

October 13, 2009

Elaine M. Howle, California State Auditor  
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Attn: Daniel Claypool  
Bureau of State Audits  
[danc@bsa.ca.gov](mailto:danc@bsa.ca.gov)

RE: Citizens Redistricting Commission Modified Text of Draft Regulations

Dear Ms. Howle:

We, the undersigned, are pleased to be able to comment on the modified text of the draft regulations issued by your office on September 28, 2009 regarding the Voters First Act. We appreciate your responsiveness in incorporating many of the comments we made on the initial draft, as well as your continued willingness to listen to our input and the input of other interested organizations and individuals.

The following is a list of items we would like to bring to your attention regarding the modified draft regulations. For your convenience, also included is an appendix listing the relevant sections of the regulations in numerical order, with our suggested revisions.

1. Proposed Revision to BSA Regulation § 60805

**On its face, the express language of Section 60805(a)(1), (a)(2), and (a)(3) in the Bureau's proposed revisions to Section 60805 that define "Appreciation for California's Diverse Demographics and Geography" limit the types of qualifying work, volunteer, academic, or life experiences that an applicant may use to demonstrate an appreciation for diversity.**

Our constituents and networks include many persons whose life work has included a devotion to public service and civic engagement, though often in ways unrelated to any understanding that people with shared geographic or demographic characteristics might share voting preferences. As many of our organizations prepare to implement their outreach programs to identify and recruit commissioner applicants, we must be confident that our outreach efforts and educational materials are precisely aligned with the Bureau's own educational materials and regulations. More importantly, applicants themselves must be confident that their decision to invest the time and resources to complete the application process will be wisely spent.

As such, we were pleased to hear during our conference call with Bureau staff on October 7, 2009, the Bureau's representation that the language identified below, did *not* place limitations on the types of work, academic, volunteer, or life experiences that an applicant could use to demonstrate an appreciation of California's demographic and geographic diversity. Your comments helped assure us, that in practice, appreciation for diversity did not need to be tied to "voting preferences."

Notwithstanding the Bureau's representations, we felt it important to provide more clarification and explanation of our concerns with Section 60805 and recommend the inclusion of specific language in the final version of the regulation.

The first part of the proposed revisions to Section 60805 read as follows:

**§ 60805. Appreciation for California's Diverse Demographics and Geography**

(a) "Appreciation for California's diverse demographics and geography" means all of the following:

- (1) An understanding that California's population consists of individuals sharing certain demographic characteristics that may ~~relate reflect to~~ their **voting preferences**, including race, ethnicity, gender, sexual orientation, and level of incomeeconomic status.
- (2) An understanding that the people of California reside in many different localities with distinct geographic characteristics that may ~~relate to reflect~~ the **voting preferences** of the residents of those localities, including urban, rural, industrial, agricultural, coastal, inland, arid, and temperate.
- (3) A recognition that California benefits by having meaningful effective participation in the electoral process **by registered voters** of all demographic characteristics and residing in all geographic locations, including participation by those voters who in the past, as a consequence of sharing certain demographic characteristics, such as race and ethnicity, have had less opportunity than other members of the electorate to participate in the electoral process.

(Emphasis added in bold.)

Our concern is that the highlighted language above will exclude large numbers of persons from the potential applicant pool, and, as a result, significantly impair the ability of the Applicant Review Panel to identify and appoint a diverse and qualified Commission.

In response to our September 14, 2009 comment letter and testimony explaining such concerns and recommending additional language that would expand the potential applicant pool, your September 28, 2009 memorandum explained that our recommended revisions to Section 60805 "could be read to require that applicants have familiarity or prior experience with redistricting." (BSA Memo, at 5.) Your memo made similar observations with regard to another commenter's request that revisions include reference to the Voting Rights Act.

The recommendations we initially proposed were not intended, nor do we believe that, as drafted, required any familiarity or prior experience with redistricting or the Voting Rights Act. Indeed, our proposed revisions were designed to have the opposite effect – expansion of the types of relevant experiences that an applicant might have that could demonstrate an "appreciation for California's diverse demographics and geography." By being more inclusive in the types of experiences an applicant could have that demonstrate one's appreciation for diversity, we seek to expand the pool of potential applicants.

Restricting applicable experiences to those that only relate to "voting preferences" or registered voters eliminates from consideration prospective applicants whose work, academic, volunteer, or life

experiences focus on non-voting, non-registered voter segments of California's population. Automatically excluded are persons with otherwise relevant experience relating to persons under age 18, non-citizens, permanent residents, the undocumented, and persons unable to vote because of felon voting laws. As you are aware, redistricting relies on the Census Bureau's accurate count of all persons in the state, not just registered voters. Redistricters (whether legislators or commissioners) do not use data that excludes those incarcerated, nonvoters, students, and noncitizens. Similarly, a Commissioner's appreciation for California's diversity should not exclude experiences relevant to these and other types of Californians.

The proposed revised regulations do not provide sufficient guidance for applicants who might not understand how their work, academic, or volunteer experiences relate to voter preferences. Indeed, notwithstanding the ambiguity in this definition, a far larger problem exists -- there are relatively few areas where one's occupation, academic, or volunteer activities could satisfy the "voter preferences" requirement embodied in Section 60805. The most obvious types of qualifying experience would include, for example, some, but not all, political scientists and demographers (so long as their research/writings demonstrated an understanding that shared demographic characteristics relate to voting preferences); political campaign consultants (who run get-out-the-vote, direct mail, and voter registration campaigns); and journalists who investigate and report on voting trends. Once this group is narrowed down to restrict those experiences to persons whose work relates to California, and who are not subject to disqualification as part of the Voters First Act's conflict of interest provisions, the applicant pool is narrowed even further.

Thus, under the proposed Section 60805 revisions, the following types of persons would *not* be able to demonstrate an appreciation for California's diverse demographics and geography, because their experiences (in most cases) do not typically relate to a group's voting preferences:

- A social worker for a nonprofit organization that combats employment discrimination in the low-income factory/garment worker industry and that proposes and lobbies in support of legislation to protect those workers.
- A school teacher who has taught in the public and private school system and who is knowledgeable about educational resource allocation issues in the neighborhood and school district, and who can describe the different issues and priorities of parents (such as transportation, availability of after school activities, educational advancement opportunities, or bilingual language classes).
- An appointed member of the Los Angeles Homeless Services Authority Commission (or social worker) who is responsible for coordinating and managing \$70 million annually in Federal, State, County and City funds for programs providing shelter, housing and services to homeless persons in Los Angeles City and County and who, through his or her work, understands the unique and largely unmet mental health, domestic violence, substance abuse, job training, and benefits enrollment needs of the homeless population.
- A public defender who through his or her work understands the unique needs of low-income persons and youth who find themselves in the criminal justice system.

- An officer of a local chamber of commerce who has worked for his constituent business owners on issues related to green/environmental economic development in matters before an economic redevelopment agency.
- A neighborhood activist in the South Los Angeles “Gateway Cities” who works with businesses, state and federal agencies, community members, elected officials, and transportation companies on addressing traffic, economic impact, and environmental/pollution issues related to the I-710 Freeway corridor.

In light of your comments that the proposed revisions in the September 14, 2009 comments introduced terms and language that might not be accessible to ordinary citizens, we offer the following minor revisions that help reconcile the current proposed revised language and the Bureau’s comments so that, in practice, an applicant’s experience would not be restrictively applied:

**§ 60805. Appreciation for California’s Diverse Demographics and Geography**

(a) “Appreciation for California’s diverse demographics and geography” means all of the following:

- (1) An understanding that California’s population consists of individuals sharing certain demographic characteristics, including race, ethnicity, gender, sexual orientation, and economic status,<sup>1</sup> that may reflect their voting preferences or social or economic interests.
- (2) An understanding that the people of California reside in many different localities with distinct geographic characteristics, including urban, rural, industrial, agricultural, coastal, inland, arid, and temperate,<sup>2</sup> that may reflect the voting preferences or social or economic interests of the residents of those localities.
- (3) A recognition that California benefits by having effective participation in the electoral process by registered voters of all demographic characteristics and residing in all geographic locations, including participation by those voters who in the past, as a consequence of sharing certain demographic characteristics such as race and ethnicity, have had less opportunity than other members of the electorate to participate in the electoral process.

By merely adding the phrase “social or economic interests,” the types of relevant work, life, academic, or life experiences is considerably expanded. Use of the phrase will be commonly understood and does not invoke any obvious connection to redistricting or voting rights act terminology.

**2. Proposed Revision to BSA Regulation § 60827**

We understand that the State Auditor will revise proposed Section 60827 (definition of “relevant analytical skills”) to replace the words “mapping programs” with “mapping websites such as Google Maps or MapQuest” or something substantially similar. We agree with this revision because it will reduce confusion about what mapping software means, and achieve an understanding among

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<sup>1</sup> We suggest a minor edit to clarify that the phrase “including race, ethnicity, gender, sexual orientation, and economic status” should modify “shared demographic characteristics” and not “voting preferences.”

<sup>2</sup> We suggest a similar edit to clarify that the phrase “including urban, rural, industrial, agricultural, coastal, inland, arid, and temperate” should modify “distinct geographic characteristics” and not “voting preferences.”

applicants that is more consistent with your intent that applicants need not be familiar with actual redistricting software used to draw boundary maps.

### 3. Proposed Revision to BSA Regulation § 60829

**The proposed definition of ‘State Office’ in Section 60829 threatens to exclude a good number of individuals who would be qualified candidates for the commission and who would contribute to the diversity of the applicant pool.** This is because the proposed definition includes advisory bodies within the scope of what constitutes “state office.” Here are a few examples of persons who would be excellent candidates for the commission except that they would be excluded under the BSA’s proposed definition –

- *Current and former members of the California Commission on Asian Pacific Islander American Affairs.* Appointed by the Governor and members of the Legislature, this advisory body provides important guidance to state government officials on the needs of California’s diverse Asian American and Pacific Islander population, and its members have a wealth of knowledge of California’s diverse communities that would make them excellent commissioners.
- *Members of the California Complete Count Committee.* Appointed by the Governor, this advisory body is dedicated to ensuring a full and accurate count of all Californians during Census 2010. Service on the committee requires an understanding of both the diversity and the diverse needs of California’s population, making its members ideal candidates for the commission. The committee members are civic-minded and engaged leaders in their respective regions and are themselves a diverse group.
- *Current and former members of the California Commission for Economic Development.* Appointed by the Governor and members of the Legislature, this advisory body provides counsel to state government leaders on economic development issues. Members of this commission have knowledge of various segments of the state’s economy such as aerospace, manufacturing, maritime, tourism and world trade that make them good candidates for the commission.
- *Current and former members of the California Health Policy and Data Advisory Commission.* Appointed by the Governor and members of the Legislature, this advisory body provides advice to state government officials on issues related to health policy and healthcare data. The skills of this commission’s members are the type of analytical skills that would serve the Citizens Redistricting Commission well.
- *Current and former members of the Departmental Transportation Advisory Committee.* Appointed by the Legislature, this advisory body serves as a mechanism to collect public input to be provided to the Department of Transportation. The committee also advises the Department of Transportation on the preparation of reports required by statute regarding functional classification schemes and needs assessments. The skills of this committee’s members are the type of analytical skills that would serve the Citizens Redistricting Commission well.

The Governor's Reorganization Plan: Reforming California's Boards and Commissions lists 24 state-level advisory entities whose members are appointed by the Governor and/or members of the Legislature, and there are additional state-level advisory entities such as the California Complete Count Committee mentioned above. The BSA's proposed definition excludes from eligibility the current and former members of these entities.

During our conference call with BSA staff on October 7, 2009, we were told that the language of the Voters First Act compels the BSA's proposed definition. We respectfully disagree. As we noted in our September 14, 2009 letter, the BSA's proposed definition of "state office" is inconsistent with previous interpretations of state law, which have held that appointees to advisory bodies are not and cannot be state officers because they do not exercise the state's sovereign power. Accordingly, the BSA's regulatory creation of a new "state office" definition is without any basis in legal precedent.

In addition to lacking basis in precedent, the BSA's new definition of "state office" is at odds with the California Political Reform Act of 1974 (PRA)'s conflict-of-interest regime for state officers and other public officials. The BSA acknowledges the relationship of the Voters First Act to the PRA by imposing a requirement in proposed revised Section 60848(g) that an applicant must file the same Form 700 Statement of Economic Interests disclosure that is required of certain public officials pursuant to California Government Code Sections 87200 and 87202. In our conference call with BSA staff on October 7, 2009, BSA staff informed us that the reason for requiring an applicant to complete a Form 700 disclosure *prior to* assuming office is to assist the Applicant Review Panel in assessing whether the applicant has any conflicts of interests.

The state's conflict of interests laws recognize that a one-size-fits-all rule does not advance the goals of the PRA. The PRA and the Fair Political Practices Commission (FPPC)'s implementing regulations expressly exempt public officials who serve an advisory function from having to comply with disclosure and disqualification provisions.<sup>3</sup> See FPPC Regulation 18701, Title 2, Division 6, California Code of Regulations (specifying that whether an individual is a "public official" for purposes of Section 82048 of the PRA is tied to whether the individual is a member of an entity with decisionmaking authority).

The PRA and its implementing regulations also exempt advisory entities from the requirement that each state agency must adopt a conflict of interest code that its "designated employees" are subject to. See FPPC Regulation 18751, Title 2, Division 6, California Code of Regulations (exempting state agencies that have no "designated employees" who would be subject to the conflict of interest code); California Government Code Section 82019 (specifying that "designated employees" do not include unsalaried members of any board or commission which serves a solely advisory function).

These exemptions reflect the view that it would be unwarranted to subject advisory entities and their members to the PRA's conflict of interest provisions. This is because advisory entities lack the authority to exercise the state's sovereign power. See, e.g., California Attorney General Opinion No. 98-101, 81 Ops. Cal. Atty. Gen. 310 (1998).

In short, the BSA's proposed definition of "state office" stands in contrast to both precedent and the PRA's conflict of interest regime. Furthermore, the definition fails to balance the Voters First Act's

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<sup>3</sup> The only exception to this is California Government Code Section 87104, which prohibits members of entities acting in an advisory capacity to a state agency from appearing as a paid representative before such agency.

goals of having a commission free of legislative influence, on the one hand, and a commission qualified to carry out its redistricting duties, on the other hand. As we have previously suggested to you, achieving both these goals is best done by (i) reasonably construing the Voters First Act's conflict of interest provisions in order to keep a wide funnel at the front end of the application process, and (ii) relying on other aspects of the application process to exclude applicants with conflicts of interest that do not fall within the Voters First Act's enumerated disqualification provisions. These other aspects include evaluation by the Applicant Review Panel of applicants' ability to be impartial, the ability of members of the public to comment on applicants, and strikes by the four legislative leaders.

The BSA's proposed definition overemphasizes the Voters First Act's goal of an independent commission at the expense of its other goals such as a commission qualified to conduct redistricting. This unwarranted overemphasis of one goal at the expense of another will significantly reduce the number of qualified individuals who are eligible to apply for the commission and who could contribute to the diversity of the applicant pool. This result can be avoided only by construing the state office definition as we suggested in our September 14, 2009 letter. Our proposed revision is as follows:

**§ 60828. State Office**

"State office" means every office, agency, department, division, bureau, board, and commission within the government of the State of California that does not serve a solely advisory function.

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

Sincerely,

Janis R. Hirohama  
President  
League of Women Voters of California

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Regional Counsel  
Mexican American Legal Defense and  
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Steven J. Reyes  
Former Voting Rights Attorney  
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**Appendix to Letter to Elaine Howle of October 13, 2009:  
Suggested Changes to Modified Text of Regulations**

**§ 60805. Appreciation for California’s Diverse Demographics and Geography**

- (1) An understanding that California’s population consists of individuals sharing certain demographic characteristics ~~that may reflect their voting preferences~~, including race, ethnicity, gender, sexual orientation, and economic status, that may reflect their voting preferences or social or economic interests.
  
- (2) An understanding that the people of California reside in many different localities with distinct geographic characteristics ~~that may reflect the voting preferences of the residents of those localities~~, including urban, rural, industrial, agricultural, coastal, inland, arid, and temperate, that may reflect the voting preferences or social or economic interests of the residents of those localities.
  
- (3) A recognition that California benefits by having effective participation in the electoral process by registered voters of all demographic characteristics and residing in all geographic locations, including participation by those voters who in the past, as a consequence of sharing certain demographic characteristics, such as race and ethnicity, have had less opportunity than other members of the electorate to participate in the electoral process.

**§ 60828. State Office**

“State office” means every office, agency, department, division, bureau, board, and commission within the government of the State of California that does not serve a solely advisory function.