California Bureau of State Audits
MEMORANDUM NUMBER 8

To: Elaine M. Howle, State Auditor

From: Steven Russo, Chief of Investigations
Sharon Reilly, Chief Counsel

Subject: Revisions To Proposed Regulations and Proposed Amendments To Existing Regulations Implementing the Voters First Act Circulated For Public Comment on April 16, 2010

Date: August 9, 2010

Introduction

On April 16, 2010, the Bureau of State Audits (the "bureau") proposed a series of new regulations and amendments to existing regulations in order to further clarify and implement the Voters FIRST Act (the "Act"),[1] which was approved by the voters at the November 2008 general election. In conjunction with issuing these proposed regulations, the bureau also issued a memorandum, dated April 16, 2010, discussing our justification for issuing the proposed regulations and explaining why the proposed regulations were crafted in the manner in which they were crafted. That memorandum remains available on our website (www.wedrawthelines.ca.gov/regulation.html) and provides valuable background information regarding the regulations we are proposing in this regulatory project.

Upon issuing the proposed regulations, a 45-day public comment period commenced, which ended on June 1, 2010; the same day that the bureau conducted a hearing to receive comments from members of the public wishing to present their comments in person. During the 45-day comment period, we received numerous written comments, and at the hearing we received many oral and written comments from members of the public concerning the regulations.

During and after the public comment period, we carefully considered every comment received by the bureau. We then revised our proposed regulations based on those comments and other ideas that have occurred to us since we proposed the regulations last April. We were not able to resolve all of the concerns that were shared with us, and we did not adopt all of the suggestions offered as proposed changes to the regulations. However, we tried to address as many of the concerns as we could, and adopted, in some form or another, all of the suggestions that we considered to be meritorious, consistent with other provisions of the regulations and the Act, consistent with what we view as the intent of the voters in approving the Act, and otherwise consistent with state and federal law.

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[1] The Voters FIRST Act is contained in Article XXI of the California Constitution and Government Code sections 8251 through 8253.6.

The purpose of this memorandum is to provide some explanation for the revisions we have made to the proposed regulations. The memorandum also addresses why we did not make certain changes requested in public comments. Concurrently with the issuance of this memorandum, we are circulating our revised version of the proposed regulations for public comment. The public comment period will end in 15 days, on August 24, 2010.

Section 60804.1. Appointive Federal, State, or Local Public Office

This section defines the phrase "appointive federal, state, or local public office" as used in Article XXI, section 2, subdivision (c)(6) of the California Constitution (hereafter "subdivision (c)(6)"). Subdivision (c)(6) makes an individual who is selected to serve as a member of the Citizens Redistricting Commission ineligible to hold appointive federal, state, or local public office for five years from the date of appointment. Subdivision (c)(6) does not define any of the terms used in the quoted phrase. Moreover, those terms do not have a universally understood meaning.

Giving meaning to the terms used in the quoted phrase is very important because this will dictate how the restrictions on holding office that are imposed by subdivision (c)(6) will operate. In giving meaning to these terms, we have been guided by Article XXI, section 2, subdivision (c)(1) of the California Constitution, which declares that the process for selecting the members of the commission "is designed to produce a Citizens Redistricting Commission that is independent from legislative influence." We also have been guided by the language of the findings and declaration of purpose found in uncodified section 2 of the Act as it appeared in the Official Voter Information Guide for the November 4, 2008 general election. Subdivision (b) of section 2 makes it clear that one of the purposes of the Act is to prevent politicians from influencing the redistricting process such that districts are drawn to serve the politicians' interests rather than the interests of the communities they serve. These statements indicate the clear intent of the voters that those who serve as members of the commission are expected to be free from partisan political influence as they perform their work. Related to that stated intent, the apparent purpose of the restriction on holding appointive federal, state, or local public office in subdivision (c)(6) is to ensure that a commissioner cannot be subject to having such an appointment either given or taken away as a reward or punishment for a redistricting decision. As we discussed in the memorandum to the State Auditor, dated April 16, 2010, we are proposing to define "appointive federal, state, or local public office" in a way that further defines these terms consistent with the voters' intent and within the plain language of the Act.

The proposed definition is necessary to provide clarity and notice to applicants and to the general public regarding the legal effect of the restrictions contained in subdivision (c)(6) as they pertain to those who apply to serve and ultimately are selected to serve as members of the commission. This proposed regulation is also essential to ensuring that the application process is effective and results in the selection of 14 members who are fully informed regarding the rules that apply to them and who are willing to abide by those rules.

The bureau received several comments about this proposed regulation. A group of nonprofit organizations (hereinafter referred to as the "Nonprofits")[2] submitted a joint letter urging that the proposed regulation be modified to define appointive local public office so that the definition only includes within its scope local public offices filled through appointment by members of a county board of supervisors, a mayor, or members of a city council. Two of the Nonprofits[3] recommended that the proposed regulation be modified so that instead of an appointive local public office being defined as one that entitles the office holder either to make governmental decisions or to receive compensation in an amount greater than $5,000 per year or receive per diem payments at a rate greater than $100 per day, an appointive local public office be defined as one in which the office holder is entitled both to make governmental decisions and to receive compensation in an amount greater than $5,000 per year or receive per diem payments at a rate greater than $100 per day.

Opposing the Nonprofits' comments, Douglas Johnson of Claremont McKenna College suggested that the proposed regulation be modified to include in the definition of appointive local public office all appointive public offices, including those for which the office holder receives compensation of $5,000 or less per year or a per diem of $100 or less per day, as there are politically influential yet unpaid public offices that may be bestowed upon a commissioner as a reward for redistricting decisions favored by the appointing authority.

James C. Wright suggested subdivision (a) of the proposed regulation be modified to prohibit a commission member from serving in a federal office filled by appointment by the President, any other member of the executive branch of the federal government, any sitting jurist of the judicial branch of the federal government, or any member or members of Congress.

We declined to modify the definition of appointive local public office to only include local public offices filled through appointment by members of a county board of supervisors, a mayor, or members of a city council. The broad wording of subdivision (c)(6), in prohibiting any member of the commission from holding "appointive local public office" for a period of five years beginning from the date of appointment, does not suggest there should be a limitation in the scope of the prohibition as suggested by the Nonprofits. Moreover, the apparent intent of subdivision (c)(6), to prevent a member of the commission from being rewarded or punished for a redistricting decision through the provision or withdrawal of a government appointment, would easily be thwarted if the prohibition only applied to appointments by some local elected officials and not by others. It is being appointed by a local elected official that creates the danger of reward or punishment, and not the nature of the elected position held by the appointing authority.

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[2] The group of nonprofit organizations consists of California Forward, California Common Cause, the California State National Association for the Advancement of Colored People (NAACP), the Asian Law Caucus, the Asian Pacific American Legal Center, the League of Women Voters of California, and the National Association of Latino Elected and Appointed Officials (NALEO) Education Fund.

[3] The NALEO Education Fund and the Asian Pacific American Legal Center.

We also declined the suggestion of two of the Nonprofits to modify the proposed regulation so that commissioners would only be prohibited from holding an appointive position that entitles the commissioner to make governmental decisions and receive compensation greater than $5,000 per year, or receive per diem payments at a rate greater than $100 per day. To do this would have the effect of changing the prohibition from one against holding appointive local public office to one against holding paid appointive local public office. But that is not what subdivision (c)(6) prohibits. As a position that entails either significant compensation or significant power would likely constitute enough of a prize that its provision or withdrawal could be used to reward or punish a commission member for a redistricting decision, a position that entitles the holder to enjoy either or both of these entitlements logically should be included within the scope of the prohibition.

However, we understand that there can be certain appointive local public offices that although they entitle the office holder to make some governmental decisions, they are not positions that entitle the office holder to make decisions of such significance that providing or withdrawing an appointment to such a position could be considered a meaningful reward or punishment. An example of this, cited by the Nonprofits, is an appointment to serve on the governing board of the El Pueblo de Los Angeles Historical Monument, which is a part of the government of the City of Los Angeles. For that reason, we revised proposed regulation 60804.1, subdivision (b)(3)(A) to exempt from the prohibition an appointment to a relatively minor position, like the governing board of the El Pueblo de Los Angeles Historical Monument, and some others, that only entitle the office holder to receive compensation of $5,000 or less per year, or receive per diem payments at a rate of $100 or less per day, and only entitle the office holder to make governmental decisions affecting persons in a particular geographic area or a particular industry, trade, or profession located within a larger local jurisdiction.

Having made that revision, we believe we have addressed the greatest of the Nonprofits' concerns about the prohibition applying to positions that have very little likelihood of serving as a reward or punishment for redistricting decisions, while still preserving the pthe President, any other member of the executive branch of the federal government, any sitting jurist of the judicial branch of the federal government, or any member or members of Congress, as these appointing authorities lack a sufficient connection with California redistricting decisions to justify such a prohibition. However, as members of Congress elected from California may have some interest in California redistricting decisions, particularly as the district lines for legislative districts can sometimes influence how congressional district lines are drawn, we added to the prohibition the holding of any federal or state public office filled by appointment by a member of Congress elected from California.

Section 60815.1. Elective Public Office at the Federal, State, County, or City Level in This State

This proposed regulation defines the phrase "elective public office at the federal, state, county, or city level in this state" as used in subdivision (c)(6). Subdivision (c)(6) provides that an individual who is selected to serve on the commission is ineligible to hold elective public office at the federal, state, county, or city level in this state for ten years from the date of appointment

to the commission. As with proposed regulation 60804.1, we have been guided by the intent of the voters and by the plain language of the Act that members of the commission should be citizens who are free of partisan political influence. This compelled us to try to define the terms in the phrase "elective public office at the federal, state, county, or city level in this state" in a manner that will insulate commissioners most effectively from being rewarded or punished for their redistricting decisions by the provision or withdrawal of political support for election to any public office at the city level of government or higher.

The proposed regulation is necessary to provide clarity and notice to applicants and the general public regarding the restrictions contained in subdivision (c)(6) as they pertain to those who apply to serve and ultimately are selected to serve as members of the commission. The proposed regulation also is essential to ensuring that the application process is effective and results in the selection of 14 members who are fully informed regarding the rules that apply to them and who are willing to abide by those rules.

The Nonprofits urged that the proposed regulation be modified to define elective public office at the county or city level as only including elective public offices that are involved in the overall governance of a county or municipality. As such, the definition would not include, as proposed by the bureau, elective positions for special districts, school districts, joint powers authorities, or other political subdivisions of the state, even though such positions command authority over a geographical area equal to or greater than a city or county. Further, they opined that the definition should not include certain city or county elective offices, such as county boards of education, which they view as functioning like the governing board of a school district.

In addition, the Nonprofits requested that the proposed regulation be modified to expressly state that an elective public office at the county or city level does not include an elective office with a quasi-governmental entity such as a city or county neighborhood council.

Responding to the Nonprofits' comments, the Gun Owners of California, Incorporated opposed any modification of the proposed regulation that would increase the ability of commissioners to serve in an elective office.

We declined to modify the proposed regulation, as requested by the Nonprofits, to define elective public office at the county or city level as only including elective public offices that are involved in the overall governance of a county or municipality. Subdivision (c)(6) does not simply prohibit a commissioner from holding elective office as a county supervisor, mayor, or city council member. It does not simply prohibit a commissioner from holding a county or city elective office. Subdivision (c)(6) broadly prohibits a member of the commission from holding any elective public office at the "county or city level" for a period of ten years beginning from the date that he or she is appointed to serve as a member of the commission. While the drafters of the Act subjectively may have intended the prohibition of subdivision (c)(6) to apply more narrowly than the plain language of the subdivision indicates, we cannot be governed by their subjective intent -- whatever it may have been. We must be governed by the language of the Act itself, how a reasonable voter would have interpreted the language in deciding to approve the Act, and how to give effect to the language of the Act to further its apparent purposes.

As noted in the above discussion about the prohibition against commissioners serving in appointive public offices, the apparent purpose of subdivision (c)(6) is to restrict the governmental positions a commissioner may hold in order to lessen the opportunity for a commissioner to be rewarded or punished by a political player for the redistricting decisions the commissioner makes. Accordingly, for the restriction on holding elective public office at the county or city level to have its intended effect, it must prohibit the holding of any elective public office at the county or city level, regardless of the duties of the position, and regardless of whether the position is in county or city government per se, or is in a different governmental unit existing at the same level. It is a commissioner being in an elective position, and therefore being dependent on political contributions and political support, that makes the commissioner vulnerable to undue influence, and not the precise duties of the position. We therefore have maintained the previously circulated language of the proposed regulation to prohibit a commissioner from holding an elective public office at the county or city level, including an elective public office with a special district, school district, joint powers authority, or other political subdivision of the state whose boundaries coincide with the boundaries of a county or city, whose boundaries include at least one entire county or city.

The Nonprofits have argued that our definition of a county or city level office would lead to absurd results because there can be powerful offices that wield authority over large geographical areas, yet do not qualify as city or county level offices because their jurisdiction does not include an entire county or city. An example they gave was that a position on the governing board of the Los Angeles Unified School District would not constitute a county or city level office because that district does not include an entire city or county, while the much smaller Burbank Unified School District would be considered a city level office because the district includes the entire city of Burbank. While we do not pretend that our definition of county and city level offices will apply perfectly to all situations throughout this large and diverse state, we found that this example does not support the Nonprofits' position. The Los Angeles Unified School District, while not including all of the City of Los Angeles, includes the entirety of several other cities, including Bell, Gardena, South Gate, and West Hollywood, just to name a few. So a position on the governing board of the Los Angeles Unified School District and a position on the Burbank Unified School District would both be elective city level offices and a member of the commission would be prohibited from serving in either position.
Although we declined to follow the suggestion of the Nonprofits to narrow the scope of what constitutes an elective county or city level office, it never was our intent to include within the definition of any elective county or city level office any elective position with a nongovernmental entity such as a nonprofit organization or a quasi-governmental entity such as a neighborhood council. We therefore accepted their suggestion to add language to the proposed regulation, in subdivisions (d) and (e), to expressly declare that a public office at the county or city level does not include a position within a non-profit organization, quasi-governmental entity, or a neighborhood council.

Section 60820.1. Paid Staff for the Legislature or Any Individual Legislator

This proposed regulation defines "paid staff for the Legislature or any individual legislator" as used in subdivision (c)(6). Subdivision (c)(6) provides that an individual who is selected to serve

as a member of the commission is ineligible, for a period of five years from the date of appointment, to serve as paid staff for the Legislature or to any individual Legislator. The proposed regulation would define and clarify the terms used in this provision and therefore is necessary to provide clarity and notice to applicants and the general public regarding the restrictions contained in subdivision (c)(6) as they pertain to those who apply to serve and ultimately are selected for service as commissioners. The proposed regulation also is essential to ensuring that the application process is effective and results in the selection of 14 members who are fully informed regarding the rules that apply to them and who are willing to abide by those rules.

The Nonprofits commented that the regulation should be modified to define paid staff for any individual legislator as including only those persons whose duties of employment are related to seeking or holding legislative office and not those persons employed by a legislator in a different capacity such as performing work in connection with a private business venture.

By contrast, James C. Wright commented that the regulation should be modified to prohibit a member of the commission from serving as paid staff for any member or members of Congress, the executive branch of the federal government, or the judicial branch of the federal government without regard for whether the duties of employment are related to seeking or holding office.

We declined to adopt the suggestion of the Nonprofits to limit application of the prohibition against a commission member serving as paid staff for the Legislature or any individual legislator so that it just prohibits a commissioner from serving in a paid staff position related to seeking or holding office. The plain language of subdivision (c)(6) does not compel such a limited application, and the intent of the subdivision, to insulate commission members from improper influence, would not be furthered by that modification of the proposed regulation. It is the financial relationship itself that would create the conflict of interest, or appearance of a conflict of interest, and not the nature of the duties performed.

We also declined to adopt Mr. Wright's suggestion to expand the scope of the proposed regulation to prohibit a member of the commission from serving as paid staff for any member or members of Congress, the executive branch of the federal government, or the judicial branch of the federal government. Such an expansion of the scope of the regulation is not authorized by law, as subdivision (c)(6), which this proposed regulation interprets, only prohibits a commission member from serving as paid staff for the Legislature or any individual legislator, and does not prohibit serving as paid staff for any other government officials.

Section 60841. Overview of the Application Process

This proposed regulation amends existing section 60841 to specify that the application process includes a Phase VI, during which the first eight members of the commission will select the final six members of the commission. The existing section briefly summarizes each phase of the application process for selecting the members of the commission, but stops short of describing the last phase. The proposed amendments to the section add a description of the final phase of the application process and make a conforming change to the regulation that recognizes the

selection of the final six commissioners as being a distinct phase of the application process. The proposed amendments to the section are necessary for clarity and for conformity with the other proposed regulatory changes.

The bureau did not receive any public comments regarding this regulation.

Section 60846. Written Public Comments and Responses

This proposed regulation amends existing section 60846, which pertains to the process for members of the public to submit written comments about applicants and for applicants to respond to those comments, by clarifying that the submission of public comments may occur during all phases of the application process, including Phase VI. The proposed amendments would also make other clarifying changes to the existing section. These changes are necessary for clarity and for conformity with other changes proposed by this rulemaking process.

The bureau did not receive any public comments regarding this regulation.

Section 60853. Phase V Random Drawing of First Eight Members of the Commission

This proposed regulation amends existing section 60853, which pertains to the selection of the first eight members of the commission during Phase V of the application process. The original section failed to provide adequately for the transition to Phase VI of the application process, in that it did not specify anything about notification of the selected applicants or how information about the selected applicants will be disseminated to the public. The proposed amendments to the section fill that void by providing that, as soon as practicable following the random drawing of the names of the first eight members of the commission, the bureau shall notify the applicants of their selection and post the names, party affiliations, and relevant qualifications of those commissioners on its website. The proposed change is necessary to provide clarity and notice to applicants and to the general public.

Jeffrey Kuta commented that the wording of the proposed regulation should be modified to clarify that when the State Auditor draws the names of the first eight members of the commission from the pool of applicants remaining after the Legislative Leadership has exercised its strikes, she must draw the names from three separate subpools created by dividing up the applicants according to their party affiliations.

James C. Wright commented that the proposed regulation should be modified to provide that the appropriate oath of office shall be administered to the first eight members of the commission as soon as practicable following the completion of the drawing.

As this proposed regulation, like all of the other proposed regulations, is intended to be read in harmony with the provisions of the Act, it is implicit that the reference in the regulation to the State Auditor drawing the names of the first eight members of the commission from those applicants who remain in the pool of 60 applicants means drawing the names as required by

Government Code section 8252, subdivision (f). However, to resolve Mr. Kuta's concern that someone might misinterpret the proposed regulation as somehow calling for a method of selection that is different than what is required by the statute, we have modified subdivision (a) of the proposed regulation to expressly state that the State Auditor shall select the names as provided in Government Code section 8252, subdivision (f).

We declined to adopt the modification to the proposed regulation suggested by Mr. Wright, which would require an oath of office be administered to the first eight member of the commission as soon as practicable following their selection, as we consider this modification to be unnecessary. Article XX, section 3 of the California Constitution and section 18151 of the Government Code already require that an oath of office be administered to the first eight members of the commission. Moreover, as the first eight members of the commission will not be required to be present at the drawing when they are selected, administration of an oath would not be feasible on that occasion. In all likelihood, an oath will be administered to the first eight commissioners sometime soon after their selection, most likely in conjunction with their receiving training.

To interject greater consistency in the terminology used in the proposed regulations when referencing the first eight members of the commission, we made a nonsubstantive change to the title of the regulation so that it refers to the first eight "members of the commission" rather than the first eight "commissioners."

Section 60855. Training of the First Eight Members of the Commission

This proposed regulation specifies the training the bureau will provide to the first eight members of the commission before those eight commissioners select the final six members of the commission. In order for the first eight members of the commission to be adequately prepared for the important task of selecting the final six members of the commission, it is apparent they will need training regarding the duties the law imposes on them when making the selection of the final six members and training regarding the qualities they need to look for in a commissioner. Modeled after existing regulation 60832, which specifies the training that must be provided to the Applicant Review Panel, this proposed regulation specifies that the first eight members of the commission shall receive training that, at a minimum, covers five key topics:

- The requirements for conducting a public meeting;
- The duties the first eight commissioners have under the Act and its implementing regulations when performing the selection;
- California's diverse demographics and geography;
- The legal responsibilities of the commission under the Act, the United States Constitution, and the Voting Rights Act of 1965; and
- The process for performing redistricting.

Providing such training to the first eight members of the commission is essential to ensuring they will have a sufficient understanding of the selection criteria to carry out their responsibilities. The proposed regulation is necessary to provide clarity to the

general public and to the first eight members of the commission regarding the training that will be provided.

The bureau did not receive any public comments regarding this regulation. However, to interject greater consistency in the terminology used in the proposed regulations when referencing the first eight members of the commission, we made a nonsubstantive change to the title of the regulation so that it refers to the first eight "members of the commission" rather than the first eight "commissioners."

Section 60856. Administrative Support for the First Eight Members of the Commission

This proposed regulation specifies the types of assistance the bureau will provide to the first eight members of the commission as they engage in the final phase of the application process, wherein they select the final six members of the commission. Although the Act is silent as to what administrative, technical, clerical, and legal support will be provided to the first eight members of the commission when they undertake selection of the final six members of the commission, it is obvious they will need such support to accomplish that duty. This proposed regulation therefore provides that the bureau will provide such support, pursuant to the State Auditor's authority to initiate and oversee the application process, in order to ensure that the first eight members of the commission can fulfill their responsibilities. This support shall include:

- Collecting and managing application materials;
- Gathering additional information;
- Arranging public meetings;
- Making travel arrangements;
- Providing technical and administrative support for meetings;
- Communicating with the public on behalf of the commission members; and
- Providing legal counsel.

The proposed regulation also provides that the bureau shall keep and retain the records generated during this final phase of the application process for at least 12 years, consistent with its record retention for the other phases of the application process.

This proposed regulation is necessary to provide clarity to the first eight commissioners and to the general public. The proposed regulation also is essential in order to fully effectuate the final stage of the application process when the full commission comes into existence.

The bureau did not receive any public comments regarding this regulation. However, to interject greater consistency in the terminology used in the proposed regulations when referencing the first eight members of the commission, we made a nonsubstantive change to the title of the regulation so that it refers to the first eight "members of the commission" rather than the first eight "commissioners."

Section 60857. Payments to First Eight Members of the Commission

Government Code section 8253.5 provides that commission members are entitled to receive specified compensation for each day they are engaged in commission business and reimbursement for expenses incurred in connection with the duties they perform pursuant to the Act. The proposed regulation clarifies that when the first eight members of the commission are engaged in training for selecting the final six members of the commission and are engaged in selecting the final six members of the commission, they are engaged in commission business for which they are entitled to receive the specified compensation. Similarly, the regulation clarifies that expenses incurred by the first eight members of the commission in training for selecting the final six members of the commission are expenses incurred in connection with the duties they perform under the Act, so they are entitled to receive reimbursement for those expenses.

The bureau did not receive any public comments regarding this regulation.

Section 60858. Phase VI Meetings of the First Eight Members of the Commission

This proposed regulation specifies procedural requirements for the meetings held by the first eight members of the commission in order to select the final six members of the commission. Generally modeled after existing regulation 60836, which specifies the manner in which the Applicant Review Panel shall conduct its meetings, this proposed regulation discusses: the scope of the first eight commissioners' authority at meetings; where their meetings will be held; the number of members required for a quorum of the first eight commission members; the open meeting requirements for the meetings; the selection of a temporary chair and temporary vice chair, the rules of order, as well as the recording and broadcast of the meetings. The proposed regulation would specify procedures for selecting a temporary chair and temporary vice chair to preside over the meetings of the first eight commissioners that are very similar to the procedures prescribed by Government Code section 8253, subdivision (a)(4) for selecting a permanent chair and permanent vice chair for the full commission once it is formed. We thought it prudent for the two processes to be similar, as the process prescribed in section 8253, subdivision (a)(4) appears designed to ensure a bipartisan balance of power.

By providing greater specificity to the procedures the first eight members of the commission must follow to conduct their meetings, the proposed regulation is essential to effectuating fully the final stage of the application process when the full commission comes into existence.

James C. Wright suggested that in subdivision (c) of the proposed regulation, where there is a specification that five of the first eight members of the commission shall constitute a quorum, the proposed regulation should further specify that a quorum must include at least two members registered with the political party having the greatest number of registered voters, at least two members registered with the political party having the second greatest number of registered voters, and at least one member who is not registered with either of those two parties.

Regarding subdivision (e) of the proposed regulation, which calls for the first eight members of the commission to elect a temporary chair and temporary vice chair, Mr. Wright suggested that the proposed subdivision be modified to eliminate the requirement that the temporary chair and

temporary vice chair not be registered with the same political party and instead require that the temporary chair and temporary vice chair not be persons selected from the same subpool of applicants and thus cannot both be registered with the largest political party, both be registered with the second largest political party, or both be registered with neither of the two largest political parties.

Also regarding proposed subdivision (e), the Nonprofits submitted a comment that they agreed with the provision of this proposed subdivision that prohibited the chair and vice chair from belonging to the same political party, but suggested that the proposed subdivision be modified in two other ways. First, they requested that the proposed subdivision be modified to call for the selection of a temporary moderator and temporary vice moderator rather than a temporary chair and temporary vice chair. Second, the Nonprofits requested that the proposed subdivision be modified to require that the temporary chair and temporary vice chair (or temporary moderator and temporary vice moderator as the Nonprofits would prefer to have these positions designated) be elected by the affirmative vote of any five of the first eight members of the commission and delete the requirement that they be elected by the affirmative vote of at least two members registered with the political party having the greatest number of registered voters, at least two members registered with the political party having the second greatest number of registered voters, and at least one member who is not registered with either of those two parties.[4]

In opposition to the Nonprofits' comment about deleting the requirement that the temporary chair and temporary vice chair be elected with a minimum number of votes from each of the three party groups, the Gun Owners of California Incorporated commented that they opposed such a modification as it would undermine the "guarantee of a bi-partisan selection of the temporary chair and vice-chair."
We declined to adopt the modification to subdivision (c) of the proposed regulation suggested, by Mr. Wright, that a quorum of the first eight members of the commission must include a specified minimum number of commissioners selected from each of the three applicant subpools. Although we can see the value of requiring certain decisions be made by the affirmative vote of a specified minimum number of applicants from each of the three subpools, and therefore required it for the selection of a temporary chair and temporary vice chair, we feel it is unnecessary to require the presence of a minimum number of commissioners selected from each of the three applicant subpools in order for the first eight members of the commission to conduct any business. Aside from selecting a temporary chair and temporary vice chair and selecting the final six members of the commission, the first eight members of the commission have no other significant duties to perform until a full commission is empanelled. However, the first eight commissioners will have many housekeeping matters that they will need to address in the regular course of their business, such as scheduling meetings, approving minutes, and the like. Requiring a quorum with a special composition should not be necessary to handle such mundane matters, and requiring a special quorum could have the effect of needlessly delaying the work of the first eight members of the commission, particularly in instances where one or more commission members are taken ill or experience transportation problems. This is something they

[4] In addition, the NALEO Educational Fund expressed the view that unless clearly compelled by the Act, there should be no requirements mandating that in order to take a particular action the commissioners authorizing the action must have a particular partisan composition.

cannot afford with just six weeks in which to undergo training and select the final six members of the commission.

We also declined to adopt Mr. Wright's suggestion that subdivision (e) of the proposed regulation be modified to eliminate the requirement that the temporary chair and temporary vice chair not be registered with the same political party and instead require that the temporary chair and temporary vice chair not have been selected from the same applicant subpool. We believe such a modification would unnecessarily restrict the options of the first eight members of the commission in selecting a temporary chair and temporary vice chair. Under Mr. Wright's proposal, either the chair, the vice chair, or both would have to be a member of one of the two largest political parties in California because applicants from the subpool containing the applicants not belonging to either of those two parties could only hold one of the two positions. However, under the current version of the proposed regulation, the first eight members of the commission would be free to bypass selecting a member of either of the two largest political parties for a temporary chair or temporary vice chair position, and could select two applicants unaffiliated with either of those parties by selecting two applicants registered as "Decline to State," two applicants registered with two separate smaller parties, or one applicant registered as "Decline to State" and one applicant registered with a smaller party. This may or may not be a strategy the first eight members of the commission would want to employ if they were concerned that filling the temporary chair and temporary vice chair position with a Democrat and a Republican, or filling one of those positions with a Democrat or a Republican but not filling the other position with a Democrat or a Republican, would appear to give both major political parties, or just one major political party, a partisan advantage during the selection of the final six members of the commission. Maximizing the options of the first eight members of the commission in selecting a temporary chair and temporary vice chair appears the best course of action to take at this time, while simply ensuring, as the proposed regulation now provides, that members of a single political party cannot occupy both positions.

Turning to the suggested modifications to the proposed regulation offered by the Nonprofits, we declined to modify the proposed regulation to change the name of the temporary chair and temporary vice chair to "temporary moderator" and "temporary vice moderator." With all due respect to the Nonprofits, we felt this change of names would not serve any purpose except potentially to introduce confusion to the proceedings of the first eight members of the commission. While the roles of a temporary chair and temporary vice chair are generally understood, and they are recognized in the procedural requirements of Robert's Rules of Order, which subdivision (f) of the regulation requires the first eight members of the commission to follow, the roles of a moderator and vice moderator are undefined. Moreover, if, as the Nonprofits fear, the persons selected to fill the positions of temporary chair and temporary vice chair are given some sort of "incumbent advantage" that will carry over to the selection of the permanent chair and permanent vice chair once the full commission is empanelled, that advantage will be the result of performing leadership roles in those positions not the result of the names used for those positions. However, in deference to the Nonprofits' concern that the commissioners selected to serve as the temporary chair and temporary vice chair not be confused with the permanent chair and permanent vice chair, we have modified our references to these positions in the proposed regulation by including the word "temporary" prior to each reference so as to emphasis that they should not be considered permanent in their positions.

We also declined to adopt the Nonprofits' suggestion that subdivision (e) of the proposed regulation be modified to eliminate the requirement that the temporary chair and temporary vice chair be selected by the affirmative vote of a minimum number of commissioners selected from each of the applicant subpools. Although we certainly share the hope expressed by one of the Nonprofits, the NALEO Education Fund, that the members of the commission will not view themselves as representatives of a particular political party or affiliation, and that their decisions must necessarily reflect their affiliations, we cannot ignore the possibility that some partisanship will exist on the commission and therefore safeguards must be in place to ensure bipartisan decision making. As pointed out by the of the Gun Owners of California Incorporated, requiring the temporary chair and temporary vice chair be selected by the affirmative vote of a minimum number of commissioners selected from each of the applicant subpools is an important safeguard to help ensure bipartisan decision making and bolster public confidence in the impartiality of the commission. Requiring the bipartisan selection of the temporary chair and temporary vice chair may indeed take a little more time, as suggested by the Nonprofits, but we have to believe this will be time well spent if it serves to promote both the fairness and perceived fairness of the commission.

Section 60859. Communications Between the First Eight Members of the Commission and Members of the State Board of Equalization, Legislature, and Congress

This proposed regulation further specifies the rules related to communications by the first eight members of the commission. Government Code section 8253, subdivision (a) prohibits members of the commission and their staff from communicating with anyone outside of an open meeting regarding redistricting matters. Meanwhile, Government Code section 8252, subdivision (d) prohibits members of the Applicant Review Panel from communicating with members of the State Board of Equalization, the Legislature, and Congress regarding their evaluation of applicants. The proposed regulation specifies that as part of the restriction of their communications regarding redistricting matters, the first eight members of the commission are subject to a restriction, similar to that of the panel, regarding their communications about the selection of the final six members of the commission.

This proposed regulation is necessary to provide clarity to the first eight members of the commission, members of the State Board of Equalization, members of the Legislature, members of Congress elected from California, and the general public that the statutory restriction on communications by commission members about redistricting matters includes a restriction on communications about the selection of the final six members of the commission.

The bureau received a joint comment from Senate President Pro Tem Darrell Steinberg and Assembly Speaker John A. Pérez asking the bureau to withdraw the proposed regulation because they viewed it as wrongly imposing "an outright prohibition on any oral communications between the first eight members of the commission and members of the State Board of Equalization, the Legislature, and Congress regarding the selection of the final six members of the commission," therefore affording members of the Legislature less of an opportunity to address the first eight members of the commission than other members of the public.

By contrast, James C. Wright submitted a comment that the scope of the proposed regulation should be expanded to prohibit the first eight members of the commission from communicating with any member of the executive or judicial branch of the federal government regarding the selection of the final six members of the commission or their role as members of the commission.

Michael D. Briggs commented that the regulation places no time limit on its prohibition against any of the first eight members of the commission communicating with specified officials about the selection of the final six members of the commission or their role as members of the commission. Accordingly, he interpreted the proposed regulation as saying the first eight members of the commission can never talk to those specified officials about the selection of the final six members of the commission or their role as members of the commission, even well after the selection of the final six members is completed and well after their service on the commission has concluded. Further, as this restriction on communications appears only to apply to the first eight members of the commission, the first eight members of the commission would forever be limited in their ability to talk about their role as a commissioner, but the final six members of the commission would not be subject to the same restriction. Mr. Briggs therefore suggested modification of the proposed regulation to include within it a sunset clause that would terminate the restriction on communications at some point, such as when the final six members of the commission are selected.

In response to the comments by Senate President Pro Tem Darrell Steinberg and Assembly Speaker John A. Pérez regarding the proposed regulation, it never was our intent to establish an outright prohibition on all oral communications between the first eight members of the commission and members of the State Board of Equalization, the Legislature, and Congress regarding the selection of the final six members of the commission. It was our intent to limit communications between the first eight members of the commission and members of the State Board of Equalization, the Legislature, and Congress elected from California, regarding the selection of the final six members of the commission and the commissioners' role, to oral and written communications presented at a public meeting. As noted above, this restriction has to be made explicit in a regulation because, while Government Code section 8253, subdivision (a) prohibits members of the commission and their staff from communicating with anyone outside of an open meeting regarding redistricting matters, the code section is ambiguous regarding whether it prohibits the first eight members of the commission, who do not yet constitute part of a full 14-member commission, from discussing outside of a public meeting the selection of the final six members of the commission or their role as commissioners during the period before the full commission is empanelled. The proposed regulation therefore serves an essential purpose and we think it would be unwise to withdraw it as requested. But we certainly intended for members of the State Board of Equalization, the Legislature, and Congress elected from California to be able to provide public testimony to the first eight members of the commission, and that is why, in the version of the regulation circulated for public comment, we expressly provided for the first eight members of the commission to accept testimony and public comment from such officials at a public meeting.

To alleviate the apparent confusion about what the proposed regulation provides, we have modified the proposed regulation to more clearly express that the first eight members of the commission are only prohibited from communicating with members of the State Board of Equalization, the Legislature, and Congress elected from California regarding the selection of the final six members of the commission and the commissioners' role outside of a public meeting, and that the first eight members of the commission are only prohibited from accepting testimony and public comments from members of the State Board of Equalization, the Legislature, and Congress elected from California about an applicant that is not presented orally at a public meeting or presented in writing and disclosed to the public either before or during a public meeting.

We declined to adopt the modification to the proposed regulation, suggested by Mr. Wright, that the regulation prohibit the first eight members of the commission from communicating with any member of the executive or judicial branch of the federal government regarding the selection of the final six members of the commission or their role as members of the commission, as we considered this modification to be unwarranted. Members of the executive and judicial branch of the federal government lack a sufficient connection to California redistricting to justify such a prohibition.

Finally, we agreed with Mr. Briggs that the absence in the proposed regulation of a time limit on the restriction of communications between the first eight members of the commission and members of the State Board of Equalization, the Legislature, and Congress elected from California, regarding the selection of the final six members of the commission and the commissioners' role created some ambiguities in how the regulation should be applied after the full commission is empanelled, particularly as the final six members of the commission would not be subject to its terms. Accordingly, we modified the proposed regulation to provide that it only restricts communications between the first eight members of the commission and members of the State Board of Equalization, the Legislature, and Congress elected from California during Phase VI of the application process.

Section 60860. Phase VI Selection of the Final Six Members of the Commission

This proposed regulation specifies the procedures that the first eight members of the commission must use in selecting the final six members of the commission. Most notably, the proposed regulation provides that prior to engaging in deliberations about who to select as the final six members of the commission, the first eight members shall review the application materials for each of the applicants in the pool of applicants eligible for selection to the commission. The proposed regulation also provides for a mechanism by which the first eight members of the commission may obtain additional information from and about applicants prior to selecting the final six commissioners. The proposed regulation then specifies that as the final six members of the commission shall be selected to ensure the commission reflects California's diversity, the first eight members of the commission shall consider and vote on the selection of applicants , not as individuals, but as part of a slate of six applicants that must be approved as a slate. Finally, the proposed regulation calls for the bureau, as soon as practicable after the final six commissioners are selected, to notify the applicants of their selection and post on its website specified information about the applicants selected.

This proposed regulation is necessary to fully implement the application process and to effectuate the intent of the voters that the full commission be reflective of the diversity of California.

James C. Wright made several suggestions for modification of this proposed regulation. Regarding proposed subdivision (a) of the proposed regulation, which stated in the version circulated for public comment that the first eight members of the commission shall review the application materials provided by the bureau for each applicant, Mr. Wright suggested that the proposed subdivision be modified to expressly afford the commissioners the option of reviewing the video recording of each applicant's interview by the Applicant Review Panel. Concerning proposed subdivision (f) of the proposed regulation, which stated in the version circulated for public comment the basis upon which the first eight members of the commission should vote to approve a particular slate, Mr. Wright made three suggestions: (1) the order in which slates come up for vote should be the result of a random selection process; (2) only one slate should be subject to a vote at any one time; and (3) a slate can only be approved by the affirmative vote of five commission members consisting of at least two members belonging to the largest political party, two members registered with the second largest political party, and one member not registered with either of those two political parties. As for proposed subdivision (g) of the proposed regulation, which stated in the version circulated for public comment the manner in which a slate of applicants shall be approved for appointment to the commission, Mr. Wright suggested replacing the subdivision in its entirety with the following text:

> "The first slate to win approval shall be final and all remaining proposed slates shall be discarded without further consideration."

Finally, Mr. Wright suggested adding a new subdivision (i) to the proposed regulation to require the administration of an oath of office to the final six members of the commission as soon as practicable after they are selected.

The Nonprofits commented that although they recognize the first eight members of the commission may need to request additional information from applicants prior to selecting the final six members of the commission, this process for obtaining additional information should be respectful to the applicants and should include safeguards to prevent applicants from being subjected to unnecessary questioning or other requirements designed to discourage or prevent certain applicants from being selected to the commission. They therefore suggested that at a minimum subdivision (a) of the proposed regulation be modified to provide that the first eight members of the commission may only request information from applicants that the State Auditor judges to be reasonably relevant to the application process.

Douglas Johnson of Claremont McKenna College commented that he applauds the requirement in the proposed regulation that the final six members of the commission be selected as a slate.

Finally, Linda W. Reichert expressed concern about the proposed regulation not including a provision for the selection of alternate commission members who would be designated to fill any vacancies that may arise on the commission. She stated particular concern about the prospect of all members of a particular party affiliation, such as all Democrats or all Republicans, vacating

the commission, thus leaving the commission unable to form a quorum, and therefore unable to approve district maps or even to fill the vacancies created by the departure of those members.

Regarding Mr. Wright's suggestion that subdivision (a) of the proposed regulation be modified to expressly afford the first eight members of the commission with the option of reviewing the video recording of each applicant's interview by the Applicant Review Panel, we declined to make the modification because we found it to be unnecessary. Existing section 60854 already expressly provides that after the State Auditor randomly draws the names of the first eight members of the commission, the bureau shall provide the eight commissioners with the application materials and the recorded interviews of each of the applicants remaining in the applicant pool. So the opportunity to review the video recording of each applicant's interview is already expressly provided for by regulation.

We also declined to make any other modifications to the proposed regulation in response to Mr. Wright's suggestions. We determined that Mr. Wright's suggested modifications to the proposed regulation to mandate that the order in which slates come up for vote should be the result of a random selection process, and that only one slate could be subject to a vote at any one time, were not justified and would unnecessary impinge on the discretion of the first eight members of the commission to conduct the selection of the final six members in a manner that operates most expeditiously for them. We also determined that his suggestion to provide in the proposed regulation that a slate of applicants can only be approved by the minimum number of commissioners selected from each of the subpools that is already specified in Government Code section 8252, subdivision (g) would be unnecessary, as it would just be a repetition in regulation of what already exists in statute. We also found unnecessary his suggested modification of the proposed regulation to provide that once a slate is approved the remaining slates shall be discarded and not considered, because the proposed regulation already provides that as soon as a slate is approved the applicants on that slate shall become the final six members of the commission. Finally we declined to adopt his suggestion to modify the regulation to call for the administration of an oath of office to the final six members of the commission, as that would be beyond the regulatory authority of the bureau to administer the application process which will end with the selection of the final six commissioners. Nonetheless, as noted earlier in this document, Article XX, section 3 of the California Constitution and section 18151 of the Government Code already require an oath of office be administered to the applicants selected to serve as members of the commission.

Regarding the suggestion of the Nonprofits that the proposed regulation be modified to incorporate a safeguard against the first eight members of the commission abusing their right to collect additional information from the remaining applicants, we were at first skeptical of the need for any such modification, but then determined that a modification would be appropriate. While we seriously doubt that any of the first eight members of the commission would abuse the application process as suggested by the Nonprofits, we recognize that the selection of the final six members of the commission will have to occur within a mere six week period, and the bureau will have only a certain amount of resources that it can devote to help gather information from and about the remaining applicants. It therefore seems important for the State Auditor to retain some control over the amount of additional information that must be gathered at the request of the first eight members of the commission. Accordingly, we modified the proposed regulation to

provide that the first eight members of the commission may ask the bureau to obtain information from or about the remaining applicants with the bureau retaining the authority to decline any request that the State Auditor believes would be unduly burdensome for the bureau, unduly burdensome for the applicant(s) subject to the request, or otherwise would be detrimental to the timely completion of the application process.

As for Ms. Reichert's suggestion that the proposed regulation may require modification to include the selection of alternate members of the commission, we declined to adopt such a modification because doing so would conflict with the provisions of the Act. Government Code section 8252, subdivision (g) only provides for the first eight members of the commission to select the final six members of the commission. It does not authorize them to select alternates. Further, Government Code section 8252.5, subdivision (b) sets forth a procedure for the filling of vacancies on the commission by a quorum of the 14 members, but that procedure calls for the filling of vacancies from "the pool of applicants of the same voter registration category as the vacating nominee that was remaining as of November 20 in the year in which the pool was established" or, if necessary, from a "new pool" created by the State Auditor. This procedure does not include the filling of vacancies by designated alternates. Accordingly, Ms. Reichert's suggested modification cannot be adopted as it is not authorized by statute.

Although it was not prompted by any public comments, we took the opportunity to modify the text of subdivision (a) of the proposed regulation to clarify that any of the first eight members of the commission may ask the bureau to seek additional information from or about an applicant. While implicitly this had been our intent in the version of the regulation that we previously circulated for public comment, it occurred to us that this intent may not have been clear. With the first eight members of the commission having such a limited period of time in which to select the final six members of the commission, it seemed that requiring commission consensus or majority vote for a member to seek additional information would be both inefficient and overly time consuming. Further, with the State Auditor retaining authority to deny inappropriate requests, any concern about the ability of a single member to make a request should be resolved.

Section 60861. Assisting the Commission To Become Functional

This proposed regulation specifies that after all 14 members of the commission have been selected, even though at that point it becomes the duty of the Secretary of State, under Government Code section 8253, subdivision (a)(5), to "provide support functions to the commission until its staff and office are fully functional," the bureau will cooperate with the commission and the Secretary of State in order to facilitate the commission becoming fully functional. This proposed regulation provides clarity and is essential to the effective implementation of the Act.

The bureau did not receive any public comments regarding this regulation.

Section 60862. Restrictions on Applicants Selected To Serve on the Commission

This regulation clarifies the time period that the post-appointment restrictions on the activities of commissioners will extend, particularly for applicants appointed to the commission after the

initial selection of the commissioners in order to fill a vacancy. The regulation provides that the restrictions cannot extend beyond the 10-year life of the commission to which the applicant was appointed. So once the first member of the succeeding commission is appointed to perform redistricting, then the restrictions end. This should encourage applicants to fill vacancies as the proposed regulation eliminates the prospect of an appointee being subject to the restrictions for many years beyond the time the restrictions serve any purpose.

The bureau did not receive any public comments regarding this regulation.

Section 60863. Commission Vacancies

This proposed regulation, adding specificity to the manner in which vacancies on the commission shall be filled, would amend existing section 60855 by renumbering it so that the sequence of the regulation conforms with the general sequence of the regulations pertaining to the application process.

Michael D. Briggs commented that it may be appropriate to include within this proposed regulation a provision mirroring proposed regulation 60859, that would prohibit anyone selected to fill a vacancy on the commission from communicating with any member of the State Board of Equalization, member of the Legislature, or member of Congress elected from California, or their representatives regarding the selection of the final six members of the commission or their role as members of the commission.

Regardless of the merits of Mr. Briggs' suggestion, it cannot be adopted as part of this rulemaking project as any rules governing communications by members of the commission who are selected in order to fill a vacancy would not be within the scope of the application process and therefore would not be within the State Auditor's regulatory authority.
Although it was not prompted by any public comments, we took the opportunity to modify the text of subdivision (d) of the proposed regulation to make it clear that if the bureau is tasked with convening an Applicant Review Panel to create a new subpool of applicants from which to fill a vacancy, the bureau will comply with the requirements of subdivisions (d) and (e) of Government Code section 8252 by creating a subpool of 20 applicants created on the basis of relevant analytical skills, ability to be impartial, and appreciation for California's diverse demographics and geography and by affording Legislative Leadership an opportunity to strike up to eight applicants from the subpool.

General Comments Received During the 45-Day Public Comment Period

In addition to commenting, as noted above, on the regulations proposed by the bureau as part of this rulemaking project, James C. Wright suggested the bureau adopt two additional regulations. One of those regulations (which he numbered as 60860.1), called for the final six members of the commission to receive training equal to the training provided to the first eight members of the commission as required by proposed regulation 60855. The other regulation (which Mr. Wright numbered as 60860.2): specified requirements for a quorum of the full 14-member commission;

required the full commission, at its first meeting, to elect a permanent chair and permanent vice chair; stated the duties of the permanent chair and permanent vice chair; prohibited the permanent chair and permanent vice chair from being registered with the same political party (or, alternatively, from having been members of the same applicant subpool during the application process); and specified the votes required for the election of the permanent chair and permanent vice chair.

Regardless of the merits of Mr. Wright's suggestions for rules governing the training to be given to the final six members of the commission and for how the full 14-member commission should conduct its first and future meetings, these rules cannot be adopted as part of this rulemaking project as they would exceed the State Auditor's regulatory authority. While the State Auditor has authority to adopt regulations, consistent with the Act, to implement the application process for selecting the members of commission, she does not have authority to adopt regulations governing the activities of the commission after it is formed.

Conclusion

Working with the valuable comments and suggestions provided to us by members of the public, we believe that we have greatly strengthened the proposed regulations by making the many revisions discussed in this memorandum. We have greatly appreciated the public's participation in this rulemaking process.