

**California Bureau of State Audits  
MEMORANDUM NUMBER 3**

To: Elaine M. Howle, State Auditor

From: Janis Burnett, Staff Counsel  
Sharon Reilly, Chief Counsel

Subject: Proposed Regulations 60823, 60824, 60830, 60831, 60832, 60833, 60834, 60835  
and 60836: Applicant Review Panel

Date: July 31, 2009

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**Introduction**

The Voters FIRST Act (the “Act”)<sup>1</sup> approved by the voters in the November 4, 2008 general election as Proposition 11 requires the State Auditor to initiate an application process for the Citizens Redistricting Commission (the “commission”) on a decennial basis. The commission, composed of fourteen members, is responsible for redrawing district lines for the Senate, Assembly, and State Board of Equalization based on decennial census information and census information for each year ending in zero thereafter. The Act requires the State Auditor to create an Applicant Review Panel (the “panel”) of three qualified independent auditors who have been practicing as independent auditors for at least 10 years prior to appointment and who are employed by the State and licensed by the California Board of Accountancy at the time of the drawing. The panel will review the applications of persons wishing to serve on the commission. Under the Act, the panel evaluates all of the applications submitted by eligible applicants, and based on that evaluation, identifies a pool of 60 of the most qualified applicants.

As the Act provides few specifics about the operation of the panel, the bureau is proposing the following regulations to address the selection and removal of panel members and to specify certain aspects of the panel’s internal administration. The regulations clearly and concisely identify the process for staffing and structuring the panel. These regulations are necessary to ensure that the Proposition 11 is properly implemented, and that the panel is properly constituted and capable of carrying out its statutory responsibilities.

**Proposed Regulations**

**Proposed Regulation 60823. Qualified Independent Auditor**

The proposed regulation defines a “qualified independent auditor” as an auditor currently employed as a permanent employee of the Bureau of State Audits (the “bureau”). As what qualifies an auditor as being independent is not specified in the Act, this regulation is necessary

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<sup>1</sup> The Voters FIRST Act is contained in Article XXI of the California Constitution and Government Code sections 8251 through 8253.6. Unless indicated otherwise, all statutory references are to the Government Code.

to provide clarity to prospective applicants and the general public regarding the meaning of this term as it is used in the Act and in the proposed regulations.

In contemplating the interpretation that we should adopt for the term “qualified independent auditor,” we considered specific language in the Act stating that “this reform will make the redistricting process open so it cannot be controlled by the party in power” and that “the reform takes redistricting out of the partisan battles of the Legislature....”<sup>2</sup> To give meaning to the statute that best supports the purposes of the Act, we determined that we should place particular emphasis on the word “independent.” Although many state agencies employ auditors, the bureau is unique given that as a matter of state law it is independent of the executive branch and legislative control.<sup>3</sup> In addition, as the state's independent external auditor, the bureau provides nonpartisan assessments of California government's financial and operational activities. We also considered California's civil service rules and the practical considerations of using auditors employed by other agencies. Of greatest concern is that auditors from other agencies would still remain under the control of those agencies and, therefore, the independence contemplated by the Act would be lost.<sup>4</sup> However, the proposed regulation includes a provision allowing an auditor currently employed by the bureau to include experience acquired outside the bureau towards the experience requirement established by the Act as long as that experience was acquired under an agency that conducted audits of departments that were external to itself although under its oversight authority. Based on the bureau's unique independence, its staff of auditors being experienced in nonpartisan assessments, and the limitations presented by California's civil service rules, we determined that this regulation is necessary to institute an application process consistent with the purposes of the Act.

### **Proposed Regulation 60824. Randomly Draw**

This proposed regulation provides a definition for “randomly draw” as the term is used in section 8252. The Act requires two random drawings to occur. The first is for the State Auditor to select the members of the panel.<sup>5</sup> The second is for the selection of the first eight commissioners.<sup>6</sup> As the Act is silent as to how the State Auditor should administer the random drawings, this regulation would provide clarity regarding that process.

We propose to use numbered balls and a bingo cage to perform the random drawings. The numbers on the balls would be assigned to the applicants in a subpool, so that each ball would bear a unique identifying number for each applicant. The balls would then be placed in a bingo cage, rotated vigorously and then the cage would drop the number of balls needed to fill the available positions on either the panel or the commission. The applicants with identifying numbers that correlate to the numbered balls selected would then be announced as either

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<sup>2</sup> Uncodified Findings and Purposes of the Act, § 2(c)-(d).

<sup>3</sup> § 8543 states that “[i]n order to be free of organizational impairments to independence, the bureau shall be independent of the executive branch and legislative control.”

<sup>4</sup> 2 CCR § 426.

<sup>5</sup> § 8252(b).

<sup>6</sup> § 8252(f).

members of the panel or the commission. As the Act requires an open redistricting process that invites public participation<sup>7</sup>, we recommend making the random drawings open to the public.

In making the determination to perform the random drawings in the manner described above, we surveyed California law and found that there were few references to random selections or random drawings. The selection process most similar to the random drawings required by the Act calls for the Secretary of State to conduct a drawing of letters of the alphabet known as the “randomized alphabet.” The process for creating a randomized alphabet system is prescribed in Elections Code section 13112. It requires each letter of the alphabet to be written on a separate piece of paper, and then the paper is folded and inserted into a capsule. Each capsule is required to be of a uniform weight, size, color, shape and texture as well as opaque. The capsules are to be placed into a container and shaken vigorously to mix them thoroughly. After the capsules are mixed, the container is opened and the capsules are removed one at a time. Each capsule is opened and the letter on the piece of paper read aloud and written down in the order in which it is selected. The resulting random order of letters constitutes the randomized alphabet that shall be used in determining the order of the names of candidates for office on election ballots.

In a discussion with staff from the Elections Division of the Secretary of State’s office, we learned that the procedure has been altered. Instead of using capsules, the staff use 26 film canisters, similar to the canisters used to package 35 mm film, with the letters of the alphabet printed on the inside of the canister caps. All other aspects of the procedure are the same. The substitution of film canisters simplifies the procedure and eliminates the potential for errors when filling the capsules with pieces of paper.

With no other guidelines for conducting a random drawing, we considered the use of balls inside a bingo cage, as it is similar to the process the Secretary of State has adopted. We then consulted a statistician to determine whether this process constitutes a random drawing as stated in the Act. According to Geetha Ramachandran, PhD, Professor of Statistics, California State University, Sacramento, this is a valid process for a random drawing. Based on the bureau’s review of other random drawings under state law and the opinion of our statistician, we are proposing that the random drawings required by the Act be conducted by using numbered balls and a bingo cage.

### **Proposed Regulation 60830. Selection of Panel Members and Alternate Panel Members**

The Act is silent as to the process for randomly drawing panel members and the applicants who will serve as the first eight members of the commission. Proposed regulation section 60824 sets forth a general process for random drawing. This regulation provides additional specifics regarding random drawing as it relates to the selection of panel members. It also provides for the selection of alternate members of the panel. The Act is silent as to the process for replacing a panel member. However, given the expected duration for service on the panel, circumstances may arise that result in the resignation or need for removal of a panel member. Since the panel must complete its review and selection of applicants by the statutory deadline, selecting alternate panel members concurrently with the selection of panel members will minimize disruption of the panel’s work if a new appointment is needed.

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<sup>7</sup> The Act, § 2 (d)-(e), (uncodified Findings and Purpose); Cal. Const, Art. XXI, § 2, subd. (b)(1), (2), (3), & (6); § 8253(a).

### **Proposed Regulation 60831. Information About Prospective and Selected Panel Members**

This regulation would require the bureau to post the names, party affiliations and relevant qualifications of prospective and selected panel members. As stated in the discussion of the last regulation, the Act requires an open redistricting process that invites public participation.<sup>8</sup> We have interpreted the Act's strong theme of transparency as applying to the process for selection of commissioners, and this interpretation has been bolstered by and echoed in comments the bureau has received from interested persons. Providing public information regarding the panel will give greater transparency to the process for selecting members of the commission.

### **Proposed Regulation 60832. Duties of Panel Members**

The Act provides only a limited amount of detail on the duties of the panel. To further the transparency goals of the Act and to assist with the administration of the panel, this regulation establishes specific duties for members of the panel.

### **Proposed Regulation 60833. Removal of Panel Members**

The Act is silent as to both the grounds and process for the removal of a panel member. However, given the expected duration for service on the panel, circumstances may arise that result in the resignation or need for removal of a panel member. This regulation will minimize the potential for disruption of the panel's work by specifying a process for the removal of a panel member.

### **Proposed Regulation 60834. Panel Administration**

The Act is silent on staffing for the panel and, although the Act provides that the bureau receive funding for implementation of the Act, the panel is not provided with its own funding source. This regulation clarifies that the bureau will provide administrative and legal support to the panel.

### **Proposed Regulation 60835. Panel Meetings**

The Act does not provide any specific requirements for panel meetings. To further the transparency goals of the Act and to assist with the administration of the panel, the proposed regulation provides guidance to applicants and the general public on the location and procedures that the panel will follow during panel meetings.

### **Proposed Regulation 60836. Panel Voting**

The Act does not address voting procedures for the panel. This proposed regulation provides guidance to applicants and the general public on the voting procedures that the panel will follow during panel meetings. Although each of the panel members is selected based on party

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<sup>8</sup> See the Act, § 2(d)-(e) (uncodified Findings and Purpose); Cal. Const., Art XXI, § 2, subd. (b)(1), (2), (3), & (6); § 8253.

affiliation, the integrity of the selection process dictates that the process should be structured to avoid even the appearance that any of the selection decisions are politically motivated. Accordingly, this regulation provides that any decision or reconsideration of a decision regarding the removal of an applicant from an applicant pool must be by a unanimous vote of the three panel members. Other decisions of the panel may be made by majority vote. This regulation is necessary to further the integrity and transparency goals of the Act and to assist with the administration of the panel.

### **Conclusion**

As the Act provides few specifics regarding the selection of the panel, removal of panel members and the internal administration of the panel, we are proposing the regulations discussed in this memorandum to direct the operation of the panel in a manner that is consistent with the purposes of the Act.