June 1, 2010

Elaine M. Howle, California State Auditor
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Sacramento, CA 95814

Attn: Gloria Gamino, Legal Analyst
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RE: Proposed rulemaking for final stage of Citizens Redistricting Commission application process and future restrictions on commissioner activities

Dear State Auditor Howle:

We, the undersigned, are pleased to be able to comment on the draft regulations issued by your office regarding the Voters First Act. We were impressed by the thoroughness shown by your staff in developing the proposed regulations, and applaud your intent to facilitate the smooth implementation of the Act by filling in some of the details. We also appreciate your willingness to listen to our input and the input of other interested organizations and individuals. The willingness to listen to the public is apparent in your detailed and thoughtful response.

The following is a list of items, in order of priority, which we would like to bring to your attention. These items reflect concerns that we share as well as suggestions to address those concerns and clarify language.

1. The State Auditor should clarify that the 10-year ban on commissioners' service in elected public office at the city or county level applies only to positions involved in the overall governance of counties and municipalities.

In considering the regulations clarifying the exclusion of commissioners from certain categories of public service, we appreciate the importance of shielding commissioners from political influence. However, we are also concerned about the possibility of losing well-qualified applicants who, because the bans on service are drawn too broadly, will either have to drop out of the application process, or may choose to. Our careful balancing of these two considerations is reflected in our comments in this first point, as well as in points #2 and #6.

Under Proposed §§60815.1(c)-(e), which sets forth the definitions of city and county offices subject to the Voters First Act 10-year ban on commissioners' service, the State Auditor defines public office at the county or city level as encompassing elected positions on the governing bodies of "special district, school district, joint powers authority, or other political subdivision of the state," if the boundaries of those entities coincide with or include at least one county or city. For the following reasons, we believe that the 10-year ban should apply only to positions involved in the overall governance of counties and municipalities. Elected positions within special districts,

school districts, or other political subdivisions should not be subject to the 10-year ban, regardless of their boundaries. Also, elected positions on county school boards of education should not be subject to the 10-year ban because as outlined below, county school boards of education are functionally equivalent to school districts and are not entities involved in the overall governance of counties. Also as outlined below, positions on governing bodies of joint powers authorities should not be subject to the 10-year ban.

First, we understand that the drafters of the Act intended that the words "county or city level" only refer to positions involved with the overall governance of counties and cities, such as members of county boards of supervisors, elected county executive positions, mayors, city councilmembers, or elected municipal executive positions.
Second, the State Auditor's definition conflicts with how the words "county or city level" are commonly used in other California statutes and by California courts, both of which have frequently used the terms "county level" and "city level" to mean county government and city government.

Examples of this common usage in California statutes include Section 121022(g)(1) of the Health and Safety Code, which discusses breaches of confidentiality of HIV-related public health records at the "city or county level." Because the code section talks about such breaches occurring through official governmental entities, and because local health officers are either county employees (all 58 counties have a local health officer) or city employees (three cities – Berkeley, Long Beach, and Pasadena – have their own local health officers), the term "city or county level" clearly applies to incidents that occur within the jurisdiction of the city or county as a governmental entity.

Similarly, Penal Code section 7518, referring to inmate HIV testing, provides that responsibility for oversight "at the county, the city, or the county and city level" lies with the local health officer. Clearly this reference is to the jurisdiction of city and county government. Another example is Welfare and Institutions Code section 10540.5, which describes the monitoring of states and counties as monitoring at "state and county levels." Section 10540.5 provides that "[t]he department shall ensure that performance outcomes are monitored at the *state and county levels* in order to . . . (a) Identify the extent to which the *state and counties* achieve the goals of Public Law 104-193." (Emphasis added.)

Additionally, the California Supreme Court routinely uses the terms "county level" and "city level" to refer to county or city government. Here is a sampling:

> "The drafters of the statewide initiative also departed from the approach that had been employed by the Legislature with respect to the use of the initiative and referendum *at the county level*. On April 3, 1911, the Legislature had approved former Political Code section 4058, providing for initiative and referendum ordinances *by counties* . . . ." (People v. Kelly (2010) 47 Cal.4th 1008, 1036, fn. 38 [emphasis added].)

> "The copy of the proposed initiative that the proponents submit to the Attorney General is accepted and treated as the official version of the proposal. It is disseminated throughout the *government at both the state and county levels* and made generally available to the public as a public record." (Costa v. Superior Ct. (2006) 37 Cal.4th 986, 1034 [emphasis added].)

> "[I]t is not for the courts, but rather for those exercising legislative authority at the *state or county level*, to make that policy judgment. As we said in *Sundance, supra*,

> 42 Cal.3d 1101, 1139: "This court should not interfere with the *County's* legislative judgment on the ground that the *County's* funds could be spent more efficiently. . ." (*Teter v. City of Newport Beach* (2003) 30 Cal.4th 446, 453 [emphasis added].)
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> "[T]he officials of *a municipality*, . . . may find it difficult, if not impossible, to put regional environmental considerations above the narrow selfish interests of their *city* . . . . One final overwhelming consideration which militates against deferring the preparation and consideration of an EIR until the proposed development reaches the *city level* is the mandate of CEQA . . ." (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284 & fn. 26 [emphasis added].)

The California Courts of Appeal also frequently use the terms "county level" and "city level" to mean county government/jurisdiction and city government/jurisdiction. In *People v. Strohl* (2nd Dist. 1976) 57 Cal.App.3d 347, for example, where the defendant was convicted under Penal Code section 67 for bribing the county chief deputy coroner, the Court ruled that "executive officers" of "various levels of local government, including the county level, as herein involved," fall under section 67. (*Id*. at 360. *See also Personal Watercraft Coalition v. Board of Supervisors* (1st Dist. 2002) 100 Cal.App.4th 129, 140-141 [discussing jurisdiction over the Marin shoreline and stating the "*county's jurisdiction* is implicit in all legislation enacted at the *municipal or county levels* . . ."]; Souvannarath v. Hadden (5th Dist. 2002) 95 Cal.App.4th 1115, 1121, 1124-25 [referring to the detention of noncompliant TB patients in the county jail as "at the county level"]; Kuhs v. Superior Ct. (5th Dist. 1988) 201 Cal.App.3d 966, 973, 974 ["An examination of analogous, though differently worded, provisions relating to the right of referendum at both the *state and city levels* reinforces the propriety of this interpretation. . . . [A]n allowance of fewer days at the *county level* than at the *city level* is not a reasonable conclusion."] [emphasis added].)

Given this common usage of the terms "county level" and "city level" within both statutory and judicial authorities, the term "county or city level" in the Voters FIRST Act should be similarly defined to mean "county government" and "city government."

Third, the State Auditor's definition does not recognize that in California special districts and school districts have distinct characteristics from cities and counties, and cannot be categorized at the same "level" of office as cities and counties. In California law and governmental practice, cities and counties are distinguished from other local government entities based on the fact that they have power and authority over a broad range of policies and services for their residents. In contrast, special districts and school districts are created with responsibilities for a specific and limited range of policies and services.

This distinction is recognized by California's Constitution, which sets forth the provisions regarding the formation and powers of city and county governments in §§1 and 2 of Article 11, pertaining to local governments, but sets forth the provisions relating to the formation of school districts separately in Article 9, pertaining to education.[1]

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[1] The formation of special districts in California is not explicitly addressed in the California Constitution. The California legislature has created special districts using its police powers, and courts have backed its authority to do so. See Woodward v. Fruitvale Sanitary Dist. (1893) 99 Cal 554, 34 P 239, 1893 Cal LEXIS 712; Palo Verde

The same distinction is seen in the structure of the California Code. On the one hand, matters relating to the formation and governance of cities and counties are covered in the Government Code (see for example, Title III, which addresses such matters as county boundaries, county charters, and the officers and board of supervisors of counties; and Title IV, which addresses comparable matters for cities).

In contrast, the California Code provisions governing the formation of school districts and special districts are generally set forth in the sections relating to the specific type of functions or responsibilities of those entities. For example, the California Education Code addresses the organization of school districts in Education Code §§35500, et seq., and the composition, membership and duties of their governing boards and officers in Education Code §§35100, et seq. Provisions relating to special districts are scattered throughout the California Code with, for example, the Health and Safety Code covering fire protection districts (§§13800, et seq.) and sanitation districts (§§6400, et seq.), the Public Resources code covering recreation and park districts (§§5780, et seq.), and the Water Code covering water districts (§§34000, et seq.) and water storage districts (§3900, et seq.).

We would note that the special nature of the local governments of school districts and special districts is also recognized by the U.S. Census Bureau. The Bureau compiles extensive data on local governments, and generally classifies them into two main categories. "General purpose" governments include counties, municipalities and townships.[2] "Special purpose" governments include special districts and school districts. Special districts generally perform single functions or a set of related functions that are not being supplied by existing general purpose governments.[3] School district governments are defined as providing public elementary, secondary, and/or higher education.[4]

Fourth, we maintain that the State Auditor's approach of subjecting positions on special districts and school districts to the 10-year ban based on the relationship of their boundaries to cities and counties is not supported by the rationale presented in the memorandum accompanying the

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Irrigation Dist. v. Seeley (1926) 198 Cal 477, 245 P 1092, 1926 Cal LEXIS 385; Willard v. Glenn-Colusa Irrigation Dist. (1927) 201 Cal 726, 258 P 959, 1927 Cal LEXIS 517.

[2] According to the Census Bureau's *2007 Census of Governments*, California's general purpose governments include only counties and municipalities – the state does not have towns or townships. http://www.census.gov/govs/cog/GovOrgTab03ss.html.

[3] http://www.census.gov/govs/go/special_district_governments.html.

[4] http://www.census.gov/govs/go/definitions.html#s.

proposed regulations. On page 5 of the memorandum, the State Auditor lists three concerns which affected its interpretation of the offices subject to the 10-year ban. These concerns include 1) preventing a commission member from being elected to a state office that represents a district whose boundaries were drawn by that member; 2) preventing commission members from being punished for their redistricting work through the denial of support for an elective office or removal from a desirable appointive position; and 3) preventing commission members from benefitting from their redistricting work through the granting of such political support or appointment.

The first concern does not relate to the distinctions between local governments for the purposes of the 10-year ban, because it involves the election to state offices. In addition, there is no meaningful relationship underlying the distinctions the proposed regulations make between school districts and special districts based on their boundaries, and the extent to which candidates for those offices will be punished or will benefit because of their commission service. Candidates for elected positions in California obtain financial support, endorsements, and other resources based on a complex set of factors, including their career experiences, political and civic activities, and their relationship with different political and social networks. A candidate for a position with a school district or special district whose boundaries coincide with or include a county or city will not be more affected by these factors than a candidate for a position on a political subdivision with different boundaries.

Because cities and counties in California vary in size so greatly throughout the state, the fact that boundaries of a particular school board or special district coincide with those of a city or county does not guarantee that officials on those entities are more "powerful" or are more susceptible to political influence than those with different boundaries. For example, the Los Angeles Unified School District (LAUSD) serves about 1.1 million students, and its boundary lines do not coincide with the boundaries of the City of Los Angeles. In contrast, the Burbank Unified School District serves about 18,000 students, and its boundaries do coincide with the City of Burbank. It does not appear that members of the Burbank Unified School District are more "powerful" or are more susceptible to political influence than those of LAUSD because of the configuration of its boundaries.

Fifth, we maintain that elected positions on county boards of education should not be subject to the 10-year ban, because those boards of education have functions that are more similar to the "special purpose" nature of school districts than the "general purpose" responsibilities of counties. County boards of education are created in Article 9, §7 of the Constitution, pertaining to education, and their formation, governance and powers are set forth in §§1000, et seq. of the Education Code. In California, county boards of education provide specific education-related services, such as support for the administrative, budget, personnel and technology operations of school districts. In some cases, the boards provide direct educational services, such as vocational programs, or services for at-risk or special needs children.

Notwithstanding the connotation of a county position that may result from the inclusion of the word "county" in the term "county board of education," for the reasons noted above, we believe that members of county boards of education should be treated as elected members of the governing

bodies of school districts, and that the State Auditor's regulations should clearly categorize them as such rather than as elected county officials.

Sixth, we believe the State Auditor should eliminate the references to "joint powers authority" and "other political subdivisions," in the listing of local government entities covered by the 10-year ban in proposed §§60815.1(d) and (e). Joint powers authorities are formed when two or more public agencies enter into an agreement to jointly exercise their common powers, and create a new entity (such as a board or commission) to administer or execute the agreement. (California Government Code §§6500, et seq.) We understand that the governing bodies of joint powers authorities typically include officials elected to one or more of the governing bodies of the parties to the agreement that created the joint powers authority, but that no governing body of joint powers authorities contains officials who are elected by the public specifically for the purpose of serving on the governing boards of such authorities.[5]

Thus, any elected official who serves on these governing boards does so in his or her capacity as an elected official from one of the entities that is a party to the agreement creating the joint powers authority. We believe that the 10-year ban should be applied to members of the governing bodies of joint powers authorities to the extent it applies to the elected positions they hold with the entities that are parties to such agreements. Since there is no need to create restrictions on service on joint powers authority governing boards that are independent from the restrictions that exist on service with the entities that create them, the reference to "joint powers authority" can be eliminated from the proposed regulations.

Further, because we believe that the only local governments subject to the 10-year ban should be counties and cities, we believe the reference to "other political subdivisions" in proposed §§60815.1(d) and (e) is confusing and suggests that other local governments could be covered by the ban. Thus, we recommend that the State Auditor eliminate that reference.

2. The State Auditor should clarify that the 10-year ban on commissioners' service in elected public office at the county or city level does not apply to elected positions with quasi-governmental entities within cities or counties.

Under Proposed §§60815.1(d) and (e), the 10-year ban applies to any elected "office of county government," or "office of city government". Arguably, this would prohibit service with quasi-governmental entities, such as local county or city neighborhood councils. We do not believe that the State Auditor intended to prohibit service with quasi-governmental entities, and we recommend that the State Auditor clarify this in the final regulations.

[5] Based on a telephone conversation with Jenifer A. McDonald, Association Manager of the California Association of Joint Powers Authorities (CAJPA), conducted on May 26, 2010. CAJPA is a membership association that includes the majority of joint powers authorities in California. Ms. McDonald indicated that while there may be members of joint powers authority governing bodies who are elected by the entities that are parties to the joint powers authority agreement, there are no members of governing bodies who are elected by voters in public elections.

3. There should be no requirement for the partisan composition of the vote to elect the commissioners who serve in the positions of "temporary chair" and "vice chair" for the meetings held by the first eight commissioners.

Under proposed §60858(e), the temporary chair and vice chair must be elected by the affirmative vote of at least five of the first eight commissioners, and the section specifies that at least two of the votes must come from commissioners registered with California's largest political party, two from the second largest, and one who is not registered with either of those parties. We are concerned that this mandate will unduly delay the selection of the individuals who will preside over the meetings, because of the time needed to obtain the consensus of five commissioners with the requisite partisan composition. The eight commissioners will have a relatively short amount of time to carry out the tasks involved in selecting the remaining six, including conducting meetings, reviewing application materials, obtaining additional information about applicants, deliberating, and voting. It is critical that the eight commissioners start to conduct business as expeditiously as possible – this can best be accomplished by merely requiring a vote of five of the eight commissioners to elect the individuals who preside over the meeting, regardless of the partisan affiliation of those members.[6]

We understand that the Act does mandate a specific partisan composition for the vote of commissioners for certain critical decisions, such as the approval of final maps under Article 21, §2(c)(5) of the California Constitution. However, we would note that the Act does not clearly require this type of vote for the selection of the chair and the vice-chair of the commission itself, and we do not believe it should be required for the commissioners who will have the temporary responsibility of presiding over the meetings of the eight commissioners when they are selecting the final six.

Our comments here should not be construed to indicate a disagreement with the provision in §60858(e) mandating that the chair and vice chair be from different political parties.

4. The application and selection process for the final six commissioners under proposed §60860 should be transparent, fair, and not burdensome to the remaining applicants.

We agree with the State Auditor that the first eight commissioners may need to request additional information from the applicants to make final decisions. However, the State Auditor should ensure that regulations during this final phase provide a respectful process for obtaining this information from the remaining applicants. The Applicant Review Panel will have already conducted a very thorough review of applicants, and applicants should not be subjected to unnecessary questioning or requirements by the eight commissioners. For example, the process of obtaining additional information from applicants should not enable an individual

[6] In addition, the NALEO Educational Fund believes that unless clearly compelled by the Act, there should be no requirements mandating the partisan composition of the group of commissioners needed to take a particular commission action. We believe that such mandates encourage commissioners to view themselves as representatives of particular political parties or affiliations when serving on the commission, and that their decisions must reflect their affiliations. We do not believe that this furthers one of the goals of the Act, which is to minimize undue partisan influences over the conduct of the commissioners.

commissioner to impose unreasonable or unfair requirements on specific applicants as a strategy to discourage or prevent those applicants from obtaining a seat on the commission. As a minimum safeguard, the commissioners should only be able to request information that is reasonably relevant to the application, in the judgment of the State Auditor.

5. Arrangements for the first meeting outlined in proposed §60858 should include support mechanisms for a smooth transition for the first eight commissioners.

When the first eight commissioners come together, they will have the immediate responsibility of choosing the final six commissioners based on diversity and other specified factors. We recommended that the BSA appoint a convener to help facilitate the beginning of the meeting and support the eight commissioners in their first meeting. We believe that the BSA's decision to assign legal counsel to this meeting may meet this need. We envision the role of the convener may serve the following functions: helping to call the meeting to order, laying out some basic ground rules, initiating a round of introductions, and moderating initial discussions.

Regarding the selection of the temporary "Chair" and "Vice Chair," we recommend that the individuals elected to serve in these roles be given a different title, such as "Moderator" and "Vice Moderator." This role is transitional until the full commission of 14 members is convened, on or after January 1, 2011. In order to reduce confusion, and to give all 14 members of the commission a relatively fair opportunity to be considered for these positions, we suggest avoiding the use of the titles "Chair" and "Vice Chair" before January 1, 2011.

6. The State Auditor should more narrowly define the appointed offices subject to the 5-year ban on commissioners' service.

We believe that two aspects of the State Auditor's definitions of the appointed offices subject to the 5-year ban may be overly broad and may thus prohibit public service where no meaningful risk of undue political influence exists.

First, under proposed §60804.1(b)(1), one criterion for determining the appointed offices subject to the 5-year ban is whether the officeholder is appointed by any elected county or city official. We recommend that the 5-year ban cover only offices appointed by members of the county board of supervisors, mayors or city councilmembers. We believe that this parallels the prohibition at the federal and state level under proposed §60804.1(a), where only positions appointed by the Governor a member of the state Legislature or a member of the Board of Equalization are subject to the 5-year ban.

In addition, we are concerned that proposed §60804.1(b)(3) may define the appointed offices subject to the five-year ban too broadly. As an example that illustrates our concern, the El Pueblo Board of Commissioners governs El Pueblo de Los Angeles Historical Monument (El Pueblo), a department within the City of Los Angeles. El Pueblo is a tourist destination owned by the City of Los Angeles that has museums, historic buildings, and retail vendors. The Mayor of Los Angeles appoints the commissioners. The El Pueblo Board has the authority to make some, but not all, departmental decisions. Many of the Board decisions can be and have been overturned by the Los Angeles City Council. Although the El Pueblo Board does not have broad

powers within the City of Los Angeles and the commissioners are not compensated for their service, under proposed §60804.1(b)(3), a redistricting commissioner would be ineligible to hold that office during the five years following his or her appointment to the Redistricting Commission. We believe that the proposed restriction is broader than the Act intended.[7]

7. The definition of "paid Staff for any individual legislator" set forth in §60820.1(b) should be amended to include only those persons whose duties of employment are related to seeking and holding legislative office.

The common usage of the term "staff" when used in conjunction with the words "legislature" or "legislator" refers to individuals whose employment is tied to the seeking and holding of legislative office. The term "paid staff for any individual legislator" should be limited to this common usage and should not include persons who are employed by a legislator in a different capacity, such as employees of a legislator's business venture.

We thank you for the opportunity to provide this input. We are happy to answer any questions you may have about our comments and concerns.

Sincerely,

James P. Mayer
Executive Director
California Forward

Stewart Kwoh
President and Executive Director
Asian Pacific American Legal Center

Kathay Feng
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[7] The NALEO Educational Fund and the Asian Pacific American Legal Center recommend that the State Auditor delete the phrase "either or" in proposed §60804.1(b)(3). We believe that for an appointed office to be subject to the 5-year ban, the office must entitle the officeholder to both make governmental decisions and receive a minimum amount of compensation. Unless an officeholder is entitled to do both, we do not believe that he or she is likely to be subject to the type of undue political influence which the Voters First Act intends to prohibit.