

California Bureau of State Audits
MEMORANDUM NUMBER 7

To: Elaine M. Howle, California State Auditor

From: Stephanie Ramirez Ridgeway, Senior Staff Counsel
Sharon Reilly, Chief Counsel

Subject: Proposed Regulations 60840, 60841, 60842, 60843, 60844, 60845, 60846, 60847, 60848, 60849, 60850, 60851, 60852, 60853, 60854 and 60855: The Application Process

Date: July 31, 2009

Introduction

The Voters FIRST Act, approved by the voters at the November 4, 2008 general election as Proposition 11 (the Act), requires the State Auditor to create the Citizens Redistricting Commission (the “commission”). The commission, composed of fourteen citizens, is responsible for redrawing district lines for the California Senate, Assembly, and State Board of Equalization. The Act, which added Article XXI, section 2 to the California Constitution, and sections 8251 through 8253.6 to the Government Code,¹ requires the State Auditor to initiate an application process and create the Applicant Review Panel (the “panel”) to review the qualifications of applicants who apply to serve on the commission. The State Auditor forms the panel by randomly drawing names from a pool of qualified independent auditors who are licensed by the board of accountancy and who have 10 or more years of experience working as an independent auditor. Government Code section 8252 places certain responsibilities on the Bureau of State Audits (the “bureau”) and the panel with regard to the application review and selection process. However, the Act provides little guidance on how the application review and selection process should work. Thus, these proposed regulations establish the parameters for the application review and selection process.

Background

Under California Constitution, Article XXI, section 2, subdivision (c)(3) and section 8252, subdivision (a)(2), registered voters who possess the following qualifications are eligible to apply to serve as a commissioner:

- Have voted in two out of the last three elections.
- Have not changed party affiliation in the past five years.
- Do not have a conflict-of-interest.

Section 8252 requires the bureau to establish an application and selection process, but provides little guidance on how that should function. As part of the selection process, section 8252, subdivision (d) requires the panel to narrow the pool of applicants to 60 of the most qualified

¹ All statutory references are to the Government Code.

applicants, with 20 belonging to the state’s largest political party, 20 belonging to the state’s second largest political party, and 20 belonging to neither of those parties. Subdivision (d) directs that “[t]hese subpools shall be created on the basis of relevant analytical skills, ability to be impartial, and appreciation for California’s diverse demographics and geography.”² In addition, the Act addresses diversity of the commission twice, with little guidance as to how the panel should consider diversity in making its selections. California Constitution, Article XXI, section 2, subdivision (c) states “[t]he selection process is designed to produce a Citizens Redistricting Commission that is ... reasonably representative of the state’s diversity.”³ We more fully address diversity in the Memorandum to the State Auditor dated July 31, 2009, regarding diversity (Memorandum Number 5).

Once the panel narrows the applicant pool to 60, section 8252, subdivision (e) requires the panel to send the names of the 60 applicants to legislative leaders, as defined in proposed regulation 60817, who may strike no more than 8 names from each of the three subpools. The remaining 36 names are then returned to the State Auditor, who randomly selects 3 applicants who are registered with the largest political party, 3 applicants who are registered with the second largest political party, and 2 applicants from the subpool of applicants who are not registered with either of the two largest parties.

The Act provides very little guidance about what the application should include and what the application process itself should entail. Moreover, while section 8253.6, subdivision (a) contemplates broad outreach, and California Constitution, Article XXI, section (2), subdivision (c) anticipates a commission that is reasonably representative of the state’s diversity, the Act provides no guidance on how outreach should occur.

Thus, the proposed regulations provide detailed information about how individuals may apply to serve on the commission and how the commissioners will ultimately be selected. The proposed regulations also provide an outreach plan. The proposed regulations further provide detailed information to the bureau and the panel about the various steps that must be followed in processing the applications. Very generally, we have determined that the process should include the following:

- Developing the applications and making them available to applicants.
- Conducting comprehensive outreach so that voters are aware of the opportunity to serve on the commission and that the applicant pool may be reasonably representative of the state’s diversity.
- Establishing application timelines and the processes for reviewing the applications and interviewing applicants.
- Screening applicants to ascertain whether they meet the eligibility requirements of the Act.
- Creating an initial applicant pool.

² These qualifications are fully discussed in the Memorandum to the State Auditor, dated July 31, 2009, regarding identifying the most qualified applicants (Memorandum Number 4).

³ Cal. Const., Article XXI, § 2.

- Narrowing the applicant pool on the basis of relevant analytical skills, an appreciation for the state’s diverse demographics and geography, and the ability to be impartial.
- Transmitting the names of 60 of the most qualified applicants to the legislative leadership, who may strike up to 24 names.
- After legislative leadership has exercised their strikes, randomly selecting eight commissioners (3 from the largest political party, 3 from the second largest political party, and 2 who are not affiliated with either party) from those remaining in the pool of 60 most qualified applicants.

Once the State Auditor randomly draws the first eight commissioners, section 8252, subdivision (g) requires the newly selected commissioners to select the final six commissioners.

In crafting the proposed application process, we were mindful of the Act’s overarching theme of transparency and openness. More specifically, section 2, subdivisions (c) and (d) of the Act, which sets forth the Act’s findings and purposes, provides that “[t]his reform will make the redistricting process open so it cannot be controlled by the party in power” and “[e]very aspect of this process will be open to scrutiny by the public and the press.” In addition, California Constitution Article XXI, section 2, subdivision (b)(1) requires the commission to “conduct an open and transparent process enabling full public consideration of and comment on the drawing of district lines.” Finally, section 8252, subdivision (c) requires the State Auditor, after removing applicants who have a conflict of interest, to publicize the names of the applicants that are entered into the initial applicant pool. Thus, the proposed regulations carry the theme of openness and transparency throughout the application process.

The proposed regulations also take into account the possibility of a very large applicant pool. As explained more fully in the Memorandum to the State Auditor, dated July 31, 2009, relating to electronic applications (Memorandum Number 6), our statistical expert has advised us that the potential applicant pool ranges into the millions. While we think it is unlikely that we would receive applications into the millions, we believe that the initial applicant pool may number into the thousands. Unfortunately, without any prior experience with this process, we cannot reasonably predict the size of the applicant pool.

Finally, the Act establishes several statutory deadlines that the State Auditor, the panel, and the commission must meet to perform their duties. More specifically, section 8252, subdivision (c) requires the State Auditor to publicize the names of applicants who do not have conflicts by August 1, 2010 and in each year ending in zero thereafter. Section 8252, subdivision (e) requires the panel to submit the names of those that they have identified as 60 of the most qualified applicants to the Legislature not later than October 1, 2010, and each year ending in the number zero thereafter. The legislative leaders must exercise their strikes no later than November 15, 2010, and each year ending in zero thereafter. Section 8252, subdivision (f) requires the State Auditor to randomly draw 8 names from the pools of names returned from legislative leadership not later than November 20, 2010, and each year ending in the number zero thereafter. These deadlines are essential to ensuring that the commission is established in time to receive the decennial United States Census data that the commission will use for redistricting. That data should be available no later than April of 2011, and in each year ending in eleven thereafter. Under California Constitution, Article XXI, section 2, subdivision (g), the commission must approve three final maps that separately set forth the district boundaries for the Senate,

Assembly, and State Board of Equalization not later than September 15, 2011, and each year ending in the number eleven thereafter. Thus, in crafting the proposed regulations relating to the application process we were mindful that these deadlines place practical limitations on the process.

Proposed Regulations.

Proposed Section 60840. Outreach Program

This proposed regulation specifies the outreach program the bureau must undertake prior to and during the initial application period. Section 8253.6 requires the Legislature to appropriate sufficient funds to meet the estimated expenses of the bureau, the commission and the Secretary of State in implementing the Act, including, but not limited to “adequate funding for a statewide outreach program to solicit broad public participation in the redistricting process.” The Act, however, does not set forth what constitutes “a statewide outreach program to solicit broad public participation.”

As part of its regulatory process, in early 2009, the bureau conducted interested persons meetings throughout the state. At each of several meetings, and in other public comments received by the bureau, the public encouraged the bureau to undertake an outreach program designed to reach as broad an applicant base as possible. Moreover, as discussed in the background section, the Act aims for the creation of a commission that is reasonably representative of the state’s diversity. Thus, we recognize that the bureau’s outreach efforts, in addition to reaching individuals who are qualified to serve on the commission, must also be directed toward creating a pool of qualified applicants that is reasonably representative of the state’s diversity. Accordingly, we recommend that the bureau, subject to the availability of funding, undertake an outreach program that will reach qualified applicants of diverse backgrounds.

Because the Act is silent as to what constitutes a sufficient outreach program, and because there exists keen public interest in the bureau’s outreach plans, we propose this regulation to inform the public about the outreach efforts the bureau intends to undertake to gather a diverse pool of qualified applicants.

Proposed Section 60841. Overview of the Application Process

As indicated earlier, the Act requires an application and selection process but provides few specifics about how that process should work and provides no guidance about how to conduct it. During the bureau’s interested persons meetings and in other public communications received by bureau, the public offered suggestions relating to various aspects of the application process including, but not limited to, the type of application the bureau should use, the timelines relating to the application period, the process for selecting the most qualified applicants, the need to interview applicants, and the need for the public to watch the panel conduct its interviews and deliberations. In crafting these regulations, we carefully considered the public’s input.

We are proposing regulations to establish the application process, including the framework for obtaining applications, and the method the panel will use to select the most qualified applicants from which the commissioners will be chosen. To organize the application process, we are

proposing that it be structured as a five-phase process. Each phase of the application process is described below.

This proposed regulation provides an overview of the different phases of the application process. It also provides the public, the bureau, and the panel with a general understanding of the application process that we are recommending.

Proposed Section 60842. General Requirements Applicable to Every Phase of the Application Process.

As discussed earlier, the Act provides very little guidance regarding the actual application process. In designing the application process, we determined that some requirements would apply to each phase of the application process. We propose to address them in one regulation.

Unless an applicant has a disability that prevents the applicant from completing an electronic application, the proposed regulations require submission of electronic applications. We make this proposal based on the many practical concerns related to the potentially large size of the applicant pool and the statutory deadlines explained in the background section. The reasoning behind this recommendation is set forth in the Memorandum to the State Auditor, dated July 31, 2009, relating to electronic applications (Memorandum Number 6).

In addition to requiring electronic submissions for everything except letters of recommendation, this regulation proposes requirements necessary to successfully implement the application process within the Act's statutory deadlines. We are proposing that all deadlines be final. Therefore, applicants must timely submit and complete applications, comments, applicant responses to comments, letters of recommendation and other materials relating to the selection process. Moreover, the proposed regulation would permit the bureau to remove from consideration applicants who submit more than one application at any phase of the application process from the applicant pool. Additionally, the proposed regulation requires the bureau to remove from consideration applicants who fail to timely respond to inquiries or provide additional information.

The proposed regulations require each applicant to certify that the information provided in the application is true and correct. In addition, materials submitted during the application process are public records and the bureau may post them on the bureau's website. To protect the integrity of the application process, the proposed regulations permit the bureau and panel to investigate and verify information provided by or about an applicant. Lastly, as the bureau should avoid serving as a vehicle for publicizing certain offensive or harassing material, this proposed regulation would permit the bureau to refrain from posting such materials on its website.

Proposed Section 60843. Phase I Application.

Because the Act does not set forth a detailed application process, the proposed regulations create one. This proposed regulation sets forth the specific requirements for Phase I of the application process. We propose an application process that includes an initial application designed to

determine whether an applicant meets the minimum qualifications set forth in the California Constitution, Article XXI, section 2, subdivision (c)(2)-(3), which requires an applicant to have voted in two of the last three statewide general elections and maintained the same party affiliation during the past five years. Also this initial phase would determine whether an applicant has any conflicts of interest, as defined in section 8252, subdivision (a)(2), and more fully discussed in the Memorandum to the State Auditor dated July 31, 2009, regarding conflicts of interest (Memorandum Number 2).

The proposed Phase I application elicits from the applicant specific information that the bureau will use to verify that the applicant meets the minimum qualifications for service. The proposed regulations establish an application period of a minimum of 60 days, which, in conjunction with the broad outreach contemplated in proposed regulation 60840, should result in the receipt of applications from a large number of diverse and qualified applicants.

Proposed Section 60844. Phase I Application Review.

The Act does not specify how the applications should be reviewed to determine whether an applicant meets the basic eligibility requirements set forth in California Constitution, Article XXI, section 2, subdivision(c)(2)-(3). However, section 8252, subdivision (a)(2) requires the State Auditor to remove from the applicant pool individuals with conflicts of interest. This proposed regulation would provide the public, the bureau, and the panel with guidance on how the bureau will screen applications during Phase I. We propose that during this phase the bureau screen the applications for disqualifying conflicts of interest and whether the applicant meets the requirements of California Constitution, Article XXI, section 2, subdivision (c)(2)-(3). At the end of this phase, the proposed regulation would require the bureau to invite applicants who are not excluded to participate in Phase II of the application process. The proposed regulation also requires the bureau to notify applicants who are excluded from the applicant pool and advise them of the grounds for their exclusion. This proposed regulation provides the bureau and the public with clarity on how the bureau will screen Phase I applications.

Proposed Section 60845. Publication of Names in the Initial Application Phase.

This regulation provides for the publication of the names of applicants in the applicant pool at the completion of Phase 1. Section 8252, subdivision (c) requires the State Auditor to publicize, no later than August 1 in 2010 and each year ending in zero thereafter, the names of those applicants remaining in the pool of applicants after the bureau screens applicants for ineligibility and impermissible conflicts of interest. However, the Act does not specify the means of publication. This proposed regulation addresses the publication of the names of those who remain in the pool at the end of Phase I on the bureau's website, as defined by the proposed regulation 60808. By publicizing the names, this proposed regulation furthers the Act's transparency goals discussed in the background section as well as the express language of the Act. Moreover, by posting the names on the bureau's website, the information is made simultaneously available to all interested persons across the state and encourages the prompt submission of public comments.

Proposed Section 60846. Written Public Comments and Responses.

This proposed regulation specifies the process for submitting written public comments and applicant responses to public comments. As explained above, the Act requires an open redistricting process that invites public participation, but does not specifically address how that public comment and participation will occur. We anticipate that, by publicizing the names of the applicants under proposed Regulation 60845, we will receive valuable public comments identifying conflicts of interest and providing other important information concerning applicants.

To satisfy public concern and the Act's overarching theme of transparency, this proposed regulation would inform members of the public about how they may submit written comments about applicants as well as provide a mechanism for applicants to respond to written comments. This proposed regulation would permit the public to submit written comments electronically, via United States mail, or facsimile. In addition, the proposed regulations require the bureau to post on its website, as defined by proposed Regulation 60808, all written comments that the panel may consider.

The proposed regulation establishes certain requirements for the written comments to encourage truthful and accurate comments. Also, to ensure that the process adheres to the statutory deadlines established by the Act, the proposed regulation imposes deadlines for submitting comments and responses to comments. Accordingly, this proposed regulation specifies that the panel will not consider untimely comments.

Proposed Section 60847. Phase II Application.

This proposed regulation specifies the process for submitting supplemental applications during Phase II of the application process. It also describes the supplemental applications and supporting materials that applicants invited to participate in Phase II would be required to submit. We propose a supplemental application that is rather detailed and involves answering a number of essay questions and other requests for information related to an applicant's qualifications. We also propose requiring applicants to submit three letters of recommendation. Additionally, while applicants are required to submit the supplemental application and all other supporting materials electronically, this proposed regulation permits applicants to submit their letters of recommendation either electronically or via the U.S. postal service, common carrier, or facsimile.

Proposed Section 60848. Phase II Application Review.

This regulation specifies the process for reviewing the supplemental applications submitted during Phase III of the application process.

As explained earlier, the potential applicant pool ranges into the millions and we have no way of accurately predicting the size of the applicant pool. Moreover, the Act does not address how the panel should reduce the potentially very large applicant pool to a pool of 60 of the most qualified applicants. Thus, this proposed regulation establishes the method by which the panel would review all Phase II applications. Further, in conjunction with proposed regulation 60835, the

panel would deliberate in open session until the panel could agree on a list of no more than 120 applicants (40 who are registered with the state's largest political party, 40 who are registered with state's second largest political party, and 40 applicants not registered with either party). The panel would then interview those 120 applicants during Phase III. Keeping in mind the size of the potential applicant pool, this regulation permits the panel to request the State Auditor to assign staff to the members of the panel to assist with their review of the application materials.

Consistent with section 8252, subdivision (d), the proposed regulation directs the panel to evaluate the applicants based on their relevant analytical skills, ability to be impartial, and appreciation for California's diverse demographics and geography. In addition, consistent with California Constitution, Article XXI, section 2, subdivision (c)(1), the proposed regulation directs the panel to consider whether the composition of the pool of applicants to participate in Phase III is reflective of the state's diversity. In doing so, the proposed regulation would prohibit the panel from using formulas or specific ratios to identify and select applicants to participate in Phase III. The rationale behind this recommendation is more fully discussed in Memorandum Number 5.

Consistent with Act's overarching theme of transparency, the proposed regulation requires the bureau to post the names of those individuals selected to participate in phase III on the bureau's website, as defined by proposed Regulation Section 60808. This will facilitate further public participation and comment in the selection process.

Proposed Section 60849. Phase III: Interviews.

This proposed regulation describes the interview process, including the scheduling of interviews. Additionally, the proposed regulation requires the bureau to pay the reasonable travel expenses incurred by applicants who must travel to participate in the interviews. To further the Act's emphasis on an open redistricting process that invites public participation, the proposed regulation would require the panel to record the interviews and would require the bureau to post the recordings on its website. Further, pursuant to proposed Regulation 60835, the interviews would take place in public. To facilitate effective and timely interviews, the proposed regulation would restrict the individuals who may ask interview questions to members of the panel, panel staff, and panel legal counsel.

Proposed Section 60850. Phase III Applicant Review.

During Phase III, the proposed regulations require the panel to identify 60 of the most qualified applicants who will participate in Phase IV of the application process. As required by Section 8252, subdivision (d), the proposed regulations direct the panel to select 20 applicants who are registered with the state's largest political party, 20 applicants who are registered with the state's second largest political party, and 20 applicants who are not registered with either of the two largest political parties. Consistent with section 8252, subdivision (d), the proposed regulation further directs the panel to evaluate applicants based on their relevant analytical skills, ability to be impartial, and appreciation for California's diverse demographics and geography. In addition, consistent with California Constitution, Article XXI, section 2, subdivision (c)(1), the proposed regulation directs the panel to consider whether the composition of the pool of applicants to

participate in Phase III is reflective of the state's diversity. In doing so, the proposed regulation would prohibit the panel from using formulas or specific ratios in selecting applicants to participate in Phase III. The rationale behind this proposal is more fully discussed in Memorandum Number 5.

Proposed Section 60851. Reconsideration.

While the Act requires an application process, it does not address whether excluded applicants should receive reconsideration. This proposed regulation specifies the limited circumstances under which an applicant may seek reconsideration of a bureau or panel decision. We considered several options regarding reconsideration. We determined granting an applicant the right to seek reconsideration of every decision could significantly slow the selection process and exhaust bureau resources, but also recognized that compelling circumstances or instances of human error on the part of bureau or panel may justify reconsideration of certain decisions. Accordingly, to ensure that the Act's statutory deadlines are met, this proposed regulation seeks to limit reconsideration while providing a mechanism for the reconsideration of certain disqualifying decisions. However, to obtain reconsideration, this proposed regulation would require an applicant to establish by a preponderance of the evidence that he or she was erroneously removed from the applicant pool. It also establishes the panel's ability to exercise its sole discretion to reconsider and correct a past panel or bureau decision during the application process where gross error has occurred or compelling circumstances exist.

Proposed Section 60852. Phase IV Applicant Name Striking Process.

While the Act specifies that legislative leaders, as defined in proposed Regulation Section 60817, will have an opportunity to strike a limited number of names forwarded to the Legislature by the panel, it does not describe how the panel shall present those names to the Legislature. To provide guidance to the panel, legislative leaders, and the public on this process, this proposed regulation requires the panel to transmit the names of 60 of the most qualified applicants to legislative leadership via hand-carried letter.

Additionally, the Act does not address what the State Auditor should do if the list returned by legislative leadership does not contain at least 12 names from each subpool. This regulation would require the State Auditor to return the list to the legislative leadership.

Proposed Section 60853. Random Drawing of First Eight Commissioners.

The Act does not set forth the method by which State Auditor must randomly draw the names of the first eight commissioners, nor does it address what the State Auditor should do if the Legislature does not return a list of at least 36 names to the State Auditor by November 15 of the application year. This regulation, together with proposed Regulation 60824 (which specifies how the names will be randomly drawn and is discussed more fully in the Memorandum to the State Auditor dated July 31, 2009, relating to the Applicant Review Panel, (Memorandum Number 3), clarifies those ambiguities. The dates contained in this proposed regulation are consistent with the dates established for transmitting the names to the legislative leadership and the random drawing of names contained in section 8252, subdivisions (e) and (f).

Proposed Section 60854. Transmission of Remaining Application Materials to Secretary of State.

Section 8253, subdivision (a)(5) requires the Secretary of State to provide support functions to the commission until its staff and office are fully functional. Section 8252, subdivision (g) requires the first eight commissioners to select the final six commissioners based on the diversity of the commission, relevant analytical skills and the ability to be impartial. Section 8252.5, subdivision (b) requires the commission to fill vacancies using the same pool of applicants remaining as of November 20 of the year that the panel establishes the pool. While the Act does not specify that the bureau or panel provide its application materials to the Secretary of State, we recognize that neither the commission nor the Secretary of State could fulfill its duties without copies of the application materials of the remaining applicants. Thus, this proposed regulation provides a mechanism and deadline by which the panel will transmit those materials to the first eight commissioners and the Secretary of State.

Proposed Section 60855. Commission Vacancies.

This proposed regulation specifies the State Auditor's role in filling commission vacancies. Section 8252.5 requires that vacancies be filled, within 30 days after a vacancy occurs, from the pool of applicants of the same voter registration category as the vacating member was selected from. If none of those remaining applicants are available for service, "the State Auditor shall fill the vacancy from a new pool created for the same voter registration category in accordance with Section 8252." While the Act is specific in requiring the State Auditor to create a new pool, it does not specify whether the State Auditor must solicit new applicants. Moreover, it does not differentiate between vacancies that occur while the panel is creating new district maps versus vacancies that occur years after the panel has completed the redistricting process. Thus, the plain language of the Act is ambiguous and, therefore, could be construed in a manner that creates an absurd result. For example, if a vacancy occurs in 2018 (eight years after the first commission is created), just before the State Auditor commences a selection process for the year 2020 commission, the Act could be construed to require the State Auditor to commence a lengthy application and selection process to fill a vacancy with a commissioner who may only serve a few months and who would not actually participate in any redistricting. In our view, commencing a new application and selection process for a commissioner under those circumstances would constitute a waste of state resources. The proposed regulation seeks to avoid an absurd result and preserves state resources by differentiating between vacancies that occur during the mapmaking process and those occurring after the commission has completed its redistricting work. Moreover, we believe this interpretation is consistent with the Act because the Act does not prohibit the State Auditor from creating a "new pool" of applicants from the applications already reviewed by the panel.

For these reasons, we recommend requiring the State Auditor to fill vacancies only at the commission's written request. If the commission has not yet certified the three final maps to the Secretary of State and is unable to fill a vacancy using the remaining pool of applicants, the proposed regulation would require the commission to notify the State Auditor in writing. As soon as practicable, the State Auditor would seek to fill the vacancy, convening a new panel that would first reconsider the applicants whose names remained in the pool at the completion of

Phase II. If the panel cannot fill the vacancy using the applicants whose names remained in the pool at the completion of Phase II, the panel would next consider those applicants who remained in the pool at the completion of Phase I. This process would enable the State Auditor to fill the vacancy from the same voter subcategory and with applicants who were similarly situated to the remaining commission members without expending significant state funds. Moreover, this regulation would leave the decision to fill a vacancy after the commission has completed its redistricting function to the discretion of the remaining commission members.

Conclusion

Because the Act lacks specifics about the application submission and review process, these proposed regulations provide much needed clarity regarding the application process. The proposed regulations are intended to create a well-ordered process that meets the goals of the Act as they relate to forming a qualified and diverse commission. The result, we believe, is a clearer and more smoothly functioning application process that is consistent with the intent of the voters in approving the Act.