will be over one year before the proposal gets to the city council. Similarly, parties for large development projects, which can take well over 12 months to receive final approval, could ingratiate themselves to councilmembers or other electeds and candidates by giving them large campaign contributions with the knowledge that their project is not likely to come before the councilmembers or other electeds and candidates for at least a year. Alternatively, those same councilmembers or other electeds could potentially delay agendizing such entitlements until they know they will not have to recuse themselves or return contributions to vote on the interested party's application(s). What is more, an elected could attempt to influence the vote of their appointed commissioners before a qualifying matter comes before that elected. This type of pump-priming, strategic agendizing, and across-agency influencing defeat the purpose of § 84038.

Option One is also counter to the language in Government Code § 84308, which consistently utilizes the phrasing "before an/the agency" and "an officer of an/the agency" (see §§ 84308(a)(2-4), (b), (c), (e)). Section 84308 does *not* use the phrasing "within" an agency or the jurisdiction of an officer, or "before an officer." Therefore, the consistent phrasing in § 84308 conveys that the intent and purpose of the law is for the prohibition on excessive contributions to apply throughout the entire period an application is before an agency/jurisdiction, rather than beginning anew across governing bodies within an agency/jurisdiction.

Finally, subsection (e)(2) of § 84308 states:

> A party, or agent to a party, to a proceeding involving a license, permit, or other entitlement for use pending before any agency or a participant, or agent to a participant, in the proceeding shall not make a contribution of more than two hundred fifty dollars ($250) to **any** officer of **that agency** during the proceeding and for 12 months following the date a final decision is rendered by **the agency** in the proceeding.

In our view, the above clause clearly intends that the prohibition on excessive contributions is meant to extend to any and all officers of an agency while a qualifying matter remains unresolved across the agency.

Option Two defines a matter as commenced and pending before all governing bodies at an agency once an application for a qualifying license, permit, or other entitlement has been filed in the jurisdiction for determination or other action. In other words, Option Two clarifies that an officer is prohibited from participating in, influencing, or voting on a matter if they received, and did not return, contributions in excess of $250 from parties, participants, and their agents at least 12 months prior to a vote on the matter OR while the matter is pending before an agency (i.e., pending before a jurisdiction, not just an officer), which we strongly believe is the intent and purpose of the law and aims of SB 1439's author. Importantly, Option Two would prevent exploitation of the law that could occur under Option One.

We would like to address two arguments that have been posed in opposition to Option Two. The first argument against Option Two is that an officer is less likely to know about an application until it is actually before them. We believe that the law's multiple curing provisions sufficiently account for this by allowing an officer to return excess contributions upon their discovery. These curing provisions mitigate the likelihood of recusal without releasing an officer and parties from their due diligence under the law. The second argument against Option Two is that it would require electeds and candidates to monitor contributions from every party filing for a license, permit, or other entitlements that may ever come before them. We disagree. Section 84308 and other regulations for the law make clear that only non-ministerial applications apply to § 84308. Furthermore, we believe the risk of exploitation of the law, which would diminish trust in government, justifies the due diligence efforts electeds and candidates who serve the public must engage in to comply with the law. If a jurisdiction wishes to assist officials with compliance with the law, there are multiple ways a jurisdiction can do so. For example, ethics training and/or a reminder to officials in their agenda packets that they should monitor their campaign finances for contributions from covered parties on the meeting agenda.

For the above reasons, we strongly urge the Commission to adopt Option Two, which is consistent with the intent and purpose of the law and positively impacts other regulations for Section 84308.

Proposed Amendments to Reg. 18438.5. Aggregated Contributions Under Government Code Section 84308.

18438.5(a)(2)(A): Aggregated Contributions while a Matter is Pending

We request that a small but important edit be added to this regulation, which is consistent with our recommendations for other Section 84308 regulations regarding the black-out period for contributions over $250. For reasons previously outlined, we strongly believe that a qualifying license, permit, or other entitlement is pending across an agency once it is filed with the jurisdiction. This means that the excessive contribution blackout period in Section 84308 is at least 12 months before a governing body considers a qualifying application OR while the application is pending, whichever is longer. Therefore, we request the following bolded and underscored edits to 18438.5(a)(2)(A), which pertain to the aggregation of qualifying contributions:

> (a)(2) All contributions made by an agent of the party or participant, as that term is defined in Regulation 18438.3, during the shorter of:
>
> (A) The previous 12-month period **and while the matter is pending before an agency**.
>
> (B) The period beginning on the date the party or principal first employed the agent as

Proposed Amendments to Reg. 18438.6. Solicitation, Direction, and Receipt of Contributions Under Section 84308.

18438.6(b): Solicitation Exemptions

We believe that there should be a correction in regulation 18438.6 to clarify that the solicitation exemption in section (b) applies if **any**, *not all*, of the listed conditions occur in subsections (b)(1-3). Requiring that all the conditions in subsections (b)(1-3) occur, as it appears proposed Regulation 18438.6 does, makes the qualifying conditions nearly impossible to meet, as an officer would have to request a contribution for *any committee* in addition to the officer knowing that an agent also requested a contribution for *the officer's committee* in addition to the officer also having directed an agent to request a contribution for *any committee*. This is not the intent of the law and is surely not the intent of the regulation. To remedy this, we believe that the conjunctive phrase "and/or" should be inserted at the end of each sentence in subsections (1-3) of section (b) of the regulation.

Proposed Amendments to Reg. 18438.7. Prohibitions and Disqualification Under Government Code Section 84308.

18438.7(b): When an Officer Knows or has Reason to Know of a Contribution

We request that the Commission adopt Option Two of subsection (b)(2) of Regulation 18438.7, which clarifies that an officer has reason to know of a contribution from a party if it was reported in the officer's campaign finance reports. This is ethical and not overly burdensome for a representative making important decisions for a jurisdiction, nor is a lack of knowledge of an officer's donors a viable defense for other violations of the Political Reform Act (PRA), which states in § 84104. Recordkeeping:

> "It shall be the duty of each **candidate**, treasurer, principal officer, and **elected officer** to maintain detailed accounts, records, bills, and receipts necessary to prepare campaign statements, to establish that campaign statements were properly filed, **and to otherwise comply with the provisions of this chapter**."

At a minimum, an officer should know who qualifying parties are upon receipt of a meeting agenda, whereupon an officer can cross-check their donor statements for contributions from those parties. Such an inquiry can be done expeditiously with the quick-search function on an electronic device (e.g., "ctrl+F" on a PC). Additionally, § 84308 requires parties to disclose contributions on the public record. Such disclosure could occur well before the party's application is agendized for a vote, thus providing officers with knowledge of and additional time to review their campaign finance statements for disqualifying contributions.

We worry that if Option Two is not adopted, then an ignorance defense could potentially be used in every violation of Section 84308, rendering the law toothless. This is not the intent of

any law. Enforcement of § 84308 should be consistent with the enforcement of the rest of the PRA. PRA Chapter 11: Enforcement, grants robust due process consideration when determining culpability and penalties for violations (see § 91001(c)), but nowhere in the PRA is automatic immunity granted for a claim of ignorance when proof of knowledge is apparent from an officer's campaign finance statements, which officers must sign under penalty of perjury.

For these reasons, we request that the Commission adopt Option Two in Regulation 18438.7.

Alternatively, we would support keeping both Options One and Two as separate clauses if the word "party" is removed from Option One, thus applying only to "participants." This is acceptable because, unlike parties, participants are not required to disclose contributions during a proceeding, nor are participants identified on a meeting agenda.

18438.7(d): Timeline for Return of Contributions

We thank Staff for adding this clause to Regulation 18438.7. We believe the clause is just and consistent with the opportunity to cure a violation within a given timeframe in the law, specifically if awareness of an excessive contribution resulting in recusal occurs during a meeting where a vote will be made on a qualifying matter.

We acknowledge that other provisions in the law provide a 30- or 14-day cure period. However, those provisions are clear that an officer cannot vote on a matter until the cure is finalized, or should not have voted on a matter before a violation was cured. The shorter cure period proposed in 18438.7(d) is thus justified because it is premised on an officer acknowledging a violation and *still* voting on a qualifying matter. While we are not against extending this cure period somewhat, we do not believe that the cure period should be extended past 14 days, given that the circumstances described in subsection (b) are extraordinary and substantially different from the circumstances and requirements that are requisite for utilizing other curing opportunities in the law. Additionally, a governing body always has the option to delay a vote on a qualifying matter for thirty days upon discovery of a violating contribution if the officer wishes to cure the violation in order to vote on the matter. Notwithstanding, there should be *some* expedited timeframe for curing a violation that is acknowledged on the public record but not cured before voting on a qualifying matter. Adopting 18438.7(d) <u>without</u> a minimum timeframe to cure, as some interested parties have requested, is counter to the intent and purpose of Section 84308 and SB 1439, and would completely defang the law, potentially rendering it moot.

For these reasons, we support maintaining or slightly modifying the language proposed in subsection (d) of Regulation 18438.7.

In conclusion, we thank the Commission and its staff for their hard work on these important regulations and for their consideration of our recommendations. If something we are proposing is unclear to the Commission or its staff, or if we are misinterpreting any portion of the regulations, we are happy to engage further on the matter. California Common Cause, as the

primary supporter of SB 1439, is committed to working with Commission staff and all interested parties to ensure that updates to the regulations for Government Code Section 84308 are clear and uphold the intent and purpose of the law.

Sincerely,

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