

September 14, 2009

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Attn: Daniel Claypool
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RE: Citizens Redistricting Commission Draft Regulations

Dear Ms. Howle:

We, the undersigned, are pleased to be able to comment on the draft regulations issued by your office on July 31, 2009, regarding the Voters First Act. We were impressed by the thoroughness shown by your staff in developing the proposed regulations, and applaud your intent to facilitate the smooth implementation of the Act by filling in some of the details. We also appreciate your willingness to listen to our input and the input of other interested organizations and individuals; that willingness to listen to the public is apparent in your detailed and thoughtful response.

The following is a list of items we would like to bring to your attention. Some of these reflect concerns that we share and suggestions for ways to address those concerns; others are suggestions for clarifying language. For your convenience, also included is an appendix listing the relevant sections of the regulations in numerical order, with our suggested revisions.

Conflicts of Interest

1. **The proposed definition of ‘State Office’ in § 60828 should be revised for clarity and to reflect previous interpretations of state law, and the proposed definition of ‘Appointed to Federal or State Office’ in § 60804 should be revised to achieve greater consistency with the intent of Proposition 11 and to facilitate the ability of applicants to determine their eligibility for the commission.** The state office definition in § 60828 should be revised to exclude advisory bodies because previous interpretations under California state law make clear that appointees serving on advisory bodies are not state officers. For example, the California Attorney General opined in 1998 that appointees to advisory bodies are not state officers because they do not exercise the state’s sovereign power (see 81 Ops. Cal. Atty. Gen. 310 (determination of whether appointee to advisory body is state officer for purposes of California Tort Claims Act)). Additionally, § 60828 creates ambiguity as to whether appointees to city, county or local district bodies are covered by the state office definition, and should be revised to make clear that such appointees are not covered by the definition. Please see our suggested revisions to § 60828 in the appendix.

§ 60804 should be revised to include appointments by the Board of Equalization in addition to appointments by the Governor and legislative members. This is because the commission will draw Board of Equalization lines, and persons who receive salaried appointments from Board of Equalization members are arguably beholden to those members. Lastly, § 60804 should be revised to provide that the State Auditor will publish on its website a list of appointed federal and state offices covered by § 60804. This will facilitate the ability of potential applicants to determine whether their appointments fall within the scope of exclusions under Proposition 11. Please see our suggested revisions to § 60804 in the appendix.

We also inform you that the signatories to this letter have had a robust discussion about whether the scope of the “Appointed to Federal or State Office” definition in § 60804 should be narrowed, and the extent to which the scope should be narrowed. This discussion has focused in part on whether the definition should cover only appointments to compensated positions, and if so, what types of compensated positions should be covered. The signatories to this letter were unable to come to consensus on this issue, but because it is one of the more significant issues raised by the regulations, we are highlighting it in this letter and letting you know that some of the signatories will provide you with separate comments outlining their respective viewpoints.

2. **The definition of “Most Qualified Applicants” (§ 60818) should be clarified.** Specifically, in the current proposed language, it is not entirely clear that a potential applicant who shifted between a party and “decline to state” during the last five years is not eligible. Please see the appendix for suggested clarifying language.
3. **The definition of “Paid Congressional, Legislative, or Board of Equalization Staff” should be clarified.** The current language appears to assume that all congressional and legislative staff are receiving compensation from the Congress of the United States only. Please see our suggested addition to § 60819 in the appendix.
4. **The definition of “Political Party” (§ 60821) should be clarified.** As currently drafted, the definition includes only those parties that make campaign expenditures to support candidates for elective public office. However, not all qualified political parties in California may actually make campaign expenditures (the Peace and Freedom Party appears to be an example). We therefore are suggesting adding the phrase, "or recognized as qualified by the Secretary of State" to this definition to ensure that it covers all operating, qualified parties regardless of whether they make campaign expenditures.

Identifying Qualified Applicants

5. **§ 60805, as currently proposed, is too narrow and does not cover the full possible range of experience of a potential applicant.** An applicant may appreciate California’s diverse demographics and geography in a manner that does not only relate to individuals’ “voting preferences,” as specified in (a)(1) and (a)(2). Indeed, limiting an “appreciation” to only voting preferences may eliminate applicants who can demonstrate an appreciation of California’s demographics and geography that may be not directly tied to “voting preference.” For example, an applicant may work closely with low-income Latino youth in the Central Valley. His or her work may not specifically demonstrate an understanding that the shared ethnicity or income level of the youth translates into “voting preferences” (since they do not vote). However, this work

may reflect some knowledge about how these particular stakeholders may benefit from shared state/local/federal representation. Please see our suggested revisions to § 60805 in the appendix.

6. **In § 60826, the proposed definition of “Relevant Analytical Skills” is too restrictive with regard to the use of statistical information and software, and does not accurately reflect the skill level a potential commissioner would require.** “Complicated” is a vague term as it refers to statistical information, especially in the context of potential applicants who will not be experts in this field. In redistricting, “complicated statistical information” would be considered the interpretation of a polarized voting analysis. There are few people even among redistricting experts who would be able to understand a polarized voting analysis without the benefit of having a specialized statistical expert explain it. The statistical information that commissioners will be asked to understand on their own is likely related to basic computations such as those derived from census data tables and variables. For similar reasons, we are suggesting to replace the word “dense and technical” with “detailed.”

A similar issue arises from the language “working with sophisticated software.” Generally speaking, the most sophisticated software in redistricting is the use of specialized geographic information systems (GIS). Such programs are only owned by those who professionally engage in redistricting in some fashion. They are very expensive and not widely available. Very few members of the general public would have ever had the opportunity to work with such software, and with most commissions that we are familiar with, the commissioners relied on technicians to work with the software. Therefore, requiring the knowledge of “sophisticated software” thus has an economic implication that may well reflect adversely on the diversity of the commission.

We also believe that the phrase describing the ability to resolve complex problems “involving factual ambiguities” is unclear, and suggest that “involving competing factual claims” be substituted.

Please see in the appendix our suggested revisions to § 60826.

7. **Regarding § 60847 (Phase II Application), “criminal history” is vague and may be too broadly interpreted to include arrests and misdemeanors that occurred at any time in an applicant’s past.** For example, an arrest for civil disobedience may not be the type of criminal history that is relevant to an applicant’s qualifications or fitness to serve on the commission. State employment applications, by way of comparison, usually limit such questions to disclosure of convictions as an adult (excluding traffic violations other than felonies) and define a conviction as a plea, verdict or finding of guilt, regardless of whether a sentence was imposed by the court. Please see our suggested revision to § 60847 in the appendix.
8. **Also regarding § 60847, information required of an applicant should be limited to those questions directly relevant to a determination of whether an applicant is qualified.** Asking for information relating to an applicant’s involvement with professional, social, political and community organizations and causes is understandable, since presumably those experiences can help demonstrate an applicant’s appreciation for diversity or possession of relevant analytical skills. Narrowing the scope of information sought from the applicant may help ensure that information provided is relevant to a determination of whether an applicant is qualified. As such, in our appendix we suggest a revision to § 60847 to only seek information that the applicant

deems relevant to service on the commission and satisfying the qualifications specified in the Voters First Act.

Also, we believe that requiring disclosure of financial contributions made to any of the above organizations and causes may unduly intrude on an applicant's privacy and is not likely to obtain much more relevant information than by excluding it. Additionally, disclosure of financial contributions¹ to organizations and causes would undoubtedly be burdensome, in particular, for those persons who have made several contributions over the relevant time period. Nonprofit organizations, while being required to disclose to the IRS the names and addresses of persons making large donations, are not required to disclose that information to the public – and many organizations, seeking to protect their donors from harassment or undue attention, keep that information confidential. Deleting reference to “financial contributions” will still allow the Applicant Review Panel to obtain relevant information that would allow adequate review of the applicant's qualifications.

9. **Applications should be fact-checked as much possible to verify accuracy and honesty, particularly regarding conflict-of-interest related statements.** We applaud the intent of the Bureau of State Audits (BSA) staff to check accuracy of the applications as much as is possible. To best maximize the time and resources of the Bureau, as well as to minimize inconvenience to applicants and applicants' family members, employers, etc., we also believe it might make the most sense to focus fact-checking activity later in the process, after the size of the applicant pool has been somewhat reduced.

Diversity

10. **The definition of diversity contained in § 60814 should be revised to mirror the statutory language contained in Proposition 11.** During the interested persons meetings conducted by the BSA earlier this year, various stakeholders urged the BSA to make the application process fair to all individuals regardless of economic status, and to remove barriers that could prevent individuals from participating in the application process, such as requiring applicants to travel for interviews at their own expense or requiring them to demonstrate skills or experiences available only to persons with disposable income. We commend the BSA for drafting regulations that, for the most part, take into account this input.

However, we have concern about the unintended consequences that may occur as a result of including economic diversity in the definition of diversity contained in proposed Section 60814. When the Applicant Review Panel is considering the composition of the applicant pool as required by proposed Sections 60848(f) and 60850(e), the panel is likely to face a difficult task in balancing the various aspects of diversity contained in Section 60814's definition of diversity.² The addition of economic diversity to the other forms of diversity listed in Section 60814 will

¹ Notwithstanding the points raised above, the term, “financial contributions” is quite broad and could be expansively interpreted to include everything from financial support of public radio, tickets for fundraising dinners for charities, and donations to homeless shelters, for example.

² We note here that we support the inclusion of Sections 60848(f) and 60850(e) in the proposed regulations. We believe these sections give proper effect to Article XXI, Section 2(c)(1) of the California Constitution.

likely make the panel's task in this regard more difficult, and creates the potential to undermine those other aspects of diversity in the applicant pool.

Rather than the definition of diversity contained in proposed Section 60814, we believe Section 60814's language should mirror the definition of diversity contained in Section 8252(g) of the Government Code. Our suggested revision to Section 60814 is contained in the appendix. We note here that we support the BSA's inclusion of economic diversity within the definition of "appreciation for California's diverse demographics and geography" contained in proposed Section 60805, but believe that economic diversity should not be included in Section 60814's definition of diversity because of the unintended consequences described above.

We also note that we reviewed the transcripts of the interested persons meetings held earlier this year. Only a handful of individuals indicated an interest in the Applicant Review Panel "staying open" to applicants from a variety of occupations and income levels. In fact, we saw a much stronger interest in ensuring that the application process was free of barriers regardless of financial situation than in adding economic diversity as one of the official criteria. We therefore request that "economic" be stricken from the proposed regulation, as we have revised it in the appendix.

The Application Process

11. **The current description of the outreach program in the proposed regulations could be clarified and strengthened.** Although we understand that the scope and breadth of the BSA's outreach program is dependent upon funding, we strongly believe that outreach needs to be not only statewide but reach into local communities. We recognize and applaud the BSA's intent to use community partners to assist with that local outreach, but we also believe that community partners will need some assistance with developing materials and perhaps some expert advice. To that end, we have suggested some additional language for § 60840 in the appendix.
12. **The BSA should ensure that adequate resources are available to persons filling out the application form.** As we recommended previously in our letter dated June 8, 2009, the BSA should provide instructional and resource materials with the application form that help applicants determine their eligibility to serve on the commission, such as links to and instructions for navigating state and federal campaign finance websites. The BSA should also make a telephone hotline available so that potential applicants can call to receive advice on questions of eligibility. We hope that the BSA will articulate a commitment to ensuring the availability of such resources, either in revised regulations or in documents accompanying the application form.
13. **§ 60842 (f) -- The language as currently drafted does not specify clearly enough exactly which information will not be posted on the BSA's website or otherwise publicly available.** It also leaves more than is necessary to the BSA's discretion, which could confuse or cause uncertainty on behalf of some potential applicants. We are concerned that some people may not apply if they are unsure if their personal/private information could be released publicly. In the appendix, we suggest new language for § 60842(f) which clarifies which information will not be released and creates another category which leaves the BSA some discretion as to what type of information not to post or otherwise disclose.
14. **Applicants who unintentionally submit two applications should not be disqualified.** Because the application process is online, it is likely that applicants will need technical assistance; some

may accidentally submit an application more than once. We suggest adding the word “intentionally” in 60842(c)(1) and 60844(a)(1) so that applicants who accidentally submit their application more than once are not disqualified nor led to believe that doing so could disqualify them.

15. **The timeline for the Phase I and II application periods should be posted on the Bureau's website at the beginning of the application process and the BSA should make every possible effort to stick to that schedule.** We are concerned that potential applicants have the opportunity to plan their time accordingly if they are asked to move into the Phase II portion of the application process. We also want to ensure that those time periods are of adequate length to accommodate the maximum number of applicants possible.
16. **§ 60846 should be revised to resolve a timing conflict.** There appears to be a timing conflict between subsection 60846(b)(1) and subsections (a) and (e). The language of (a) and (e) allow information received late in a given phase to be considered in the next phase. But (b)(1) says language received late in a phase cannot be considered at all. The language suggested in our appendix removes the timing reference in (b)(1), leaving in place the timing rules of (a) and (e).
17. **Five days notice for interviews does not provide sufficient time for applicants.** We commend the BSA for ensuring an equal playing field for applicants, regardless of economic status, by reimbursing applicants for their expenses in traveling to Sacramento for interviews. However, we are concerned that a five-day notice for interviews will not provide sufficient time for many applicants to adjust their schedules, and will exclude some applicants from participating in their interviews, especially applicants whose employer policies necessitate that they provide more than five days notice when taking time off, or if they need to find a replacement to cover their time off. Accordingly, in order to further ensure an equal playing field for all applicants, we urge you to revise Section 60849(b) to provide applicants with at least 7 business days notice of their interview time, date and location, as suggested in our appendix.
18. **Videotaped Phase III interviews should not be made public until all the interviews have taken place.** The regulations as currently written do not make it clear if the interviews will be videotaped and posted on a rolling basis, or after all are completed. If the former, those who are interviewed later could possibly view the interviews of those who came before them and enjoy an unfair advantage. In the appendix, we have suggested a revision to § 60849 to clarify this point.

The Applicant Review Panel

19. **Improvements can be made to the definition for “Randomly Draw.”** We applaud the State Auditor’s definition for the “randomly draw” definition and believe that the process as generally described in the regulation will result in a successful random selection process. However, the description can be further improved by adding the word “immediately” at the beginning of 60824(b) to clarify that there will not be a significant gap in time between the assigning of numbers to final applicants and the selection of those applicants. Such a time gap can lead to an actual or perceived opportunity for mischief that can easily be avoided by requiring the assigning of numbers to happen immediately prior to the drawing. It is also important that it not be possible for the person making the random selections to know what numbers specific applicants have been assigned; if numbers are assigned sequentially to an alphabetical list then it will be possible for the selector (and everyone else) to know what numbers specific applicants have been assigned, since

the names of the final pools of applicants will be public. For this reason, we suggest adding the phrase “in random order” in the same section when describing how applicants’ names and numbers will be assigned and recorded.

20. **Add language to the regulations that restates the final process for selecting the first eight commissioners.** In §60853, the draft regulations discuss the “strikeout” process for legislative leaders to remove applicants from the final pool, and also how the Auditor’s office shall proceed if those strikeouts do not happen by the deadlines stated in Proposition 11. However, both 60853(a) and (b) describe these final stages as applying to all applicants as a group rather than applicants comprised of three subpools. To avoid confusion, we suggest adding language to 60853(a) that simply restates the process for making the final selections from the three subpools as it is written in the initiative itself.
21. **§ 60833 (Removal of Panel Members) appears to have a typographical error.** § 60833(a)(3) currently makes a reference to § 60833, and we suggest changing this reference to § 60832.
22. **Each member of the Applicant Review Panel should review each application to ensure a full review and provide the opportunity for redundant evaluation.** As the proposed regulations are unclear on this point, we suggest a revision to § 60848 in the appendix.
23. **§ 60850 wording should be clarified.** As other sections imply, the “top 20” in a given partisan subpool may not be among the “best 60” in the entire pool. Most sections avoid this problem by avoiding references to the “60 most qualified applicants,” such as appear here in 60850(b). The language suggested in our appendix eliminates this problem by referring specifically to “The 60 applicants who will participate in Phase IV ...”
24. **The regulations should be revised to provide that decline-to-state voters will be represented in the non-major party subpool when the applicant pool is reduced to 120 persons in Phase II and 60 persons in Phase III of the application process.** The language of Proposition 11 suggests that so-called “independents” (voters not registered with any political party, also known as “decline-to-state” voters) will have a role on the new redistricting commission.³ Of the approximately 4.2 million Californians currently registered to vote with neither of the two major political parties, 82 percent are registered as “decline to state.”⁴ Accordingly, we believe the regulations should be revised to require the Applicant Review Panel to give some consideration to whether the non-major party applicant pool includes decline-to-state voters when the applicant pool is reduced during Phases II and III. Without such consideration, it is possible that decline-to-state voters may be underrepresented in the non-major party applicant pool, which in turn would increase the likelihood that decline-to-state voters would not be represented on the commission. Please see our suggested revisions to Sections 60848 and 60850 in the appendix.

³ For example, the findings and purpose language of Proposition 11 states that, “This reform . . . will ensure full participation of independent voters. . . [T]his reform requires support from Democrats, Republicans, and independents for approval of new redistricting plans.”

⁴ See California Secretary of State, May 4, 2009 Report of Registration, available at <http://www.sos.ca.gov/elections/ror/ror-pages/15day-stwdsp-09/ror-050409.htm> (last accessed September 8, 2009).

25. **If the State Auditor creates additional phases of the application process during which the applicant pool is reduced, the regulations should provide that when carrying out such additional phase(s), the Applicant Review Panel will follow the same provisions it is required to follow when carrying out the reduction phases already contemplated in the proposed regulations, such as Phases II and III.** For example, we understand the State Auditor may be considering an additional reduction phase during which the Applicant Review Panel will first reduce the applicant pool to 180 persons, prior to reducing the applicant pool to 120 persons during Phase II and further reducing the pool to 60 persons during Phase III. If the State Auditor does include such an additional reduction phase, the Applicant Review Panel should follow the provisions outlined in Sections 60848 (for Phase II) and 60850 (for Phase III) when it is carrying out the additional reduction phase, and the regulations should be revised to reflect this.

We thank you for the opportunity to provide this input. We are happy to answer any questions you may have about our comments and concerns.

Sincerely,

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