



September 14, 2009

Elaine M. Howle, California State Auditor
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Attn: Daniel Claypool
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Sharon Brumley
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RE: Additional Comments on Proposed Regulations for
Citizens Redistricting Commission Selection Process

Dear Ms. Howle:

On behalf of the Asian Pacific American Legal Center (APALC), the Mexican American Legal Defense and Educational Fund (MALDEF), and the National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund, we provide the following comments on the Bureau of State Audits' proposed regulations to implement Proposition 11's commission selection process.¹

First, we thank you and your staff in the Bureau of State Audits for carefully and diligently preparing a set of regulations that is clearly the product of much work and thought.

The comments in this letter focus specifically on issues affecting the participation of historically underrepresented diverse communities in the commission selection process.

¹ In addition to this letter, APALC and NALEO Educational Fund are also signatories to the letter submitted by a working group of organizations and individuals including APALC, California Common Cause, California Forward, California State NAACP, California Voter Foundation, Center for Governmental Studies, League of Women Voters of California, NALEO Educational Fund, Rose Institute, and Steven J. Reyes (Working Group Letter). The comments submitted by APALC and NALEO Educational Fund in this letter are in addition to the comments contained in the Working Group Letter. MALDEF did not participate in the working group's discussions and is not a signatory to the Working Group Letter, but supports several of the recommendations made in the Working Group Letter. MALDEF supports the suggested revision to proposed Section 60814 to strike out economic diversity from the definition of diversity, and also the suggested revision to proposed Section 60805 regarding the definition of "appreciation for California's diverse demographics and geography," for the reasons stated in the Working Group Letter.

(1) The regulations should clarify that contributions in excess of \$2,000 made by candidates who self-finance their campaigns for local elected office do not constitute a “conflict of interest” that in and of itself will prevent their service on the commission. In defining the conflicts of interest that will result in disqualifying individuals for service on the commission, Section 60811 of the proposed regulations incorporates the activities and relationships set forth in Section 8252(a) of the Government Code, which includes “Contributed \$2,000 or more to any local candidate for elective public office in any year.” Under California’s campaign finance laws, personal resources or loans that a candidate for local office provides to his or her own campaign may be considered “contributions.” Thus, individuals who have self-financed their campaigns in amounts in excess of the limits set forth in Section 8252(a)(2)(A)(vi) could be disqualified from service on the commission if those resources or loans are considered “contributions” for the purposes of Proposition 11’s conflict of interest provisions.

We believe that Proposition 11’s conflict of interest provisions relating to candidate contributions are intended to disqualify individuals who may be unable to make impartial decisions during the redistricting process because of their biases in favor of particular local political candidates. However, we do not believe that the drafters of Proposition 11 intended that merely mounting a campaign for local elected office would make an individual improperly biased. If that were the intention, the drafters could have explicitly barred all local candidates for office under Section 8252(a)(2)(A)(i), which prohibits service by candidates for state and federal office.

Thus, an interpretation of Section 8252(a) which bars those candidates for local office who have provided significant resources to their own campaigns leads to an anomalous result which prohibits service on the commission by candidates who have essentially self-financed their campaigns, but allows service by local candidates who have financed their campaigns by accepting significant contributions from outside donors, and who arguably are more beholden to political interests that could affect their impartiality. We do not believe that Proposition 11’s authors intended to make such an irrational distinction between candidates for local office when they drafted the conflict of interest provisions relating to campaign contributions.

Moreover, we believe that barring local candidates for public office who have self-financed their campaigns would bar many individuals from service on the commission who have actively participated in the civic life of their communities and have acquired the skills needed to serve on the commission. Individuals from California’s underrepresented populations, such as African American, Asian American and Latino communities, seek seats on school boards or city councils because they have a strong commitment to public service. These candidates may not have access to funding for their campaigns from wealthy donors, and may need to invest a significant amount of their own resources into their candidacies, often by making great personal sacrifices such as mortgaging their homes. We do not believe that barring such individuals from service on the commission furthers the goal of ensuring that commission members are well-qualified and impartial. Thus, we recommend that the Bureau add a regulation clarifying that the resources provided by these individuals for their own campaigns do not constitute contributions that will trigger the application of Proposition 11’s conflict of interest prohibitions.

(2) The proposed definition of “Appointed to Federal or State Office” in Section 60804 potentially excludes a significant number of individuals who are unlikely to be beholden or perceived to be beholden to their appointing authority; accordingly, Section 60804 should be revised to avoid overbreadth. The definition of “appointed to state office” in Section 60804 should be revised to cover only those individuals who may reasonably be deemed to be beholden, or perceived to be beholden, to their appointing authority. We believe whether an appointee receives salaried compensation is a fair measure of this. Looking at salaried compensation also provides a measure that is clear and easy to administer. In contrast, an appointee who is paid a per diem should not fall within the scope of Section 60804. Per diem compensation does not provide enough of a financial benefit to justify the time and effort of serving in an appointed position—and to make the appointee beholden to the appointing authority—when the appointee could spend the same time and effort engaging in other opportunities that provide a full salary or are otherwise more financially lucrative. Additionally, by its nature, per diem compensation provides a less predictable and reliable source of income than salaried compensation. The same rationale applies to appointees who receive no payment at all except for reimbursement for expenses. Accordingly, appointees who receive per diem compensation or no payment at all other than reimbursement of expenses should not be covered by the definition of “appointed to state office” in Section 60804.

You may hear arguments from other stakeholders that narrowing the scope of the appointed to office definition in this fashion would constitute impermissible legislating by the Bureau. However, we believe that narrowing the Bureau’s proposed definition is necessary to avoid overbreadth; otherwise, as we explain above, the current definition would unduly exclude many applicants who cannot reasonably be considered beholden to their appointing authority. If the Bureau were to narrow the definition as we suggest, this would be an appropriate exercise of the Bureau’s duty and authority to interpret Proposition 11 in a manner that avoids conflict with other legal considerations, rather than impermissible legislating.

Lastly, individuals from California’s historically underrepresented diverse communities seek seats on commissions and boards because of their commitment to public service, much as they seek seats on school boards and city councils as we describe in our first recommendation. Unduly excluding such appointees when they cannot reasonably be considered beholden to their appointing authority also conflicts with Proposition 11’s intent that the selection process produce a commission reflective of the state’s diversity, in addition to raising overbreadth concerns.

Our suggested revision to Section 60804 is contained in the attached appendix. Our suggested revision is in addition to the suggested revisions to Section 60804 that are outlined in the Working Group Letter referenced in footnote 1.

(3) In Section 60800(a)(3) of the proposed regulations, the reference to an individual’s capacity to put aside support for or opposition to “social or political causes” as an indicator of impartiality is too vague, and creates significant potential for qualified applicants without meaningful conflicts to be removed from the applicant pool. Under Section 60800’s definition of “ability to be impartial,” the Applicant Review Panel could reject an individual’s application because of his or her support for or opposition to “social or political causes.” The

regulations do not define this phrase, and it could be interpreted broadly to apply to virtually any type of social or political activity such as supporting immigrants' or workers' rights. We are concerned that this vague phrase gives far too much unguided discretion to the Applicant Review Panel to disqualify capable applicants simply on the basis of past or present social or political work that in no way will impair their ability to act impartially on the commission. We therefore believe the Bureau should delete the phrase "social and political causes."

Our suggested revision to Section 60800 is contained in the attached appendix.

(4) The proposed regulations should be revised to specify a minimum period of time during which applicants may submit Phase II supplemental applications and supporting materials, and such minimum period of time should be long enough to accommodate applicants and organizations conducting outreach efforts. We believe that achieving a diverse and qualified applicant pool is contingent on providing applicants with a sufficient amount of time to complete their Phase II supplemental applications. The interests of Proposition 11, and the ability of the Applicant Review Panel to accurately evaluate applications, will be best served by ensuring that applicants have enough time to prepare articulate responses to the supplemental application's substantive questions. Applicants will also need sufficient time to gather three letters of recommendation by the end of the Phase II application period; the fact that applicants will have no direct control over the submission of recommendation letters suggests that a longer submission period is warranted.

Additionally, organizations conducting outreach to encourage individuals to apply for the commission will need time to conduct follow-up outreach to applicants who have been invited to submit a Phase II application. Many of these organizations serve historically underrepresented communities and are effective messengers in conducting outreach to the communities they serve. However, in order to be effective in encouraging diverse applicants to follow through with the supplemental application, these organizations need enough time to conduct follow-up outreach.

We recommend that applicants have a minimum of 35 days to submit supplemental applications and supporting materials. We have suggested a revision to Section 60847 that reflects this recommendation. This recommendation is in addition to the suggested revisions to Section 60847 that are outlined in the Working Group Letter.

(5) Generally speaking, the proposed regulations should be revised to include a greater emphasis on the federal Voting Rights Act and the important role it plays in ensuring that historically underrepresented diverse communities have an equal opportunity to participate in the electoral process and elect candidates of their choice. A close reading of Proposition 11 indicates that its drafters intended for the commission to heed the primacy of the Voting Rights Act when exercising its map-drawing responsibilities. In spelling out the redistricting criteria that the commission must follow, Article XXI, Section 2(d) of the California Constitution makes compliance with the Voting Rights Act supreme over the other mandated criteria; Voting Rights Act compliance follows only population equality in order of importance. Additionally, Section 8253(a)(5) of the Government Code requires that at least one of the legal

counsel hired by the commission possess demonstrated experience and expertise in implementation and enforcement of the Voting Rights Act.

We appreciate that several of the proposed regulations are intended to ensure an application process which promotes a commission that both reflects diverse communities and also understands the needs, interests and preferences of such communities. However, we believe that the regulations should go one step further by ensuring the application process promotes a commission that understands not only the needs, interests and preferences of diverse communities, but also how the redistricting process affects the extent to which elected representatives are responsive to such needs, interests and preferences. We have the following two suggestions for achieving this:

- (a) In Section 60805 of the proposed regulations, we recommend that the definition of “appreciation for California’s diverse demographics and geography” be expanded to include an understanding that racial and ethnic minority communities have historically faced an uphill battle in gaining fair representation, an understanding of how the placement of district boundaries affects whether such communities have equal electoral opportunities, and a general awareness of the role of the Voting Rights Act in ensuring equal electoral opportunities for such communities. Our suggested revision to Section 60805 is contained in the attached appendix. Our suggested revision is in addition to the suggested revisions to Section 60805 that are outlined in the Working Group Letter.
- (b) In Section 60834 of the proposed regulations, which specifies the support that the Bureau will provide to the Applicant Review Panel, we recommend that the Bureau add a provision which explicitly provides that the Applicant Review Panel will receive training on the Voting Rights Act and the issues of minority vote dilution it addresses. While members of the Applicant Review Panel themselves will not draw any maps, we believe it is important for them to have a basic understanding of the Voting Rights Act and the concept of minority vote dilution so they are able to assess whether applicants understand the effect of redistricting on representation for California’s diverse communities. Our suggested revision to Section 60834 is contained in the attached appendix.

(6) The regulations providing for the random draw of eight applicants should be revised to avoid a situation that contravenes the intent of Proposition 11 that the commission selection process produce a commission that is reasonably representative of the state’s diversity.

Because Proposition 11 requires that eight of the commissioners be randomly drawn, Proposition 11 arguably contemplates and permits the possibility that all of the eight commissioners will be of the same racial or ethnic background. At the same time, the constitutional provisions added by Proposition 11 are clear—they unambiguously specify that the intent of Proposition 11 is that the selection process produce a commission reasonably representative of the state’s diversity.

In order to harmonize these two provisions, the Bureau should revise Section 60853 of the proposed regulations to require the State Auditor to conduct a second drawing of the eight randomly selected commissioners in the event that all eight commissioners selected in the first

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drawing are of the same race or ethnicity. This "redraw" provision would help avoid a result that contravenes Proposition 11's intent.

Our suggested revision to Section 60853 is contained in the attached appendix. Our suggested revision is in addition to the suggested revisions to Section 60853 that are outlined in the Working Group Letter.

If you have any questions about our comments, please feel free to contact us at the phone numbers and email addresses listed below.

Sincerely,



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APPENDIX

Suggested Revisions to Proposed Regulations Implementing Proposition 11²

§ 60800. Ability to Be Impartial

(a) “Ability to be impartial” means a capacity and willingness to set aside all of the following considerations when serving as a commissioner in order to evaluate information with an open mind and make decisions that are fair to everyone affected:

- (1) Personal interests including personal financial interests.
- (2) Biases for or against any individuals, groups, or geographical areas.
- (3) Support for or opposition to any candidates, or political parties, ~~or social or political causes.~~

(b) An applicant may demonstrate an ability to be impartial through a description of that ability and both of the following:

- (1) Having no personal, family, or financial relationships, commitments, or aspirations that might have a tendency to influence someone making a redistricting decision.
- (2) Occupational, academic, or life experiences that show an ability to set aside his or her personal interests, political opinions, and group allegiances to achieve a broad objective.

§ 60804. Appointed to Federal or State Office

“Appointed to” a federal or state office means a person has been appointed to a salaried federal or state office by the Governor or any member of the Legislature, or has served in an appointed position at the pleasure of the Governor or a member of the Legislature. A person has been appointed to an office regardless of whether the appointment was subsequently confirmed by the Legislature.

§ 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 to their voting preferences, including race, ethnicity, gender, and level of income.

² As noted in our letter, the suggested revisions contained in this appendix are in addition to the suggested revisions outlined in the Working Group Letter.

- (2) An understanding that the people of California reside in many different localities with distinct geographic characteristics that may relate to the voting preferences of the residents of those localities, including urban, rural, industrial, agricultural, arid, and temperate.
- (3) A recognition that California benefits by having meaningful participation in the electoral process by registered voters of all demographic characteristics and residing in all geographic locations.
- (4) (i) An understanding that certain individuals sharing demographic characteristics such as race and ethnicity historically have lacked equal opportunities to participate in the electoral process and elect candidates of their choice, (ii) an understanding of how the placement of district boundaries affects the extent to which such individuals have equal electoral opportunities, and (iii) a general awareness of the role of the federal Voting Rights Act in ensuring that the placement of district boundaries results in individuals having equal electoral opportunities.

(b) An applicant may demonstrate an appreciation for California's diverse demographics and geography through a description of that appreciation and through occupational, academic, or life experiences that show this appreciation, such as:

- (1) Working on a project of statewide or local concern affecting Californians of different backgrounds and from different areas, achieving a result acceptable to these different Californians.
- (2) Studying the voting behavior and political preferences of Californians, including historically underrepresented diverse communities, in various areas of the state for the purpose of improving the effectiveness of the electoral process.
- (3) Traveling throughout the state and meeting with a broad range of individuals in order to build consensus on some issue of statewide concern.
- (4) Conducting nonpartisan efforts to foster civic and electoral participation among historically underrepresented diverse communities, and working to remove barriers to civic and electoral participation faced by such communities.

§ 60834. Panel Administration

(a) The bureau shall provide the panel with administrative, technical, and clerical support as needed by the panel to carry out its responsibilities under the Act. This support shall include, but not be limited to, the provision of office equipment, facilities, and staff sufficient to perform the following tasks:

- (1) Process applications.
- (2) Collect information concerning applicants.

- (3) Schedule meetings.
- (4) Maintain files.
- (5) Make travel arrangements.
- (6) Communicate with the public regarding panel decisions.

(b) The bureau shall provide the panel with legal counsel. To the extent permitted by law, all work performed by the bureau's legal counsel and all communications between the bureau's legal counsel and the panel shall be confidential and protected from disclosure by any applicable privileges.

(c) The bureau shall make available to the panel, and require members of the panel to attend, a training on (1) the provisions of the federal Voting Rights Act, (2) how the placement of district boundaries affects the extent to which historically underrepresented communities have an equal opportunity to participate in the electoral process and elect candidates of their choice, and (3) the role of the Voting Rights Act in ensuring that the placement of district boundaries results in such communities having equal electoral opportunities.

(ed) The bureau shall retain the records concerning the application process, including correspondence, applicant lists, applications and supporting materials, public comments and responses, and video recordings for a period of at least 12 years.

(de) If a position on the panel becomes vacant, the bureau shall provide the person filling the vacancy with all of the documents that were provided to the outgoing panel member.

§ 60847. Phase II Application

(a) In Phase II of the application process, the bureau shall direct the members of the initial applicant pool to submit a supplemental application with supporting materials. The bureau shall post supplemental application forms on the bureau's website for use by the members of the applicant pool. Except for individuals qualifying for a reasonable accommodation under the Americans with Disabilities Act (42 U.S.C. § 12101, et seq.), applicants shall complete the supplemental application forms and supporting materials electronically and submit them using the bureau's website. Notwithstanding this requirement, applicants may submit letters of recommendation by facsimile, United States mail, or other common carrier as an alternative to submitting the letters through the bureau's website.

(b) The supplemental application, with supporting materials, shall consist of, but need not be limited to, all of the following:

- (1) Questions designed to elicit information from the applicant describing his or her qualifications to serve on the commission, including essay questions to be answered in 250 words or less.

- (2) Questions designed to elicit information about the applicant, including:
 - (i) Former names, former residences, and criminal history.
 - (ii) Educational and employment history.
 - (iii) Involvements with, and financial contributions to, professional, social, political, and community organizations and causes.
 - (iv) Financial interests.
- (3) Questions about an applicant's immediate family members.
- (4) A request for three letters of recommendation from individuals or organizations.

(c) During the Phase II application period, applicants shall have a minimum of 35 days to submit supplemental applications and supporting materials.

(ed) The bureau shall remove from the initial applicant pool any applicants who fail to submit a completed supplemental application with supporting materials by the deadline established by the bureau.

(de) The bureau shall transmit a copy of every complete and timely received supplemental application with supporting materials to the panel. Subject to the provisions of California Code of Regulations, title 2, section 60842, subdivision (f), the bureau shall also post the supplemental application with supporting materials on the bureau's website.

(ef) After posting the supplemental applications with supporting materials on its website, the bureau shall establish a deadline for the receipt of written public comments during Phase II of the application process.

§ 60853. Phase V: Random Drawing of First Eight Commissioners

(a) During Phase V of the application process, the State Auditor shall randomly draw the names of eight applicants from those remaining after the legislative leaders have exercised their right to strike the names of up to 24 applicants from the pool of 60 of the most qualified applicants identified by the panel. The State Auditor shall conduct the random drawing on or before November 20 of the application year in the manner prescribed by California Code of Regulations, title 2, section 60824.

(b) Notwithstanding subdivision (a) of this section, the State Auditor shall randomly draw the names of 8 applicants from the names of all the applicants in the pool of 60 most qualified applicants identified by the panel, rather than from a reduced collection of names, if the Secretary of the Senate and the Chief Clerk of the Assembly do not jointly present, by November

15 of the application year, a list containing the names of no fewer than 12 applicants in each of the three subpools that comprise the list.

(c) The eight applicants whose names are drawn by the State Auditor shall become members of the commission.

(d) As the application process is intended to produce a commission that is reasonably representative of the State's diversity, as specified in subdivision (c)(1) of section 2 of Article XXI of the California Constitution, notwithstanding subdivision (c) of this section, if all of the eight applicants randomly drawn pursuant to subdivision (a) of this section are of the same race or ethnicity, then the State Auditor shall return the names of the eight applicants to the pool of remaining applicants and conduct a second drawing pursuant to which the State Auditor shall randomly draw the names of eight applicants in accordance with the process set forth in subdivision (a) of this section. The eight applicants whose names are drawn by the State Auditor pursuant to this subdivision shall become members of the commission.