

**California Bureau of State Audits**  
**MEMORANDUM NUMBER 5**

**To:** Elaine M. Howle, State Auditor

**From:** Sharon Reilly, Chief Counsel  
Steven Benito Russo, Senior Staff Counsel

**Subject:** Proposed Regulations 60814, 60848, and 60805: Diversity

**Date:** July 31, 2009

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**Introduction**

In providing for the creation of the Citizens Redistricting Commission (the “commission”) to redraw the boundaries of California’s legislative and Board of Equalization districts, the Voters FIRST Act (the “Act”)<sup>1</sup> declares that the process for selecting the members of the commission “is designed to produce a Citizens Redistricting Commission that is independent from legislative influence and reasonably representative of the state’s diversity.”<sup>2</sup> While this may be a fundamental purpose of the Act, the Act is silent as to how diversity will be achieved through the selection process. Moreover, while the Act mentions diversity in the constitutional provision just quoted, and in another statutory provision of the Act that lists diversity as including certain elements,<sup>3</sup> the Act does not include a comprehensive definition for what diversity means for the purpose of selecting the members of the commission.

Accordingly, it falls to the Bureau of State Audits (the “bureau”) as part of its responsibility to initiate an application process for the selection of commission members, and through its authority to adopt regulations, to provide clarity to the term “diversity” and to specify the means by which diversity is to be promoted during the process for selecting commission members. The purpose of this memorandum is to discuss the issue of diversity as it relates to the selection of commission members and to explain the regulations that the bureau is proposing to both define diversity and include a consideration of diversity in the selection process.

**Background**

At the heart of the process for selecting the members of the commission is the work of the Applicant Review Panel (the “panel”), whose job is to review the applications submitted by members of the public wishing to serve on the commission and reduce the pool of applicants from an initial applicant pool, consisting of all applicants who satisfy the basic eligibility requirements for serving on the commission, to a pool of 60 of the most qualified applicants from which the members of the commission will be chosen. After the panel identifies the pool of

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

<sup>2</sup> Cal. Const. Art. XXI, § (2)(c)(1).

<sup>3</sup> § 8252(g).

60 of the most qualified applicants, the panel is required to send a list of the names of the 60 applicants to specified leaders in the Legislature who may strike the names of up to 24 applicants. The legislative leaders are then required to return the remaining names to the State Auditor, who randomly draws from the remaining names the names of eight applicants who become the first eight members of the commission. Those eight commission members then select an additional six applicants to serve on the commission from those remaining in the pool of 60 of the most qualified applicants created by the panel.<sup>4</sup>

The Act requires the panel to select the pool of 60 of the most qualified applicants based on the extent to which they possess the following qualifications:

- Ability to be impartial;
- Appreciation for California's diverse demographics and geography; and
- Relevant analytical skills.<sup>5</sup>

Absent from the above stated selection criteria is any mention of using diversity as a basis for selecting the pool of 60 of the most qualified applicants. However, there are two important indications that the Act contemplates that the diversity of the pool will be taken into consideration by the panel in selecting the members of the pool. The first indicator is the constitutional provision, cited in the introduction to this memorandum, that declares the selection of a commission that "is reasonably representative of the state's diversity" is a fundamental purpose of the Act. The other indicator is found in section 8252, subdivision (g), which describes the manner in which the first eight members of the commission will select the other six members from the pool of 60 of the most qualified applicants assembled by the panel. Subdivision (g) states that the six members "shall be chosen to ensure the commission reflects this State's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity." The only way applicants can be chosen from the pool of 60 to ensure the commission reflects California's diversity is if that pool is a diverse pool. So the panel has some duty, in addition to selecting applicants for the pool based on their qualifications, to select applicants with an eye toward assembling a pool whose membership is diverse.

Finally, the need to have a commission that reflects California's diversity was emphasized at the interested persons meetings we held throughout the state earlier this year, and in the written public comments we have received.

Upon concluding that the panel must consider diversity in selecting the pool of 60 most qualified applicants, two issues come forward: (1) what kind of diversity should the panel seek to achieve in the composition of the pool and (2) how may the panel use diversity as a basis for selecting the members of the pool within the confines of the law?

Regarding the kind of diversity the panel should seek to achieve in the pool of 60, section 8252, subdivision (g) lists certain characteristics of diversity that must be included, but suggests that diversity may include other characteristics as well. Under that subdivision, the diversity the panel shall seek must include racial, ethnic, geographic, and gender diversity. Of course,

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<sup>4</sup> § 8252(d) – (f).

<sup>5</sup> § 8252(d).

diversity may include any of a host of other characteristics, including, age, income level, education level, sexual orientation, religion, disabilities, and so on. In selecting any other characteristic of diversity to be considered by the panel, in addition to the characteristics listed in subdivision (g), two factors should be kept in mind. First, any characteristic that is selected should be related to redistricting such that having a person or persons with that particular characteristic on the commission will bring a particularly important set of experiences or point of view to the redistricting process. For example, being left-handed might be considered by some to be an element of diversity, but if being left-handed does not bear on redistricting, it is not a worthy basis for selecting commission members. Second, for the panel to select commission members based on a particular characteristic of diversity, the application process for selecting the commission members will have to inquire of applicants about that characteristic, and some prospective applicants may be dissuaded from applying to serve on the commission if they consider such an inquiry to be an invasion of privacy. For example, some prospective applicants may be opposed to responding to a public inquiry about their sexual orientation.

Regarding how the panel may use diversity as a basis for selecting the members of the pool of 60 most qualified applicants, care must be taken to avoid running afoul of the constitutional prohibitions against racial, ethnic, and gender discrimination. Without question, the panel cannot reserve a particular number of positions in the pool for applicants belonging to a specific racial or ethnic group, as the United States Supreme Court has declared this to be “a form of racial balancing” that the Court described as “patently unconstitutional.”<sup>6</sup> The Act itself recognizes this limitation in discussing how the first eight commissioners are to choose the other six with a goal of ensuring the commission reflects California’s diversity. In section 8252, subdivision (g), the Act declares that in selecting applicants to ensure diversity “it is not intended that formulas or specific ratios be applied for this purpose.” However, while racial and ethnic quotas would not be permissible, the United States Supreme Court has supported the use of diversity as one factor among others in determining who to appoint to a public position in to ensure that public institutions are open and available to all segments of American society, including people of all races and ethnicities.<sup>7</sup>

With the above considerations in mind, we are proposing the following three regulations to define the diversity that the panel shall seek to obtain as it pares down the pool of applicants wishing to serve on the commission to a pool of 60 of the most qualified applicants, and to incorporate into the panel’s selection process the manner in which it will consider diversity in arriving at that pool of 60.

## **Proposed Regulations**

### **Proposed Regulation 60814. Diversity**

In this regulation, we have defined diversity as the variety in the racial, ethnic, geographic, economic, and gender characteristics of the population of California. This definition largely just

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<sup>6</sup> *Grutter v. Bollinger* (2003) 539 U.S. 306, 333.

<sup>7</sup> *Id.* at pp. 333-343.

incorporates the list of characteristics included in Government Code section 8252, subdivision (g). However, it adds the characteristic of economic diversity. Economic diversity was added based on comments that we received during the interested persons meetings that we held earlier this year. Many members of the public expressed concern about the membership of the commission being dominated by persons in professional occupations with higher levels of income, such that the commission would not be representative of most Californians. Moreover, 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. We therefore included economic diversity as a factor for the panel to consider in assessing diversity.

We look forward to additional comments from the public on the issue of how diversity should be defined, as we evaluate whether the definition should be expanded or contracted in any way.

### **Proposed Regulation 60848. Phase II Application Review**

As described in greater detail in the bureau's separate memorandum regarding the application process, the application process is divided into five phases. During two of the phases, Phase II and Phase III, the panel will evaluate applicants, and based on that evaluation, reduce the pool of applicants to a smaller pool of most qualified applicants who will be allowed to participate in the next phase of the process. During Phase II, the panel must evaluate all of the applicants in the initial applicant pool, consisting of all applicants certifying that they satisfy the eligibility requirements for serving on the commission and who do not have a conflict of interest. Based on that evaluation, the panel must reduce the applicant pool to not more than 120 of the most qualified applicants who will be invited to participate in the next phase of the process.

Subdivision (f) of this regulation incorporates diversity as a consideration for the panel in determining which applicants shall remain in the pool of 120 applicants who will be invited to participate in the next phase of the application process. Obviously, if the pool of 120 applicants is not diverse, the smaller pool of 60 applicants selected from this pool cannot be diverse. The way that the regulation is crafted, the panel is to consider diversity in conjunction with qualifications when determining who belongs in the pool of 120. The regulation goes on to reinforce, however, that formulas or specific ratios may not be used to identify which applicants shall be included in the 120 member pool.

### **Proposed Regulation 60850. Phase III Application Review**

During Phase III of the application process, the panel must interview the applicants who remain in the applicant pool, perform a further evaluation of the applicants, and based on that evaluation reduce the applicant pool to 60 of the most qualified applicants. Subdivision (e) of this regulation incorporates diversity as a consideration for the panel in determining which applicants will be identified as 60 of the most qualified applicants. So the panel is to consider diversity in conjunction with qualifications when determining who belongs in the pool of 60. The regulation goes on to reinforce, however, that formulas or specific ratios may not be used to identify which applicants shall be included in the 60 member pool.

## **Conclusion**

Through the proposed regulations discussed in this memorandum, we are furthering the intent of the Act that the process for selecting the members of the commission is designed to be reasonably representative of California's diversity. Although questions of diversity and how to achieve it can sometimes be contentious, we believe that we have fairly blended together the intent of the voters, the comments that we received from the public, and the constitutional requirements that govern the issue.