



STATE OF CALIFORNIA  
**FAIR POLITICAL PRACTICES COMMISSION**  
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**To:** Chair Silver, Commissioners Baker, Ortiz, Wilson, and Wood

**From:** Dave Bainbridge, General Counsel, Legal Division  
Kevin Cornwall, Senior Commission Counsel, Legal Division  
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**Subject:** Prenotice Discussion of Proposed Amendments to: Regulations 18438.2, 18438.3, 18438.4, 18438.5, 18438.6, 18438.7, 18438.8, 18360.1 & 18705.

**Date:** January 6, 2025

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### **Executive Summary**

In response to recently enacted statutory changes to Section 84308 of the Act,<sup>1</sup> staff submits proposed amendments to the following existing regulations for prenotice discussion:

- 18438.2 – Proceedings Under Government Code Section 84308
- 18438.3 – Agents Under Government Code Section 84308 (repeal)
- 18438.4 – Participants Under Government Code Section 84308
- 18438.5 – Aggregated Contributions Under Government Code Section 84308
- 18438.6 – Solicitation, Direction, and Receipt of Contributions Under Government Code Section 84308
- 18438.7 – Prohibitions and Disqualification Under Government Code Section 84308
- 18438.8 – Disclosure Under Government Code Section 84308.
- 18360.1 – Eligibility Requirements and Considerations for Campaign Violations -- Streamline (Tiers One and Two), Warning Letters and the Political Reform Education Program (PREP)
- 18705 – Legally Required Participation

If the Commission chooses to proceed with staff's recommendations, these amendments will be proposed for adoption at the March Commission meeting.

### **Reason for Proposed Regulatory Action**

Recently enacted legislation— SB 1243 (Dodd) and SB 1181 (Glazer) —made numerous changes to Section 84308 of the Act. As a result of these statutory changes, which went into

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

effect on January 1, 2025, staff has identified a number of necessary conforming changes to existing regulations, in addition to other issues requiring further clarification or clean-up.

## **Background**

### *Section 84308 (the “Levine Act”)*

The Act’s “pay to play” restrictions, contained in Section 84308,<sup>2</sup> aim to ensure that state and local government officers are not biased by significant campaign contributions from contributors who might appear before them in a proceeding involving a license, permit, or entitlement for use (an “entitlement for use proceeding”).

Section 84308 places two restrictions on “officers,” defined as 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.<sup>3</sup> (Section 84308(a)(4).) First, officers are prohibited from soliciting, directing, or accepting contributions of more than \$500 (formerly \$250) from a party, participant, or their agent while an entitlement for use proceeding is pending before the officer’s agency, and for 12 months thereafter. (Section 84308(b).) Second, if an officer has received such a contribution in the preceding 12 months, the officer must disclose this fact on the record and recuse themselves from the proceeding. (Section 84308(c).) Section 84308(d) provides a mechanism for an officer who receives an otherwise disqualifying contribution to cure the violation or still participate in the proceeding, depending on the circumstances.

Section 84308 also prohibits parties and participants (and, until recently, their respective agents) in an entitlement for use proceeding from contributing more than \$500 (formerly \$250) to an officer of the agency the proceeding is before during a 12-month period. (Section 84308(e)(2).) A party—but not a participant—is also required to disclose any contributions exceeding an aggregate \$500 (formerly \$250) that the party and their agents have made to an officer of the agency within a certain timeframe, depending on when the party makes the contribution. (Section 84308(e).)

### *Recent Legislative Changes*

SB 1181 and SB 1243 amended Section 84308 in a number of significant ways, including, in relevant part: raising the contribution threshold from \$250 to \$500; defining or redefining key terms, such as “pending,” “agent,” “license, permit, or other entitlement for use,” and what types of contract decisions fall within the law; specifying that contributions from agents are no longer aggregated with those of parties; expanding the circumstances in which a disqualifying contribution may be returned and extending the period for return from 14 to 30 days; and adding clarification to the time period during which a party to an entitlement for use proceeding must disclose that it made a contribution greater than \$500 (formerly \$250).

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<sup>2</sup> Also commonly referred to as the “Levine Act,” after the legislation’s original author, former Assemblymember Mel Levine.

<sup>3</sup> As of January 1, 2025, the definition of “officer” in Section 84308(a)(4) now also includes an exemption for a city attorney or county counsel providing legal advice to the agency, but who does not have authority to make a final decision in the proceeding.

## *Recent Advice*

Separate from these recent legislative changes, recent advice requests have highlighted other issues around Section 84308 that staff believes could benefit from clarification by regulation.

### Proceedings Initiated by an Agency (Regulation 18438.2)

One issue that has arisen in recent advice letter requests is whether an action initiated by an agency can qualify as a “proceeding” for purposes of Section 84308. Regulation 18438.2(a) currently defines “proceeding involving a license, permit or other entitlement for use” as:

...any proceeding to grant, deny, revoke, restrict, or modify a license, permit or other entitlement for use, that does not solely involve purely ministerial decisions and is:

- (1) Applied for by the party;
- (2) Formally or informally requested by the party; or
- (3) A contract between the agency and the party or a franchise granted by the agency to the party, other than a contract that is competitively bid, a labor contract, or a personal employment contract.

This raises the question of whether a proceeding that is not applied for, or requested by a party, and that is not a contract, can be a proceeding. We have advised that, under certain circumstances, it can. For example, in the *Bakker* Advice Letter, No. A-24-004, we noted that, while a proceeding involving “general policy decisions where the interests affected are many and diverse” falls outside the scope of Section 84308, a rulemaking proceeding can fall within the scope of 84308 “if it implicates or targets a limited number of persons, or businesses, or properties.”

### Central Committee Contributions (Regulation 18438.6)

Another question that arose in a recent advice request is whether candidates for county central committee are “candidates for elective office” for purposes of Section 84308. In the *Strabone* Advice Letter, No. I-23-037, we advised a sitting elected official that the disclosure and disqualification requirements of Section 84308 apply to contributions received as a candidate for county central committee, specifying that so long as an official is an officer subject to Section 84308 at the time of the decision, the official was subject to its provisions.

## Business/Nonprofit Participant Materiality Standard (Regulation 18438.4)

Recent advice requests have raised the issue of whether a nonprofit organization, such as a labor union, qualifies as a “participant” in an entitlement for use proceeding for purposes of Section 84308. We have advised that the nonprofit materiality standard under Regulation 18702.3(a)(3) used in a conflict of interest analysis should be applied to make this determination. For example, in the *Bortnowsky* Advice Letter, No. A-24-023, we applied the nonprofit materiality standard under Regulation 18702.3(a)(3) to conclude that it was not reasonably foreseeable that a decision regarding the continuation of an existing contract for law enforcement services between a city and county would not have a material financial effect on the law enforcement employees, the law enforcement employees’ union, or non-law enforcement employees. Accordingly, we concluded that contributions from these potential contributors were not restricted under Section 84308 as the potential contributors do not meet the definition of a “participant.”

Similarly, in the *Sablan* Advice Letter, No. A-21-020, we advised that, where permit decisions would not have a reasonably foreseeable and material financial effect on the interests of contributors to an appointed board member, labor union contributors did not meet the definition of a “participant” under Section 84308 and the board member need not disclose their contributions nor disqualify themselves from the decision.

### **Proposed Regulatory Amendments**

#### *Amend Regulation 18438.2 – Proceedings Under Government Code Section 84308*

Before January 1, 2025, subdivision (a) of Section 84308 defined key terms under the Levine Act, including: “party,” “participant,” “agency,” “officer,” “license, permit, or other entitlement for use,” and “contribution.” The newly enacted legislation makes changes to some of these definitions, including the definition of “license, permit, or other entitlement for use” in subdivision (a), paragraph (5) of Section 84308. Specifically, new subparagraph (A) of paragraph (5) now reads:

(5) ~~“License, (A) Except as provided in subparagraph (B), “license, permit, or other entitlement for use” means all business, professional, trade, and land use licenses and permits and all other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor, or personal employment contracts), contracts, and all franchises.~~

New subparagraph (B), meanwhile, now defines what a “license, permit, or other entitlement for use” is not, namely:

- (i) Competitively bid contracts that are required by law, agency policy, or agency rule to be awarded pursuant to a competitive process.
- (ii) Labor contracts.

- (iii) Personal employment contracts.
- (iv) Contracts valued under fifty thousand dollars (\$50,000).
- (v) Contracts where no party receives financial compensation.
- (vi) Contracts between two or more agencies.
- (vii) The periodic review or renewal of development agreements unless there is a material modification or amendment proposed to the agreement. Non-material modifications or amendments may be approved by agency staff.
- (viii) The periodic review or renewal of competitively bid contracts unless there are material modifications or amendments proposed to the agreement that are valued at more than 10 percent of the value of the contract or fifty thousand dollars (\$50,000), whichever is less. Non-material modifications or amendments may be approved by agency staff.
- (ix) Modification of or amendments to contracts that are exempt under this subparagraph, other than competitively bid contracts.

Newly enacted paragraph (7) also now defines when a proceeding involving a license, permit, or other entitlement for use is “pending.” Staff therefore recommends amending Regulation 18438.2 to insert updated statutory references and delete terms now codified in statute, namely “pending,” as well as language pertaining to “competitively bid contracts,” “labor agreements,” and “personal employment contracts.”

Separately, based on recent advice letters discussed above, staff recommends clarifying that term “proceeding involving a license, permit, or other entitlement for use” can also include situation where an action is initiated by an agency but implicates or targets a party, or limited number of parties (for example, a zoning change initiated by a city that would impact only one or two permit applicants whose permits are pending).

#### *Amend Regulation 18438.3 – Agents Under Government Code Section 84308*

Previously, the Act was silent on the definition of “agent” under Section 84308. Instead, Regulation 18438.3 was devoted to defining this term. Newly enacted subdivision (h) of Section 84308 codifies in statute the definition of “agent” as set forth by existing Regulation 18438.3. Staff therefore recommends the full repeal of Regulation 18438.3 since it is no longer necessary.

#### *Amend Regulation 18438.4 – Participants Under Government Code Section 84308*

Based on recent advice letters discussed above, staff recommends adding a new subdivision (e) to Regulation 18438.4, clarifying that where the participant is a business or nonprofit, the relevant “source of income” materiality standards in Regulation 18702.3 apply.

Amend Regulation 18438.5 – Aggregated Contributions Under Government Code Section 84308

Under recently amended subdivision (g) of Section 84308, contributions from agents are no longer aggregated with those of parties. Staff therefore recommends removing paragraph (2) of subdivision (a) of Regulation 18438.5 and deleting the references to “agent” in subdivision (b) of the regulation.

As noted above, recent amendments to Section 84308 raise the contribution threshold from \$250 to \$500. Accordingly, staff proposes amending subdivision (a) of Regulation 18438.5 to reflect this change.

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

As noted above, we have advised that the disclosure and disqualification requirements of Section 84308 apply to contributions received as a candidate for county central committee. Therefore, staff recommends adding new paragraph (6) to subdivision (a) of existing Regulation 18438.6, clarifying that contributions to a candidate’s central committee are subject to Section 84308 restrictions and limits.

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

Paragraph (1) of Section 84308, subdivision (d) has now been amended to read:

If an officer receives a contribution ~~which~~ that would otherwise require disqualification under this section, and returns the contribution within 30 days from the time the officer makes any decision, or knows, or should have known, about the contribution and the proceeding involving a license, permit, or other entitlement for use, whichever comes last, the officer shall be permitted to participate in the proceeding.

Staff therefore recommends revising the language of subdivision (b) of existing Regulation 18438.7 to address when an officer “knew or should have known” about a contribution, which has become more relevant now that disclosure by parties is no longer required upon initiation of the proceeding. Thus, Regulation 18438.7(b) would now address both Section 84308, subdivision (c), which pertains to an officer’s “willful or knowing receipt of a contribution,” and subdivision (d), which relates to when an officer “knows, or should have known” about a contribution. Although those phrases differ somewhat, staff believes the proposed provisions of Regulation 18438.7(b) effectively address both circumstances. In other words, an officer can reasonably be considered to have willfully received a contribution (distinct from having actual knowledge of the contribution) and should have known about the contribution when either (A) the contribution has been properly disclosed by the party; or (B) the officer is aware of facts establishing other reasons to know of the contribution, as detailed in the regulation.

Additionally, as noted above, recent amendments to Section 84308 raise the contribution threshold from \$250 to \$500. Accordingly, staff proposes amending subdivisions (a)(2) and (b)(2)(B)(ii) of Regulation 18438.7 to reflect the statutory change from \$250 to \$500.

*Amend Regulation 18438.8 – Disclosure Under Government Code Section 84308*

Prior to the recent legislative changes, a party in an entitlement for use proceeding—but not a participant— was required to disclose on the record of the proceeding any contributions exceeding an aggregate \$250 that the party and their agents have made to an officer of the agency within the preceding 12 months. Current Regulation 18438.8 requires the disclosure to be made on the date the party files the application or other request initiating the proceeding. However, recent amendments to subdivision (e) of Section 84308 have changed this timeline to be “before the date that any decision is rendered by the agency.” Staff, therefore, recommends amending subdivision (b), paragraph (1) of existing Regulation 18438.8 to reflect the more flexible time horizon for disclosure now afforded by statute. Staff proposes the disclosure be made at least 30 days before the date that any decision is rendered by the agency to establish a workable bright line rule that provides sufficient disclosure in a timely manner before a decision is made.

Additionally, staff proposes amending subdivisions (a) and (b) of Regulation 18438.8 to reflect the statutory change of the Section 84308 threshold from \$250 to \$500.

*Amend Regulation 18360.1 – Eligibility Requirements and Considerations for Campaign Violations -- Streamline (Tiers One and Two), Warning Letters and the Political Reform Education Program (PREP)*

As noted above, recent amendments to Section 84308 raise the contribution threshold from \$250 to \$500. With this in mind, staff has amended the Section 84308 Enforcement streamline penalty criteria in Regulation 18360.1(e)(12) to reflect that change.

*Amend Regulation 18705 – Legally Required Participation*

Regulation 18705 sets forth the standards under which an otherwise disqualified official is permitted to take part in a decision because the official’s participation is legally required. In 2023, the Commission amended Regulation 18705 to encompass disqualifications under Section 84308. For the same reasons as the proposed amendments to Regulation 18360.1 above, staff recommends amending Regulation 18705 to remove and update references to the now outdated \$250 limit in Regulation 18705(b)(1)(B).

## **Conclusion**

The proposed amendments would conform existing regulations with the recently amended statutory provisions of Section 84308, eliminate redundant or outdated language, and clean up other outstanding issues in need of clarification in light of recent advice letters.

### **Attachments:**

Proposed Amendments to Regulations 18438.2, 18438.3, 18438.4, 18438.5, 18438.6, 18438.7, 18438.8, 18360.1 & 18705