



# William C. Velásquez Institute

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Bureau of State Audits  
555 Capitol Mall, Suite 300  
Sacramento, CA 95814

*Re: Proposed Regulations for Voters FIRST Act*

Dear Mr. Claypool and Ms. Brumley:

On behalf of the William C. Velasquez Institute (WCVI), we write to offer comments on the proposed regulations to implement the Voters FIRST Act. We appreciate the careful thought and effort that you and your staff brought to this endeavor and offer these comments to strengthen the final regulations. Our comments focus on three areas critical to implementation of the Voters FIRST Act:

1. Attention to the Voting Rights Act;
2. The importance of diversity and creating a truly Citizens Redistricting Commission; and
3. Encouraging robust public participation throughout the process.

In many places, the Bureau has already integrated these principles into the regulations. There are some places, however, where the regulations stray from these values or are inconsistent with them. The modifications to the regulations that we propose are designed to make the regulations more consistently reflect these essential values without sacrificing clarity or effectiveness. At the end of each section, we offer specific language changes to the regulations that would address our concerns.

## **I. The Voting Rights Act**

Despite the central importance of the Voting Rights Act to the Commission's activity, the proposed regulations fail to emphasize the importance of this seminal piece of legislation. We believe that an understanding of and commitment to equality, diversity, and fair electoral participation, consistent with the VRA, are critical characteristics not just for the commissioners and their staff, but also for the members of the Applicant Review Panel. After all, the Review Panel cannot be expected to choose prospective commissioners who understand and are committed to the VRA if the Panel members themselves are not at least somewhat versed in the VRA, its goals and requirements.

We, therefore, urge the Bureau to amend the proposed regulations as follows:

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1. Amend the definition of “Appreciation for California’s diverse demographics and geography” in section 60805(a) to add a new subparagraph (2) that reads: “A recognition that federal and state law require that election processes must be equally open to participation by groups of voters who have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” This language is taken directly from section 2 of the Voting Rights Act.

2. Add a regulation requiring that the members of the Applicant Review Panel receive training that includes instruction in the importance of the Voting Rights Act.<sup>1</sup>

## **II. The Citizens Redistricting Commission**

### **A. Achieving Diversity on the Commission (Sections 60848(f) and 60850(e))**

Diversity plays a critical role in the Voters FIRST Act. Article XXI(2)(b)(c)(1) of the California Constitution requires, “The selection process should be designed to produce a Citizens Redistricting Commission that is...reasonably representative of the State’s diversity.” California, perhaps more than any other state, has a history of dramatic diversity. Regional and economic tensions and efforts at cooperation are consistent themes in our history. Only in the past ten to twenty years have our political institutions begun to reflect our diverse ethnic and racial communities. Further, California’s population is in a constant state of change.

The regulations being adopted now will set the standards well into the future, as California’s demographics continue to change. In order to know whether the constitutional mandate for diversity in the Voters FIRST Act is being met, the Review Panel needs to know how diverse the state is at any given time. Using the most recent information is of critical importance. The Commission should reflect California as it is, not as it was.

Previously the Census Bureau would not have been an effective source for this information as new Census data would not have been available until after the Panel’s work was completed. However, as the Census has shifted from the previous once-a-decade “long form” to the “American Community Survey,” or ACS, the Census Bureau now provides the information necessary to identify many of these characteristics on an annual basis. The California Department of Finance also produces annualized information that is used by other branches of state government and thus should be given consideration by the Panel.

The proposed regulations can be strengthened by providing guidance to the Panel in this area. Therefore we recommend the following underlined additions to Regulations 60848(f) and 60850(e):

60848 (f). 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, the panel shall also consider whether the composition of the pool of applicants to participate in Phase III of the application process is reflective of the State’s total population diversity as described in the most recently available demographic information including data from the United States Census Bureau and the California Department of Finance. The panel shall not use formulas or specific ratios in identifying which applicants will participate in Phase III of the application process.

60850(e). 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, the panel shall also consider whether the composition of the pool of applicants to participate in Phase IV of the application process is reflective of the State’s total population diversity as described in the most recently available demographic information including data from the United States Census Bureau and

<sup>1</sup> For more about the need to provide training for the members of the Review Panel, see the discussion in Section III.B., below.

the California Department of Finance. The panel shall not use formulas or specific ratios in identifying which applicants will participate in Phase IV of the application process.

Please note that we have used the language “including” in order to leave room for the Review Panel to consider other available demographic information regarding groups that may not be identified in the Census Bureau or Department of Finance data. These may include, for example, the disabled community or the LGBT community.

## **B. “Relevant Analytical Skills” (Section 60826)**

We understand that many interested parties are concerned about the definition of “Relevant Analytical Skills.” We share those concerns because as the term is now drafted it will discourage qualified applicants, exclude many people who would otherwise wish to serve and would serve effectively as commissioners, and result in a commission of elite technocrats and academics rather than a citizens commission. Although this is a major concern for us, we will not dwell on it too long because we understand others are voicing our shared concerns.

We do, however, propose three changes to this definition. First, we recommend adding an additional task that will be critical to ensuring that the final plans are truly the work of the commission and fully understood by its members: the ability to assess information provided by staff, direct staff activities, and think critically about staff recommendations.

Second, the references to having highly technical and advanced core competencies should be removed. Such an approach is inconsistent not only with the idea of a citizens commission but with the requirement that the commission “reflect[ ] this state’s diversity, including, but not limited to, racial, ethnic, geographic and gender diversity.” (Gov. Code, § 82522(g).)

Third, the language of proposed section 60826(c)(4)(A) raises several concerns. It currently states that applicants must have “Effective communication skills including basic writing skills and strong oral communication skills.” This definition invites discrimination against the disabled community and those for whom English is a second language. It should suffice to say simply that applicants must have “effective communication skills.”

In sum, we recommend amending Regulation 60826, subdivision (c) to read as follows:

(c) The following are examples of relevant analytical skills grouped according to the tasks listed in subdivision (b):

(1) Gathering and comprehending information that bears upon redistricting:

(A) An ability and willingness to learn about how redistricting is done, what legal and practical requirements govern the process, and what impact the process has on the future composition of the State Legislature and the Board of Equalization;

(B) An ability and willingness to conduct a careful and critical review of proposed redistricting plans and supporting materials submitted by staff and by the members of the public;

- (C) An ability to participate effectively in public hearings regarding redistricting by listening carefully and critically to the testimony of witnesses, including staff, and formulating concise questions that will elicit relevant information.
- (2) Evaluating the validity and significance of the information gathered by the commission and staff in order to make sound decisions about the proper placement of communities in districts:
- (A) Basic computer and mathematical skills.
- (B) An ability to assess the credibility of information, distinguish facts from opinions, distinguish relevant facts from irrelevant facts and assess the relative strength of competing arguments.
- (3) Applying the appropriate legal standards to drawing district boundaries:
- (A) An ability to understand the legal principles that govern redistricting as communicated through written materials and advice provided by the commission's legal counsel and through submissions from the public.
- (B) An appreciation for the importance of applying proper legal standards to redistricting decisions.
- (4) Working effectively as a member of a group to promote redistricting decisions that are factually and legally defensible and that the commission can agree upon:
- (A) Effective communication skills.
- (B) An ability to interact effectively with other commissioners to build consensus on proposed decisions through reasoned discussion and negotiation.

**C. "Criminal History" (Section 60847(b)(2)(i))**

The memoranda accompanying the proposed regulations are very conscious of the practical and legal concerns raised by either interpreting the mandatory exclusions so broadly or creating any application process that is so burdensome that it prevents the creation of a Citizens Redistricting Commission that can truly live up to its name.

Therefore it is puzzling that section 60847(b)(2)(i) of the regulations requires disclosure of past "criminal history" when this question does not relate to any of the criteria on which potential commissioners are either selected or disqualified. This is particularly problematic as the term "criminal history" is unquestionably vague and overbroad. It could include convictions sealed by the court for minors and charges on which the applicant was never tried or was eventually exonerated. It also encompasses a host of crimes that have nothing to do with the applicant's ability to serve as a commissioner. It is important to note that all of this information would be made available to the public under the proposed regulations. The potential chilling effect is enormous.

The only criminal history relevant to the commission selection process is the conviction for a felony that results in the loss of voting rights preventing the applicant from meeting the requirements of Article XXI, section 2(c)(3) of the California Constitution. However, that information can already be verified by checking the individual's registration status without the chilling effects of the proposed question. Section 60847(b)(2)(i) should, therefore, be amended to delete the reference to "criminal history."



#### **D. “Economic Status” Rather Than “Level of Income” (Section 60805(a)(1))**

Paragraph (1) of subdivision (a) of proposed regulation 60805 identifies four specific demographic characteristics that relate to the requirement that potential commissioners have “an appreciation of California’s diverse demographics and geography.” These are race, ethnicity, gender and level of income. While we applaud the decision to recognize that economic factors are a critical component of appreciating the diversity of a state like California, we believe the proposed language requires modification. Specifically, the words “level of income” should be replaced with “economic status.”

Economic status is much more descriptive of the many levels of diversity that exist in the state. The economic status of a 45-year-old, married father of four who does not have a college degree and works a blue-collar job is very different from that of a single 21-year-old professional who just graduated from college, even though their level of income may be identical. Indeed your own Memorandum #4, page 9 identifies a host of demographic characteristics captured by the census that would be included in a definition of economic status but would not be captured by level of income. These include employment status, occupation, industry, poverty status, educational attainment and marital status.

Further, the proposed regulations themselves already recognize the importance of economic status. Section 60843(b)(2) cites “economic status” as one of the factors that should be considered in determining if the commission is reflective of the state’s diversity. If economic status is a necessary measure of whether the commission is reflective of the state’s diversity certainly it is a characteristic that potential commissioners should be able to appreciate. Memorandum #5 puts it best stating, “economic status bears upon redistricting, in that the economic status of the residents of an area is a factor that may be considered in determining whether the residents of the area constitute a community of interest that needs to be reflected in the area’s redistricting.”

#### **E. “Impartiality” (Section 60800)**

We are concerned, as we know others are, that section 60800, defining the “ability to be impartial,” is vague with its reference to support for or opposition to “social or political causes.” Including that as a potential means by which an applicant could be disqualified opens the term to myriad interpretations. We think it should be deleted.

In addition, the proposed regulation appears to require applicants to prove a negative when it states that an applicant “may demonstrate an ability to be impartial through . . . (1) Having no personal, family, or financial relationships, commitments, or aspirations that might have a tendency to influence someone making a redistricting decision.”

The requirement is not only vague but far too broad. Because a relationship, commitment or aspiration “that might have a tendency to influence someone making a redistricting decision” could be just about anything, this regulation risks decisions by the Applicant Review Panel that would be nothing short of capricious.

We therefore recommend using a reasonable person standard and moving the concept up to make it subparagraph (a)(4). With these changes, section 60800 would read as follows:

§ 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.
- (4) Any other political, social, personal, family, or financial relationship or commitment that a reasonable person would view as likely to improperly influence someone making a redistricting decision.

(b) An applicant may demonstrate an ability to be impartial through a description of that ability and 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.

#### **F. State Office (Sections 60804 and 60828)**

We are concerned that as they stand, section 60804, defining “Appointed to Federal or State Office” and section 60828, defining “State Office,” will automatically disqualify a large pool of highly qualified individuals who are exactly the sorts of civic-minded and engaged individuals who should be serving on the Citizens Redistricting Commission. These two provisions could disqualify many thousands of individuals with a history of serving the State in a nonpartisan manner. The regulations would disqualify any gubernatorial or legislative appointees over the last ten years. The Governor is responsible for making appointments to 691 boards, commissions, and state positions. For many of those boards and commissions, the Governor makes multiple appointments. Thus, the Governor appoints a total of 2,060 positions. The Legislature likewise appoints a total of 719 positions, bringing the total between the two to 2,779 positions. Many of these appointments are to small, local commissions or advisory boards whose members volunteer and receive nothing at all or only a small per diem or have their expenses reimbursed.

Given the fact that the prohibition applies to anyone who has served on these boards or commissions in the last ten years, the definitions as drafted will disqualify thousands of civic-minded citizens who have a demonstrated interest and ability to do precisely the type of work required of a commissioner, namely to serve on a commission, receive public testimony, analyze data and competing arguments and make difficult policy decisions. To avoid this, and make the disqualification provisions consistent with the Act’s goal of having a well-qualified citizen’s commission, the term “state office” should be defined more narrowly. This could be done in several acceptable ways, such as adopting the Political Reform Act’s definition of “elective state office,” defined as “the office of the Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Member of the Legislature, member elected to the Board of Administration of the Public Employees’ Retirement System, and a member of the State Board of Equalization.” (Gov. Code, § 82024.) Then, as the Political Reform Act does in defining “elected state officer,” the definitions could include any person who was appointed to a fill a vacancy to one of those positions. (See Gov. Code, § 82021.) This approach would distinguish between “politicians,” a group the Voters FIRST Act clearly intends to disqualify from serving, and civic-minded citizens, who should be encouraged to serve.

Alternatively, the term could be defined to include all elected state officers and all political appointees serving full-time in State government. This approach strikes a reasonable balance between, on the one hand,

ensuring that elected politicians and those who serve at their pleasure do not participate and, on the other hand, ensuring that those who are well qualified to serve are not disqualified because of an inconsequential association with an elected official, such as being appointed by an official to an advisory or volunteer board. At an absolute minimum, we strongly believe that individuals who have been appointed to ad hoc or advisory boards or commissions and have received nothing in return but a small per diem or reimbursement of expenses, should not be disqualified.

### **III. Public Participation**

#### **A. Timelines for Public Input**

The Bureau faces a difficult challenge in implementing the multiple phase application process envisioned by the proposed regulations and which we strongly support. As the Bureau has noted, it is difficult to predict how many applicants there will be. Thus, it will be difficult to know how much time should be allowed for each phase of the process, particularly Phases I and II. The resulting proposed regulations therefore lack significant detail as to when certain events will occur and how long they will take. While in general this is acceptable, given the uncertainties and the desire to avoid proscriptive regulations, there are four points where this approach could produce unacceptable results.

1. First, section 60843(c) requires the Phase I application period to be at least 60 days. However, the tentative calendar published by the Auditor has that period beginning December 15 and ending February 15. By moving the beginning of the application process forward by two weeks, the effect is to narrow the application window by having it run concurrent with the holiday season. The result will be to dissuade many applicants, resulting in a potentially less representative pool from which the Panel will select.

This problem can be handled administratively by extending the period forward to the end of February. Additionally, to prevent such problems in the future, the Bureau should consider modifying subdivision (c) to extend the minimum period to 75 days or at least exclude recognized state and federal holidays from the threshold.

2. Second, while the regulations do a good job of requiring public comment in every phase of the application process, they do not specify the minimum number of days for each of these periods. In our experience, when mandatory deadlines result in time pressures on state agencies, one of the places they are most likely to cut is opportunities for public comment. The result is all too often public comment periods that are technically compliant but as a practical matter allow no real opportunity for participation. We strongly encourage the Bureau to take steps to avoid being caught in the same trap by modifying the regulations to establish a minimum number of days for each public comment period. Specifically, section 60846(a) should have the following sentence added at the end: "The public comment period for each Phase shall be no less than 30 days."

3. Third, in order to have meaningful public comment, the public must have timely access to information. The proposed regulations require that information be made public, but do not set out the timeline in which this should occur. Again, we have found that the posting of information for public consumption is often one of the first things sacrificed for bureaucratic convenience unless there are strong protections in place.

We, therefore, urge the following additions to sections 60842, 60845 and 60848:

60842(f). All application materials collected and maintained by the bureau are public records. To enhance the transparency of the application process, the bureau shall post application materials on the bureau's website within 15 days of their receipt, except that it may decline to post any material, or specific information contained in any material, that bureau staff determines to be either of the following:

60845(a). Having excluded from the initial applicant pool those applicants who, based on their initial application, were not eligible to serve as members of the commission because of an inability to satisfy the requirements of subdivision (c)(3) of section 2 of Article XXI of the California Constitution, or due to a conflict of interest, the bureau shall post on the bureau's website a list of the names of the applicants who have been placed in the initial applicant pool immediately upon its completion.

60848(g). The bureau shall post on the bureau's website a list of the applicants remaining in the applicant pool who will therefore be invited to participate in Phase III of the application process immediately upon the completion of Phase II. The bureau shall also notify the applicants removed from the applicant pool that they have been removed from the pool.

4. Finally, a robust application process needs to be fair not only to the public, but the applicants as well. While Phase I prescribes a minimum 60-day period for applicants to submit their required information, no such period is specified for Phase II. This is particularly problematic given that Phase II is arguably the more complicated part of the application process, involving multiple essays and letters of recommendation. Therefore we recommend a minimum 60-day period for Phase II just as with Phase I by inserting the following into section 60847 either as a final sentence in section 60847(a) or as a new paragraph: "The Phase II application period shall extend a minimum of 60 days."

## **B. The Applicant Review Panel**

We are concerned that the proposed regulations do not include any mechanism to assure that the Applicant Review Panel will be accountable and will have sufficient knowledge regarding redistricting to perform its role effectively.

In order to select a diverse pool of the "most qualified" applicants to serve on the Redistricting Commission, the auditors serving on the Applicant Review Panel must themselves be knowledgeable regarding redistricting, the redistricting process, and the criteria that guide that process. Therefore, the regulations should provide for training the members of the Applicant Review Panel in these areas. This could easily be achieved with modifications to sections 60832 and 60834 as follows:

1. Add a subparagraph to section 60832 stating that Panel members shall participate in training regarding redistricting, the Voting Rights Act, staff management, operating as a public body, and such other matters as may be necessary to the effective performance of their responsibilities.<sup>2</sup>
2. Add a subparagraph to section 60834(a) to state that the Bureau shall provide the Panel with training in (i) the processes and criteria for redistricting; (ii) staff management; and (iii) laws and expectations regarding transparency and openness of Panel operations.

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<sup>2</sup> In this regard, we note an anomaly in the regulations' definition of "consultants" and "staff" that, we believe is best dealt with by training the Review Panel rather than by modifying the definitions. The proposed regulations define "consultant", "paid consultant", "paid staff" and "staff" by limiting the relevant offices and campaigns to California. (Regs., §§ 60813, 60820, 60819, 60827.) In doing so, the regulations inadvertently create a situation where partisans who have operated within the state are disqualified but partisans who have operated outside the state are not. Broadening the definition would run into the overbreadth problem that the Bureau, appropriately, is attempting to avoid. However, this is the type of consideration that could and should be included in training for the Review Panel so that they may approach their task with an understanding of both the theoretical framework and the political realities.



As measures to assure accountability, the selection of the Applicant Review Panel should be more transparent and open to public comment, and the operations of the Applicant Review Panel should be subject to the same sorts of rules regarding transparency and limitations on ex parte communications as the redistricting commission. As the Bureau's own counsel has noted, the Act has strong themes of transparency and assuring an open process that invites public participation. (See July 31, 2009 Memorandum Number 3 at p. 4.) Without transparency provisions, the selection of the Panel takes on an aura of secrecy, and there is the appearance that the Review Panel and BSA staff working with the Panel may engage in undisclosed communications that could influence their recommendations and determinations.

We, therefore, would like to see the regulations regarding the Applicant Review Panel modified as follows:

1. Add as the first paragraph in section 60831 a provision that the list of all possible candidates for the Review Panel, as well as applications or materials used to determine whether an auditor is qualified to serve on the Applicant Review Panel be made public and available for public comment at least 10 days before the pool from which the Panel members will be randomly selected is formed. (Any concerns regarding private information may be dealt with by provisions such as those in section 60842(f).)
2. Add a new paragraph to section 60831 to provide for disclosure of the reasons for disqualification of an auditor from the pool for the Applicant Review Panel.
3. Modify what is currently paragraph (a) of section 60831 to increase the window for public review of the list of auditors in the pool from which the Panel members will be randomly selected from 10 days to 20 days.
4. Add to section 60835(e) a sentence stating, "Panel members and staff may not communicate with or receive communications about applicants or selection for the redistricting commission outside of a public hearing. This paragraph does not prohibit communication between Panel members and staff that is otherwise permitted by the Bagley-Keene Open Meeting Act outside of a public hearing."

Along these same lines, if as provided in Proposed Regulation 60848(c), Bureau staff are allowed to make substantive recommendations regarding applicants for commission membership, then it is essential that both the recommendations and the reasons supporting them be published well in advance of the hearings at which such applicants are considered, so that there is a meaningful opportunity for public comment.

To address these concerns, a sentence should be added to section 60848(c) stating that staff summaries, recommendations or other information provided by staff to the Panel shall be posted on the Bureau's website at least 10 days before any hearing at which they may be considered. This would be consistent with the State's open meeting laws.

We appreciate the opportunity to provide comment. We are confident that you will receive our comments in the spirit of advancing the Act's goals – and our shared goals – of establishing an open process that produces a Citizens Redistricting Commission that is diverse, highly qualified, impartial, and committed to fair representation.

Respectfully,



Antonio Gonzalez  
President



Steven Ochoa  
Vice President of Public Policy and Research