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Background:

In 1982, the California Legislature passed the Levine Act (Section 84308 of the Political Reform Act). The Act:

- Prohibited an officer of an agency from accepting, soliciting, or directing contributions of more than \$250 from any party, participant or agent thereof while a proceeding involving a license, permit or other entitlement for use is pending before the agency and for three months following the date a final decision is rendered.
- An official was also prohibited from taking part in such a decision if they received a contribution exceeding \$250 within the preceding 12 months.
- Local government agencies whose members are directly elected by voters (e.g. boards of supervisors and city councils) *were exempt*.

With the adoption of SB1439, this section of law was changed in two ways:

- The period in which contributions are prohibited after a final decision is rendered was changed from 3 months to 12 months.
- Local government agencies whose members are directly elected by voters (e.g. boards of supervisors and city councils) *are no longer exempt*.

In late 2022, the FPPC determined that the law would be prospective, and the official would not be prohibited from taking part in a decision if they received a contribution exceeding \$250 within the 2022 calendar year.

On May 25, 2023, the Sacramento Superior Court ruled against a coalition of business-related entities (the California Restaurant Association, the California Retailers Association, the California Business Roundtable, among others) that filed suit challenging the constitutionality of SB1439. The litigation unsuccessfully argued that the law violates campaign finance laws and freedom of speech rights for local elected officials and interest groups.

Discussion:

While the Levine Act amendments were effective January 1, 2023, the FPPC issued a document in February 2023 that provided “2023 Changes to Section 84308” and included some commonly asked questions and answers from the Commission (Attachment A). On April 21, 2023, the FPPC held an interested persons meeting to receive comments and feedback on proposals for regulatory amendments necessary to implement, interpret, and address changes related to SB1439 and Government Code Section 84308. The Commission was to consider those regulatory amendments on May 18, 2023; however, the meeting was cancelled. The item was later heard at the FPPC’s June 15, 2023 meeting and the regulatory amendments were approved. The FPPC has also indicated that “Fact Sheet” guidance and educational material is being developed in addition to the implementing regulations.

A summary of the approved regulations is listed below and are shown in detail on Attachment B:

Regulation 18438 – Codifies the Commission’s In re Kendrick Opinion, No. O-22-002, and specifies that Section 84308’s provisions, as amended by SB 1439, do not apply to contributions received or proceedings participated in prior to SB 1439’s effective date, January 1, 2023.

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Regulation 18438.1 – Officers and Agencies Under Section 84308 – amended to: (1) reorganize the regulation for clarity and effectiveness; (2) remove provisions and references related to Section 84308’s prior exemption for local elected officers; (3) amend the definition of “officer of an agency” to better reflect Section 84308 and the Legislature’s intent in enacting SB 1439; and (4) define the term “constitutional officer,” referenced in Section 84308. Of note, the “officer of an agency” was broadened to include even when someone was a candidate within the 12 months before the decision and the amendment makes clear the section does not include departments heads (unless they qualify as a candidate for elected office).

Regulation 18438.2 – Proceedings Under Section 84308 – amended to: (1) better define and clarify the phrase “proceeding involving a license, permit or other entitlement for use” and related terms such as “labor contract” and “personal employment contract;” and (2) further define the term “pending.” At the June 15 meeting, the FPPC approved this amendment with staff’s Option 3 that defines a proceeding is “pending” for an officer differently than for a party/participant. (See Attachment B)

Regulation 18438.3 – Agents Under Section 84308 – amended to: (1) amend the definition of “agent” to clarify the term’s scope; (2) reorganize the regulation; and (3) move a provision pertaining to aggregation into Regulation 18438.5.

Regulation 18438.4 – Participants Under Section 84308 – amended to: (1) clarify the term “lobbies in person;” and (2) clarify the term “otherwise acts to influence.”

Regulation 18438.5 – Aggregated Contributions Under Section 84308 – amended to: (1) revise and reorganize provisions pertaining to the aggregation of contributions by parties, participants, and agents, including related entities; and (2) incorporate the aggregation provision removed from Regulation 18438.3.

Regulation 18438.6 – Solicitation, Direction, and Receipt of Contributions Under Section 84308 – amended to: (1) revise the definition of “making” and “receiving” a contribution, including specifying the types of controlled committees in which an officer may receive a contribution; (2) condense certain provisions to remove unnecessary language; and (3) revise the definition of “directing” a contribution.

Regulation 18438.7 - Prohibitions and Disqualification Under Section 84038 – Repealed and adopted to provide 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. At the June 15 meeting, the FPPC approved the adoption with the inclusion of staff’s Options 1 and 2 that includes language to address: 1) “the idea that although a contribution by a party or participant may have been properly reported in the officer’s campaign statements, an officer cannot reasonably be expected to commit each contribution to memory”; and 2) “the idea that although Section 84308 requires parties and their agents to disclose their contributions exceeding \$250, officers should not solely rely on that requirement for purposes of taking part in or recusing themselves from a proceeding”.

Regulation 18438.8 – Disclosure Under Section 84308 – amended to address disclosure requirements in circumstances where the officer is not aware of a contribution prior to the beginning of a public meeting.

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Regulation 18705 – Legally Required Participation – amended Regulation 18705 to apply its provisions—permitting an otherwise disqualified officer to take part in a governmental decision where their participation is legally required—to officers otherwise disqualified under Section 84308.

Definitions and clarifications of terms

This Board Letter and the attached information from the FPPC provides interpretation, clarification and FAQs regarding SB1439. Staff is providing general information provided by the FPPC on this topic and nothing contained within this report is intended to be legal advice to your Board.

What proceedings may be affected?

Government Code Section 84038(a)(5) states:

“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), and all franchises”. This has been further clarified by Regulation 18483.2 referenced above.

How are other jurisdictions addressing SB1439?

Generally, it is the responsibility of a party or participant and officers of the agency to be aware of their campaign contributions and ensure compliance with this new law. The FPPC is the regulatory agency for administration and enforcement of the Political Reform Act. To assist with compliance related to this new law, the Board could direct staff to implement additional processes and procedures to facilitate compliance.

At this time, it does not appear that many local agencies are actively taking action other than consideration of disclosure language on Council or Board agendas, which we have already implemented (see below). While the FPPC indicates in its *Common Questions Regarding Section 84308* (Attachment A), that “neither the statute nor regulation establish a proactive duty (*for the official*) to investigate a potential financial interest, such as reviewing other public records or questioning the individual”, it is likely many local agencies were awaiting the approved regulatory amendments and clearer implementation requirements. Orange County did formally adopt a policy that requires a disclosure form be completed by applicants and contractors as part of their agenda review process for licenses, permits, solicitations, etc. (Attachment C).

Agenda Disclosure Language

Standard disclosure language was circulating among local agencies and was added in April to the Board of Supervisors’ meeting agendas. The language indicates the requirements of the new law as a notice to the public to be aware of Government Code Section 84308(e)(1), which states, “A party to a proceeding before an agency involving a license, permit, or other entitlement for use shall disclose on the record of the proceeding any contribution in an amount of more than two hundred fifty dollars (\$250) made within the preceding 12 months by the party or the party’s agent”. Clerk of the Board staff will process any disclosures received as part of the record for respective agenda items. The disclosure language on the agenda is as follows:

DISCLOSURE OF CAMPAIGN CONTRIBUTIONS

Pursuant to Government Code section 84308, members of the Board of Supervisors are disqualified and not able to participate in any agenda item involving contracts

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(other than competitively bid, labor, or personal employment contracts), franchises, discretionary land use permits and other entitlements if the Board member received more than \$250 in campaign contributions from the applicant or contractor, an agent of the applicant or contractor, or any financially interested participant who actively supports or opposes the County's decision on the agenda item since January 1, 2023. Applicants, appellants, contractors, agents or any financially interested participant who actively supports or opposes the County's decision on the agenda item who have made campaign contributions totaling more than \$250 to a Board member since January 1, 2023, are required to disclose that fact for the official record of the subject proceeding. Disclosures must include the amount and date of the campaign contribution and identify the recipient Board member and may be made either in writing to the Clerk of the Board of Supervisors prior to the subject hearing or by verbal disclosure at the time of the hearing.

Other Board Policy Options

The Board of Supervisors could direct staff to develop a policy and procedures to assist the Supervisors, other impacted elected County officers and parties, participants and agents with compliance with Government Code Section 84038 requirements. This policy could include a process whereby departments obtain a disclosure form for compliance with SB1439 from the party/participant as part of the application (or appeal if applicable) process prior to the item being placed on the Board's agenda. A process to address contracts (with exceptions) and all franchises would also need to be explored. Potentially, these could then be included in a database for any individual to search. Staff will need to work with departments to determine the fiscal and staff time impacts that would be required to facilitate the implementation of such a proposed policy.

Other ways to facilitate compliance could also be explored, preferably once "Fact Sheet" guidance and educational materials are developed by the FPPC.

Fiscal Analysis:

There is no fiscal impact related to this item, but staff time will be required should procedures be implemented to facilitate compliance.

Attachments:

- Attachment A: February FPPC Memo: 2023 Changes to Section 84038 and Frequently Asked Questions
- Attachment B: FPPC June 15, 2023 Memo and Approved Implementing Regulations
- Attachment C: Orange County Policy Disclosure Form
- Attachment D: Government Code Section 84038

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