

# Proposed Regulations Addressing Section 84308, as Amended by SB 1439



June 2023 Commission Meeting

# Adopt Regulation 18438

Application of  
Government Code  
Section 84308

- Codifies Commission's *Kendrick* Opinion, No. O-22-002
- Clarifies application of Section 84308 for officers subject to prior version of Section 84308

# Amend Regulation 18438.1

Officers and Agencies  
Under Government  
Code Section 84308

- Removes provisions superseded by SB 1439
- Re-organizes regulatory exception for members of the Governor's Cabinet
- More thoroughly defines “officer of an agency” to:
  - Include those with decisionmaking authority with respect to the proceeding and who are or have been a candidate for elected office within the 12 months prior to the proceeding;
  - Clarify application to chief executive of an agency
- Defines the term “constitutional officer”—positions exempted under Section 84308

# Amend Regulation 18438.2

Proceedings  
Under Government  
Code Section 84308

- Defines the term “proceeding involving a license, permit or other entitlement for use.”
  - Would also define “competitively bid contract,” “labor contract,” and “personal employment contract”
- Staff presents three approaches to defining the term “pending,” for the Commission’s consideration.
  - Option 1: Narrowest definition, logistically feasible but raises concerns about sufficient application, deterrence, etc.
  - Option 2: Broadest definition, would theoretically capture more instances of pay-to-play practices, but raises concerns about feasibility
  - Option 3: Drafted with Option 1 and 2 concerns in mind, aims to strike a balance between sufficient protection against pay-to-play practices and feasibility of adhering to and enforcing the law

## Option 1

A proceeding is pending when:

- The decision is before the officer for the officer's consideration; or
- It is reasonably foreseeable the decision will come before the officer and the officer knows or has reason to know an entitlement for use proceeding is before the agency for its decision or other action

## Option 2

A proceeding is pending when:

- It is before the agency for its decision or other action

## Option 3

A proceeding is pending for an officer when:

- Option 1 applies

A proceeding is pending for a party/participant when:

- Option 2 applies
- **Recommended by Staff and Law & Policy Committee**

# Amend Regulation 18438.3

Agents  
Under Government  
Code Section 84308

- Amends definition of “agent” to mean someone who:
  - (1) Represents party/participant for compensation;
  - (2) Appears before or otherwise communicate with the agency;
  - (3) For the purpose of influencing the proceeding
- Moves aggregation provisions into Regulation 18438.5 for purpose of consolidation
- Identifies certain types of communications not considered to be made “for the purpose of influencing the proceeding”

# Amend Regulation 18438.4

Participants  
Under Government  
Code Section 84308

- Revises definition of “lobbies in person” to emphasize application based on direct communication with officer
- Revises definition of “otherwise acts to influence” to emphasize application to circumstances where definition of “lobbies in person” or “testifies in person” definitions do not apply



# Amend Regulation 18438.5

Aggregated  
Contributions  
Under Government  
Code Section 84308

- Consolidates aggregation requirements currently present in Regulations 18438.3 and 18438.5
- Incorporates aggregation by reference to Section 82015.5, regarding aggregation of contributions generally
- Includes an exemption for uncompensated officers of nonprofit organizations
- Provides officer does not violate 84308 via receiving contribution from individual/entity required to be aggregated where party/participant/agent has not disclosed contribution and officer does not otherwise know contribution must be aggregated



# Amend Regulation 18438.6

Solicitation, Direction,  
and Receipt of  
Contributions  
Under Government  
Code Section 84308

- Clarifies the circumstances in which a person “makes” and an officer “receives” a contribution, including specifying types of controlled committees through which an officer may receive a contribution
- Clarifies when an officer “solicits” a contribution
- Re-defines when an officer “directs” a contribution

# Repeal/Adopt Regulation 18438.7

Prohibitions and  
Disqualification  
Under Government  
Code Section 84308

- Provides the standards under which an officer is deemed to know or have reason to know about a participant's financial interest in a proceeding
- Establishes when an officer has “willfully” or “knowingly” received a contribution
  - **Both optional provisions recommended by staff and Law and Policy Committee**
- Specifies permissible return of a contribution based on timing within proceeding
- Specifies an officer, under limited circumstances, may participate in a proceeding prior to returning a contribution

# Amend Regulation 18438.8

Disclosure  
Under Government  
Code Section 84308

- Specifies disclosure requirements for officers and parties
- Consolidates disclosure information requirements under current subdivision (c) into proposed amended subdivisions (a) (officer requirements) and (b) (party requirements)
- Amends regulation to permit disclosure by the officer or another agency employee

# Amend Regulation 18705

## Legally Required Participation

- Applies “legally required participation” exception to officers otherwise disqualified under Section 84308
- Addresses disclosure in circumstance where officer learns of contribution mid-proceeding and is unable to provide specific information beyond basic disqualifying facts
- Amends regulation to permit/clarify disclosure by officer or another employee of the agency

# Hypothetical

- Post-2023 application
- Pre-2023 contribution to Councilmember Hon
- Post-2023 contributions to Councilmember West and Commissioner Nakano
- Dave needs to disclose
- When is the proceeding “pending”?

On **January 2, 2023**, Dave, a developer, files an application for a permit from the City of Sacramento to allow him to convert an unoccupied office building across from the Golden 1 Center into affordable housing units. Under the City’s rules, the application must first go to the City Planning Commission for approval before the City Council votes on it. The City uses the state “default” local contribution limit of \$5500 per election for candidates for city council and mayor.

In **May 2022**, Dave contributed \$5500 to City Councilmember Hon. On **January 3, 2023**, he contributed to City Councilmember West. On **January 5, 2023**, Dave contributed \$5500 to Planning Commissioner Nakano, who has formed a committee for the purpose of seeking election to the office of Sacramento Mayor in 2024. <sup>13</sup>



# Hypothetical

When is the proceeding “pending”?

- Application filed with Planning Commission on Jan. 2, 2023.
- Contribution to Councilmember West on Jan. 3, 2023.
- Contribution to Commissioner Nakano on Jan. 5, 2023.

Option 1	Option 2	Option 3
<p>A proceeding is pending when:</p> <ul style="list-style-type: none"> <li>• The decision is before the officer for the officer’s consideration; or</li> <li>• It is reasonably foreseeable the decision will come before the officer and the officer knows or has reason to know an entitlement for use proceeding is before the agency for its decision or other action</li> </ul>	<p>A proceeding is pending when:</p> <ul style="list-style-type: none"> <li>• It is before the agency for its decision or other action</li> </ul>	<p>A proceeding is pending <u>for an officer</u> when:</p> <ul style="list-style-type: none"> <li>• Option 1 applies</li> </ul> <p>A proceeding is pending <u>for a party/participant</u> when:</p> <ul style="list-style-type: none"> <li>• Option 2 applies</li> </ul>
<ul style="list-style-type: none"> <li>• Potentially pending for Dave and Commissioner Nakano</li> <li>• Unlikely pending for Councilmember West</li> </ul>	<ul style="list-style-type: none"> <li>• Pending for Dave, Commissioner Nakano, and Councilmember West</li> </ul>	<ul style="list-style-type: none"> <li>• Pending for Dave</li> <li>• Potentially pending for Commissioner Nakano</li> <li>• Unlikely pending for Commissioner West</li> </ul>



# Hypothetical

- Proceeding pending for Commissioner Nakano
- Disclosure and recusal requirements for Commissioner Nakano
- Does Commissioner Nakano have reason to know about the participants' contributions and financial interests?

On **July 1, 2023** the Planning Commission meets for the first time to consider Dave's application. Dave testifies at the Planning Commission meeting in support of his application.

Jay, who owns a deli adjacent to Golden 1 Center and within 200 feet of Dave's proposed project, also **testifies in support** of Dave's application. Jay previously contributed \$500 to Councilmembers West and Hon in **September 2022** and, on **June 30, 2023**, Jay made a \$500 contribution to Planning Commissioner Nakano's mayoral election committee.

Brian, a union certified electrician who made \$300 contributions to both Planning Commissioner Nakano and Councilmember Hon in **June 2023**, also testifies in support of Dave's project at the Planning Commission meeting, stating that **"approval of this project will provide steady work of many union-certified electricians like me."**

The Planning Commission asks staff to gather more information about the economic and environmental impacts of Dave's proposed project but does not otherwise vote to approve or deny Dave's application at the July 1 meeting.

# Hypothetical

What are Commissioner Nakano's duties with respect to each party and participant?

Dave	Jay	Brian
<ul style="list-style-type: none"><li>Contributed \$5500 on Jan. 5, 2023</li><li>Party to the proceeding</li></ul>	<ul style="list-style-type: none"><li>Contributed \$500 day before Commission meeting</li><li>Testified in support of application at July 1 meeting</li><li>Owens deli located less than 200 feet from proposed site</li></ul>	<ul style="list-style-type: none"><li>Contributed \$300 in June 2023</li><li>Stated "approval of this project will provide steady work of many union-certified electricians like me"</li></ul>
<ul style="list-style-type: none"><li>Must disclose and recuse unless able to return/pay down within 30 days of knowing/having reason to know of the contribution and proceeding</li></ul>	<ul style="list-style-type: none"><li>Jay has no duty to disclose contribution</li><li>Also unclear if Commissioner Nakano is aware of Jay's deli and its proximity</li><li>May need to disclose and recuse or return</li></ul>	<ul style="list-style-type: none"><li>Brian has no duty to disclose contribution</li><li>Brian's statement alone does not amount to "reason to know"</li><li>May need to disclose and recuse or return</li></ul>

# Hypothetical

## Impact of Media on Officer's Reason to Know About Proceeding

In September 2023, the Sacramento Bee publishes an opinion article written by Dave which highlights what he sees as the potential economic and other benefits of his proposed project. The opinion article notes that the project is currently pending before the Planning Commission and will require City Council approval to proceed.

On November 15, 2023, the Planning Commission approves Dave's application. Dave, Jay, and Brian all testify at the Planning Commission meeting in support of the project.

# Hypothetical

What are the duties of Councilmembers Hon and West?

- Reason to know of proceeding and Dave's contribution prior to December 15 Council meeting
- Councilmember West had duty to disclose at beginning of meeting

Dave's project is listed as an action item on the agenda for the City Council's December 15, 2023 meeting. At the start of the December 15, 2023 City Council meeting, the City Manager announces that Dave's project is being pulled from the agenda to give staff additional time to review the application and recommendation from the Planning Commission.

# Hypothetical

- Under any standard, the proceeding is pending with respect to Commissioner Hon
- Councilmember Hon's request may constitute a "solicitation"

On **December 16, 2023**, Dave attends a fundraiser for a group that is proposing a city initiative measure that they believe would make it easier to approve affordable housing projects. Councilmember Hon is one of the speakers at the fundraiser. She tells the audience she strongly supports the initiative measure and **asks the people in attendance to make campaign contributions** to the committee formed to support the measure. Dave tells Councilmember Hon that **he will contribute \$5,000** to the committee.



# Hypothetical

- Additional comments by Dave, Jay, and Brian
- Participation by Chris, nearby restaurant owner
- Implied participation by Councilmembers Hon and West

Dave's application is considered by the City Council at its January 15, 2024 meeting. Dave, Jay, and Brian again testify in support of his application. Chris, the owner of an upscale restaurant located next door to the proposed project site, **testifies in opposition** to Dave's application. While Chris has not made any monetary contributions to any member of the City Council, he **allowed Councilmember West to hold a holiday party** for her staff at his restaurant free of charge in December 2023; the **fair market value** of Councilmember West's use of the restaurant is **approximately \$1,000**. Councilmember West reported this on her campaign finance filings as a non-monetary contribution from Chris.

At the conclusion of the meeting, the City Council unanimously approves Dave's application.



# Hypothetical

What are the duties of Councilmembers Hon and West with respect to each party and participant?

Dave	Jay	Brian	Chris
<ul style="list-style-type: none"> <li>Contributed \$5500 to Hon in May 2022</li> <li>Contributed \$5500 to West on Jan. 3, 2023</li> <li>Pledged \$5000 to initiative committee after solicitation by Hon</li> </ul>	<ul style="list-style-type: none"> <li>Contributed \$500 to Hon and West in Sep. 2022</li> <li>Testifies in support</li> </ul>	<ul style="list-style-type: none"> <li>Contributed \$300 to Hon in June 2023</li> <li>Testifies in support</li> </ul>	<ul style="list-style-type: none"> <li>Contributed \$1,000 in-kind to West in Dec. 2023</li> <li>Testifies in opposition</li> </ul>
<ul style="list-style-type: none"> <li>West violated Section 84308 by failing to disclose and recuse in Dec.</li> <li>Hon has violated 84308 if she solicited</li> </ul>	<ul style="list-style-type: none"> <li>Contributions pre-date SB 1439 effective date and therefore do not apply to Hon and West</li> </ul>	<ul style="list-style-type: none"> <li>Depending on facts known, Hon may be required to disclose and recuse or return/pay down</li> </ul>	<ul style="list-style-type: none"> <li>Depending on facts known, West may be required to disclose and recuse or return/pay down</li> </ul>