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New FPPC Regulations for Campaign Contributions

On June 15, 2023, new regulations to implement Senate Bill (SB) 1439 were adopted by the Fair Political Practices Commission (FPPC). As some readers may recall, SB 1439 became effective on January 1, 2023 and extends the applicability of the Levine Act (Government Code section 84308) relating to campaign contribution disclosure requirements, to elected officials (previously it only applied to appointed officials). As a result of these changes, it is critical that elected and appointed officials that receive campaign donations monitor donations received to determine whether a donor is a “party” or “participant” to any pending proceeding before their agencies and recuse themselves from those items if necessary.

In summary, SB 1439 prohibits these officials from accepting, soliciting or directing a campaign contribution of more than \$250 from any “party” to or “participant,” as those terms are defined, in a proceeding involving a license, permit or other entitlement for use both while that proceeding is pending and for 12 months following the date a final decision is rendered. The bill also requires officials to recuse themselves from any proceeding if the member received a campaign contribution of more than \$250 from a person involved in the proceedings within the previous 12 months. However, an official is not required to be recused if the officer returns the contribution within 30 days from the time the officer knows, or should have known, that the contribution came from a participant or party in the proceeding involving a license, permit, or other entitlement for use. Moreover, an official may cure a violation if (1) the officer did not knowingly and willfully accept, solicit, or direct the contribution; and (2) the officer returns the amount over \$250.00 within 14 days of accepting, soliciting, or directing the contribution, whichever comes latest.

There was some initial confusion over whether the requirements applied prospectively to donations received after January 1, 2023 or whether campaign donations received in 2022 (prior to the effective date of SB 1439) were subject to the new requirements. The FPPC issued an opinion on December 22, 2022 (Kendrick Opinion) concluding that there was no clear indication that the Legislature intended SB 1439 to apply retroactively and so, the requirements should apply to contributions received after January 1, 2023.

The new FPPC Regulations (2 Cal. Code of Regs. §§ 18438 – 18438.8)

("Regulations") are intended to further clarify the application of SB 1439. A summary of some of the new Regulations and changes to Regulation 18705 (Rule of Public Necessity) are summarized below.

Regulation Section 18438

- Confirms that the requirements of Government Code Section 84308 do not apply to proceedings participated in, or contributions made to or accepted, solicited, or directed by an officer prior to January 1, 2023.

Regulation Section 18438.1

- Clarifies when officers and agencies are exempted from or included in proceedings involving a license, permit or other entitlement for use.

Regulation Section 18438.2

- Clarifies what is meant by "proceeding involving a license, permit or other entitlement for use" under Government Code section 84308 and defines other terms to clarify the exemptions from the definition of "License, permit, or other entitlement for use." The exemptions include certain types of contracts including a "competitively bid contract," "labor contract" and "personal employment contract".

Regulation Section 18438.3

- Clarifies what is meant by the term "agent" under Government Code section 84308 and clarifies that drawings or submissions of architectural, engineering or similar nature or purely technical data or analysis submitted in a proceeding to an agency may not be included under the term "communication with the governmental agency for purpose of influencing the proceeding."

Regulation Section 18438.4

- Provides definitions to clarify participants under Government Code section 84308, including defining various terms such as "lobbies in person," "testifies in person" or "otherwise acts to influence."

Regulation Section 18438.5

- Provides guidance on how to determine whether the contribution limit of \$250 has been met under Government Code section 84308 and aggregated contributions. To

determine whether a contribution of more than \$250 has been made by a party or participant during a 12-month period, the following must be aggregated: (1) All contributions made by the party or participant; (2) All contributions made by an agent of the party or participant during the shorter of: (A) The previous 12-month period; or (B) The period beginning on the date the party or participant first hired the agent as either a paid employee, contractor, or consultant. (3) All contributions made by an individual, other than an uncompensated officer of a nonprofit organization, or entity required to be aggregated with the party or participant and any agent of the party or participant under Government Code Section 82015.5.

Regulation Section 18438.6

- Clarifies when an officer “makes,” “accepts” or “receives” a contribution and when an officer “solicits” or “directs” a contribution.

Regulation Section 18438.7

- Specifies when an officer is deemed to have knowledge of a financial interest.

Regulation Section 18438.8

- Specifies when disclosure is required under Government Code section 84308 for an officer of the local agency as well as when disclosure is required for a “party” to a proceeding.

Regulation 18705 - Legally Required Participation (Rule of Public Necessity)

- Adds to the Legally Required Participation requirements that a public official that has received a disqualifying contribution under Government Code section 84308 may participate if they are legally required to make or participate in the making of the a governmental decision within the meaning of Government Code Section 87101, if there is no alternative source of decision, after disclosure of the disqualifying contribution, as specified.

These Regulations became effective on August 12, 2023 and significantly impact disclosure and recusal requirements for campaign contributions for elected and appointed officials. These Regulations may also require agents, parties and participants to certain proceedings to disclose campaign contributions and thus public agencies may want to review their applications or conflict disclosure statements to ensure compliance with the Regulations.

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