

CALIFORNIA'S NEW CAMPAIGN CONTRIBUTION REGULATIONS: WHAT LOCAL GOV'TS NEED TO KNOW

THURSDAY, JULY 13, 2023 | 12:00 PM – 1:00 PM

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Host & Moderator

MELISSA KUEHNE
Senior Program Manager
Institute for Local Government



WEBINAR OVERVIEW

Welcome

Updates to the Political Reform Act

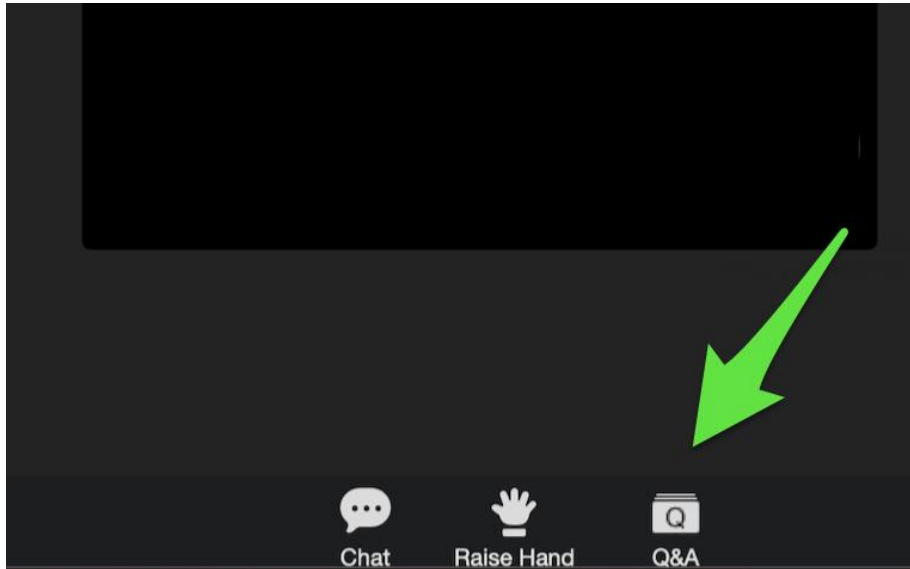
Audience Q&A

Wrap Up & Adjourn

We welcome your written questions and comments in the Q&A throughout the webinar

TECH OVERVIEW & HOUSEKEEPING

- All webinar participants will be on **MUTE** for the duration of the event.
- Please type any questions for into the **Q&A BOX** at any time during the session.



- A recording of the session will be available shortly after the webinar.

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Our mission is to help local government leaders **navigate complexity, increase capacity & build trust** in their communities

TODAY'S PRESENTERS



CRAIG STEELE

Shareholder, Public Law Department
Richards, Watson & Gershon



NATALIE KALBAKIAN

Associate Attorney, Public Law Department
Richards, Watson & Gershon



California's New Campaign Contribution Regulations: What Local Governments Need to Know

Craig Steele
Natalie Kalbakian
July 13, 2023

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LAW

Senate Bill 1439

The Law, Its Impact, and Our Recommendations

- What officials are impacted?
- What are parties and participants?
- How should candidates adjust their campaign fundraising?
- When is a proceeding considered “pending” before an agency for purposes of the 12-month fundraising ban and disclosure and recusal requirements?
- What constitutes “willful and knowing” receipt of a contribution for purposes of the recusal requirement?
- How can appointed or elected officials cure violations?
- Does this law impact PAC and independent expenditure fundraising?



Government Code Section 84308 (Levine Act of 1982)

- Anti-corruption law intended to curb pay-to-play schemes
- “Public trust is greatly enhanced when decision-makers maintain their independence from these corrupting influences”
 - SB 1439 author Sen. Steven Glazer
- The law “**closes the loophole**” that previously allowed directly elected politicians, and not appointed officials, to take action on matters that affected contributors when the elected received donations for a political campaign

Government Code Section 84308: (Summary)

- While a proceeding is pending, and for 12 months after a final decision, an officer may not accept, solicit or direct a contribution of more than \$250 from a party, participant with a financial interest, or participant's agent.
- Prior to participating in a decision, an officer who received a contribution of more than \$250 in the previous 12 months from a party, participant, or agent must disclose and recuse.
- Officers have the opportunity to cure some violations within a specified time frame. There are ways to lawfully participate.
- A party to a proceeding who made a contribution of more than \$250 to an officer in the previous 12 months must disclose that contribution on the record of the proceeding.
- Parties, participants, and agents may not make contributions of more than \$250 to officers in the 12 months following the date of an agency decision.

Legislative Changes



Former Government Code Section 84308 (applies to contributions made and proceedings participated in prior to Jan. 1, 2023)

- Only impacted appointed, non-elected local or state agency officers
- Fundraising ban for post-proceeding contributions over \$250 was limited to 3 months after the final decision

Amended Government Code Section 84308 (new prohibitions and requirements are effective as of Jan. 1, 2023)

- Broadened fundraising prohibitions and recusal requirements to include local elected officers
- Fundraising ban for post-proceeding contributions over \$250 was extended to 12 months after the final decision

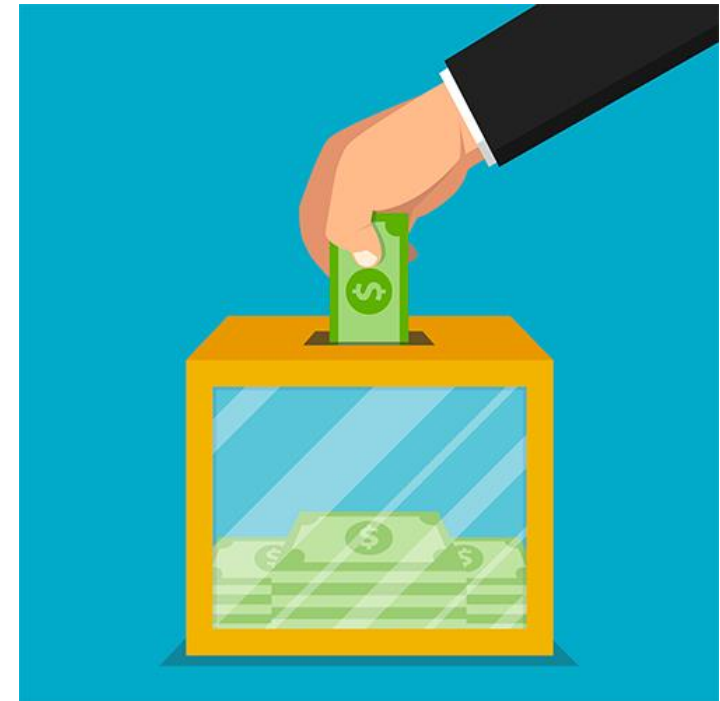
Who is impacted by this law?

- State or local agency “officers”
 - Any elected or appointed officers, alternates, and candidates for elective office
 - Courts and judicial branch and governor’s cabinet members are excepted
 - Examples: Members of city councils, county and special district boards, appointed boards



Disclosure and Recusal Requirements

- An officer who received contributions of more than \$250 from a party or “participant” (who the officer knows has a financial interest) in the 12 months prior to rendering a decision must:
 - (1) **disclose the fact on the record and**
 - (2) **recuse herself from the proceeding.**
- An officer cannot make, participate in making, or attempt to use her official position to influence the decision if she “**willfully or knowingly**” received a contribution from the party or a participant with a financial interest



What is the “willful and knowing” receipt of a disqualifying contribution?



- Actual knowledge
- Party to a proceeding before the agency involving the license, permit, or use entitlement discloses the contribution made on behalf of himself *or his agent* within the preceding 12 months as required pursuant to Government Code 84308(e)
- Aware of facts establishing other reasons to know of contribution (someone has informed officer, party or participant previously made 2 or more \$250+ contributions, personal solicitation, personal acceptance)
- **Not actual knowledge:** Contribution reporting alone

Fundraising Ban



- An officer cannot “accept, solicit, or direct” a contribution over \$250 from any party, participant, or their agent (if the officer “knows or has reason to know” that the participant has a financial interest), **while a proceeding involving a license, permit, or other use entitlement is pending and for 12 months following the final decision**
- What kind of contracts, licenses, and permits? Any business, professional, trade, franchise, and land use matters
- Any exclusions? Competitively bid, labor (collective bargaining agreements), and personal employment contracts (only involving agency employees, not independent contractors).

When is a proceeding “pending”?

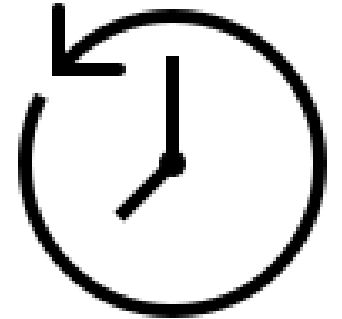
A proceeding has commenced and is pending when:

For an officer:

- When decision is before officer’s consideration as an item on a public meeting agenda; or
- Officer knows, or has reason to know, the proceeding is before the agency’s jurisdiction for its decision and it is reasonably foreseeable that decision will come before the officer

For a party, participant, or agent:

- When decision is before the agency’s jurisdiction for a decision



What is a “participant” with a financial interest in a proceeding?

- A “participant” lobbies, testifies in person, or otherwise communicates with an officer or employee of the agency for the purpose of influencing the decision-making and has a financial interest in a decision
- If an officer is aware that the individual has a financial interest in a decision, the officer is required to disclose contributions of more than \$250 in the past 12 months and recuse themselves
- The officer must have actual knowledge of the “participant’s” financial interest or the “participant” reveals facts during the proceeding that make that person’s financial interest apparent (giving the officer a “reason to know” about the financial interest):
 - Property interest within 500 feet of the real property at issue in the proceeding.
 - Economic interest in a business entity that may see a significant increase or decrease in customers as a result of the proceeding.
 - A business relationship with the applicant that may result in additional services provided to the applicant.
 - Not an economic interest in the general vicinity of a business entity or real property at issue in the proceeding.

Regulatory Changes

- FPPC has issued the *Kendrick* Opinion clarifying that SB 1439 did not apply retroactively to proceedings participated in or contributions accepted in 2022
- Newly amended Regulations 18438.1-18438.6, 18438.8 (6/15/2023); newly adopted Regulations 18438 and 18438.7 (repealed former version on 6/15/2013)
- Regulations available on FPPC website



Example

- On April 1, 2023, Councilmember Watson received a \$500 campaign contribution from NCK, a developer who has previously had development applications before the City of Beverly City Council and has donated to his campaign several times over the years in amounts over \$250. The President of NCK delivered the most recent check in person at a fundraising event. On April 10, 2023, Councilmembers received a local online newsletter featuring an article about NCK's future development plans within the City and an announcement for a community courtesy meeting to gather feedback from residents about a project.
- On April 17, 2023, the posted City Council agenda for the April 20, 2023 meeting shows an item to consider a land use application from NCK for a large multi-family housing project in the City.

If Councilmember Watson participates in making the governmental decision in which NCK is a party, would that violate Government Code Section 84308?

Can officers cure a violation?

- Did the officer receive the contribution prior to knowing or having reason to know the proceeding involving the party commenced? → **Yes**
- Did the officer receive the contribution from a participant prior to knowing or having reason to know of the participant's financial interest in the matter? → **Yes**
- **Solution**: Return the excess portion of the contribution within 30 days from the time he knows or should have known about the contribution and proceeding, allowing him to participate, and do not solicit or accept a contribution for at least 12 months after the decision.
- Government Code Section 84308(d)(1); Regulation 18438.7



How should Councilmember Watson proceed?

- Option 1: Disclose the contribution and recuse himself from the proceeding
- Option 2: Participate in the public proceeding prior to returning the contribution provided that the following conditions are met:
 - 1. Councilmember Watson has known about the public proceeding for **fewer than 30 days** (here, arguably only 3 days)
 - 2. Councilmember Watson must disclose the disqualifying contribution on the record of the proceeding before taking part in any further discussion or decision
 - 3. Councilmember Watson must confirm that he will return the amount within 30 days from the time he knew or should have known about both the contribution and the proceeding
 - 4. Councilmember Watson must finally return the contribution or excess portion of the contribution **within 30 days of April 17, 2023**

Note: In an abundance of caution, Councilmember Watson should consider returning the contribution sooner since he may have had reason to know that the proceeding was before the agency's jurisdiction and it may have been reasonably foreseeable that the decision would come before the officer earlier on April 10 when the article about the project was circulated, or even earlier since this repeat donor had previously applied before this agency.

Can officers cure a **post-proceeding** violation?

- Did the officer knowingly and willfully accept, solicit, or direct the contribution during the 12 months after the date of a final decision in a proceeding? → **No**
- If an officer unknowingly accepts, solicits, or directs a disqualifying contribution during the 12 months post-proceeding, the officer may cure violation by returning excess portion within 14 days of accepting, soliciting, or directing contribution (whichever is latest).
- Government Code Section 84308(d)(2)

Example 2 - Participants

During the proceeding on the NCK application, public speakers disclose the following:

- Mr. Gershon reminds Councilmember Watson that he has voted for Councilmember Watson at every election, hosted a fundraiser at his home for the Councilmember in 2022 and personally donated \$1,000 to Councilmember Watson's campaign at that event. Although Gershon lives elsewhere in the City, he thinks the project will ruin the character of the neighborhood in which it would be located, and expects Councilmember Watson to prioritize the views of the people who elected him, and vote to deny the project.
- Ms. Richards is the owner of an ice cream shop located just across the street from the proposed new development. She speaks in favor of the project because it will increase customers for her shop. After Gershon's testimony, she feels the need to remind Councilmember Watson that she attended his fundraiser on April 1, 2023 and contributed \$300, which was a large amount for her, because she feels so strongly about this project.
- A lawyer for the property owner speaks in favor of the project. Councilmember Watson knows that the lawyer's client is one of the top donors to the "Keep Beverly Growing" PAC, which supports Councilmember Watson and two other members of the City Council majority. The landowner has contributed \$10,000 to the PAC this year alone.

How do these disclosures affect Councilmember Watson under Government Code Section 84308?

Key Considerations

- ✓ **Elected or appointed agency officers** – Direct contributions to city council candidates are covered under the new provisions, but political action committee donations are not.
- ✓ **Donation Date** – The amended provisions will not apply to any donations made before 1/1/2023.
- ✓ **Donation amount** – Officers must only return an amount in excess of \$250 if the contribution was prohibited.
- ✓ **License, permit, or use entitlement** – A land use permit is covered by this law.
- ✓ **Decision date** – Within 12 months after the contributions, which would trigger recusal requirement based on Ms. Richards' contribution.
- ✓ **Party or participant** – Gershon does not appear to have a financial interest in the decision; Richards' business is across the street and she likely qualifies as a “participant;” the lawyer is an “agent” but contributions to the PAC do not create a conflict under Section 84308.

How can local officials return contributions from **participants** in a timely manner?

- An individual who lobbies in person to a local officer directly, testifies in person before the agency, or otherwise acts to influence the agency members for purposes of influencing a decision in the proceeding is a participant if she also has a financial interest.
- However, unlike parties to a proceeding, participants are typically not required to disclose their contributions to agency members. *In addition, it might be difficult to identify a potential financial interest if the speaker does not volunteer sufficient facts about her economic interests.*
- **Takeaway: An officer who has willfully or knowingly received a contribution from a participant (Regulation 18438.7(b)), and knows or has a reason to know that the participant has a financial interest in the proceeding violates Government Code Section 84308 when he participates in the proceeding.**
- **Pre-Decision Violation:** The period to cure the violation begins within 30 days after he learns about the contribution and the participant's financial interest in the proceeding.
- **Post-Decision Violation:** Within 14 days of accepting the contribution only if the officer did not knowingly and willfully accept the prohibited contribution.

Future of SB 1439 / Recommendations

- *Family Business Association of California v. FPPC* – State court ruling upholding the constitutionality of the law; does not have precedential value; appellate courts have not yet determined this issue
- Pending Attorney General Opinion

Recommendations:

- Campaign committees should carefully monitor contributions and consider limiting contributions to \$250 or less annually for purposes of both the fundraising ban and the recusal requirement
- Committees should also ensure that multiple small donations from a repeat donor do not amount to over \$250 within a 12-month period
- Public agency staff should consider whether it is practical to compile lists of donors above \$250
- Make sure to publicly disclose and return excess portion of prohibited contributions in a timely manner (consider whether your contributions have been “knowingly” received or whether you have sufficient information to establish knowledge of a participant’s financial interest)



Thank you!

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AUDIENCE Q&A

What questions or comments do you have for us?



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- <https://www.ca-ilg.org/leadership-and-governance>

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- **TIERS Public Engagement Training**
 - July 26th & 27th, 10:00am-3:00pm
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