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Pay-to-Play Contribution Restrictions

In order to promote transparency and fairness in the governmental decision making process there are rules in place to prevent public officials from being unfairly influenced by contributors to their campaign. The type of activity these laws were enacted to limit are often referred to as “pay-to-play”.

Section 84308

A law aimed at preventing pay-to-play, Section 84308 prohibits a party seeking a contract (other than competitively bid), license, permit, or other entitlement for use from making a contribution of more than \$250 to an “officer” of the agency. Statutes such as Section 84308 aim to maintain the integrity of the contracting process and to prevent a culture where bidders or applicants come to believe it is necessary to make political contributions to receive government contracts or permits.

Section 84308 was enacted in 1982 in response to reports in the *Los Angeles Times* that several coastal commissioners had solicited and received large campaign contributions from persons who had applications pending before them. The purpose of the statute is to assure that appointed members of boards or commissions are not influenced by the receipt of campaign contributions from the persons appearing before them, and are not able to use their position of authority to unduly influence applicants to make contributions to their campaigns.

Section 84308 contains three restrictions:

1. A party, or his or her agent, seeking a license, permit, or other entitlement for use *may not contribute* more than \$250 to an officer of the agency while the proceeding is pending and for three months after.
2. An officer of an agency *may not solicit a contribution* of more than \$250 from a party or participant to a proceeding, or his or her agent, while the proceeding is pending and for three months after.
3. An officer of an agency *may not participate* in a decision on a license, permit, or other entitlement for use if the officer has received a contribution of more than \$250 from a party, participant or his or her agent.

Example: *Sarah Smith is a candidate for the Smalltown City Council. Smith is also on the Smalltown Planning Commission. John Builder has a permit request pending before the*

planning commission. Under section 84308, Smith is prohibited from soliciting or receiving any contribution of more than \$250 from Builder or Builder's agent. If Smith did receive a contribution of more than \$250 from Builder, Smith and Builder would be required to disclose the contribution in the record of the planning commission meeting. Smith would also have to disqualify herself from considering Builder's permit request unless she returns that portion of the campaign contribution in excess of \$250 within 30 days after learning of the contribution and Builder's pending permit.

Who is Covered?

Section 84308 covers all elected and appointed "officers" of an "agency" and their alternates, as well as candidates for elective public office. The term "officer" is very broadly defined under section 84308. It includes the governing board or commission of any public agency, as well as the head of an agency. One important exemption applies to members of the governor's cabinet, but *only* when they act in the capacity of secretary of an agency. (Reg. 18438.1.)

The scope of the statute is narrowed considerably, however, by the definition of the term "agency." Due to exemptions from the definition of agency (discussed below), the law applies most often to appointed members of local boards and commissions, such as planning commissions.

Section 84308 primarily regulates *agencies, not* individuals. As a result, a person who is a member of an exempted agency (such as an elected city council), is covered by the law when he or she acts as a voting member of *another* agency.

What Agencies Are Not Covered?

Section 84308 expressly exempts from its coverage the following agencies:

- the judicial branch
- the Legislature
- the Board of Equalization ("BOE")
- constitutional officers
- local agencies whose members are elected by the voters (e.g., city councils and county boards of supervisors)

The exemption for these agencies extends to *committees* of the agencies, if only members of the governing body of the agency are on the committee. It also applies when the governing body, *in its entirety*, sits as the governing body of another agency (e.g., a board of supervisors designates itself as the redevelopment agency for the county). In these cases, the officers are *not appointed* to the other agency. However, as stated above, if a member of an exempt agency also serves as an appointed member of another, non-exempt agency, the prohibitions of section 84308 do apply.

Section 84308 applies to city councilmembers who also serve as members of the City of Brea Redevelopment Agency, unless the redevelopment agency is made up of the city council in its entirety without any other members. (Markman Advice Letter, No. I-94-223.)

In determining whether a board or commission is exempt for purposes of Section 84308, the focus should be on the actual make-up of the board or commission. For instance, the governing board of a sanitation district that may consist of both elected and appointed members, but which, in fact, consists solely of members of the board of supervisors, is exempt under section 84308. (Dixon Advice Letter, No. A-96-203.)

NOTES: Though the BOE is not covered by section 84308, it is subject to Government Code section 15626, a similar statute that prohibits BOE members from acting on adjudicatory proceedings if they have received a contribution of \$250 or more from a party or participant.

Because constitutional officers are specifically exempted by statute, it is the FPPC's longstanding interpretation that the campaign contribution disqualification provisions of Section 84308 do not apply to decisions made by constitutional officers, such as the State Controller and the State Treasurer, when they are serving as members of other boards which they are statutorily required to do, such as the CalPERS Board.

Prohibited Conduct

Section 84308 prohibits officers from soliciting, accepting or directing campaign contributions of more than \$250 from any party, participant or agent of a party or participant, while a proceeding is pending before the officer's agency and for three months following the date of that decision. This prohibition applies even where the contribution is directed to *another* candidate. Similarly, a party, a participant, or an agent cannot make a campaign contribution of more than \$250 to an officer during the course of the proceedings and for three months following the decision.

FPPC regulation 18438.6 defines when behavior becomes "soliciting, accepting or directing contributions." In short, for section 84308 to apply, contributions must be made to and accepted by an officer for his or her own candidacy or controlled committee.

An officer "solicits" a contribution only if he or she knows or has reason to know that the person being solicited is a party or participant (or an agent of either) and personally requests the contribution or knowingly allows his or her agent to do so. A prohibited solicitation under section 84308 does not include a request made in a mass mailing to the public, at a public gathering or in a published newspaper or other vehicle of mass media.

A person "directs" a contribution if he or she acts as the agent of another person or committee, other than his or her own controlled committee, in accepting a contribution on behalf of, or transmitting a contribution to, such other person or committee. If a subcontractor makes a contribution at the direction of a party or participant, it will be aggregated with contributions made by the party or participant under Section 84308. (Skelton Advice Letter No. I-13-145.) If an employee of a party or participant makes a

contribution at the request of a party or participant, the employee's contribution will be aggregated with those of the party or participant. (*Id.*)

A planning commissioner is prohibited under section 84308 from soliciting, accepting or directing contributions for a candidate for the state office of Secretary of State, if the person making the contribution is a party, participant or an agent of a party or participant in a proceeding before the planning commission. (Calvert Advice Letter, No. A-94-263.)

Disqualification

An officer will be disqualified from participating in a decision when, prior to making the decision, he or she learns that a party or participant in a proceeding (either individually or with or through an agent) has made a contribution of more than \$250 to the officer within the preceding 12 months. However, if the officer returns the contribution (or that portion of the contribution which is over \$250) within 30 days from the time he or she learns of the contribution and the proceeding, then disqualification is not required. (Regulation 18438.7 discusses an officer's knowledge of pending proceedings, parties and participants to the proceeding, and their contributions.)

Example: *A developer has filed for a conditional use permit from the city's land use agency. The developer gave a land use agency officer a \$750 campaign contribution two months before he filed for the permit. The campaign contribution did not violate section 84308 since it was given prior to the developer's request for a permit (which initiates a proceeding under section 84308). Both the officer and the developer are required to disclose the contribution and the officer must disqualify himself from considering the conditional use permit, unless the officer returns at least \$500 of the \$750 (reducing the amount to \$250) within 30 days of learning of both the contribution and the proceeding.*

Disclosing Contributions

Prior to rendering any decision, each officer who received a campaign contribution of more than \$250 within the preceding 12 months from a party, participant or agent of a party or participant must disclose the fact on the record of the proceeding. If there is a public hearing, the officer should make the disclosure on the public record at the beginning of the hearing. However, if no public hearing is held, the disclosure should be included in the written record of the proceeding.

Likewise, a party or participant to a proceeding must disclose on the record of the proceeding any campaign contribution of more than \$250 made within the preceding 12 months by the party or participant, or his or her agent, to any officer of the agency.

Proceeding

A proceeding involves action to grant, deny, revoke, restrict or modify "licenses, permits, or other entitlements for use." (Reg. 18438.2.) Section 84308 defines the phrase "licenses,

permits, or other entitlements for use" to mean proceedings on all business, profession, trade and land use licenses and permits, and other entitlements for use, including all entitlements for land use, all contracts (other than competitively bid, labor or personal employment contracts) and all franchises.

Examples of the types of decisions covered by the law include decisions on professional license revocations, conditional use permits, rezoning of real estate parcels, zoning variances, tentative subdivision and parcel maps, consulting contracts, cable television franchises, building and development permits, public street abandonments, and private development plans.

Decisions on general plans, general building or development standards or other rules of general application are not covered by section 84308. In addition, "proceedings" do not include purely ministerial decisions, in which no discretion is exercised.

The prohibitions of section 84308 apply to proceedings that are "pending" before the agency with which the officer is affiliated. A proceeding is pending when: (1) an application has been filed, the proceeding has been commenced, or the issue has otherwise been submitted to the jurisdiction of an agency for its determination or other action; and (2) the proceeding is of a type that the officers of the agency are required by law to make a decision about or the matter has been submitted to those officers for their decision. (Reg. 18438.2(b).)

Once the staff of an agency has started reviewing a request for proposal ("RFP"), the contract proceeding has commenced and is pending before the agency. From that point forward (and until three months following the date a final decision is rendered), no officer of the agency may accept, solicit or direct a contribution in excess of \$250 from any participant who attempts to influence the review of the RFP. (Alperin Advice Letter, No. A-96-083.)

Party

A party is any person (including a business entity) who files an application for, or is the subject of, a proceeding involving a license, permit or other entitlement for use.

When a closed corporation is a party (or participant) in a proceeding before a board, commission, or agency, the majority shareholder of the corporation is also treated as a party (or participant), and all prohibitions and disclosures required under section 84308 will apply to the majority shareholder. (Gov. Code Section 84308(d).)

Participant

A participant is any person who is not an actual party to the proceeding, but who:

(1) actively supports or opposes a particular decision (e.g., lobbies the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence the officers of the agency); and (2) has a financial interest in the outcome of the decision. A person does not lobby, testify or otherwise act to influence the officers or

employees of an agency by communications made to the public, other than those made in the proceedings before the agency. (Reg. 18438.4(d).)

Example: *Paul Peters and Nancy North are neighbors. North has applied for a conditional use permit to allow her to conduct an auto repair business on her driveway. In opposing North's application before the planning commission, Peters testified that granting the permit would substantially reduce the fair market value of his property. He also presented a petition signed by 20 neighbors opposed to granting the permit. North is a party. Peters is not an actual party to the proceeding, but since he testified in opposition to North's request, and has a financial interest in the outcome of the proceeding, he is a participant. The neighbors who merely signed the petition are not participants.*

Agent

An agent is an individual or firm who represents a party or a participant in a proceeding. If an agent is an employee or member of a law, architectural, engineering or consulting firm, or a similar entity, both the entity and the individual are considered agents. Campaign contributions made by a party or participant are aggregated with those made by the party or participant's agent within the 12 months preceding the decision or the period of the agency relationship, whichever is shorter. (Reg. 18438.3.)

An attorney representing a party in a proceeding and that attorney's law firm are considered agents of the party. The law firm has a PAC that wishes to make contributions to an official who sits on the board before which the proceeding is occurring. If the law firm and the PAC are directed and controlled by a majority of the same persons, the contributions of the two entities will be aggregated for purposes of section 84308. If the combined contributions of the law firm and the PAC to the official would exceed \$250, the PAC's contribution would be prohibited. (Sutton Advice Letter, No. A-95-156.)

A spouse is an agent for purposes of section 84308. If the spouse of an official solicits contributions of more than \$250 from a person the official knows or has reason to know is a party, a participant, or an agent of a party or participant, a prohibited solicitation will result. (Calvert Advice Letter, No. A-94-263.)

A person is the "agent" of a party to, or a participant in, a proceeding only if he or she represents that person in connection with the proceeding. An attorney representing clients before the coastal commission is an agent of those clients. If the attorney's contributions made to a member of the coastal commission exceed \$250 within the prohibited time period, the official must disqualify himself from the proceeding. (Karas Advice Letter, No. I-94-211.)