

# The More You Know: An Election Year Update on California's New Governance and Ethics Laws

WEDNESDAY, MAY 1, 2024 | 12:00 PM – 1:00 PM

# THANK YOU FOR JOINING US!



*Host & Moderator*

**MELISSA KUEHNE**  
*Senior Program Manager*  
*Institute for Local Government*



# WEBINAR OVERVIEW

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**Welcome & Introductions**

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**Overview and Updates on the Levine Act**

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**Audience Q&A**

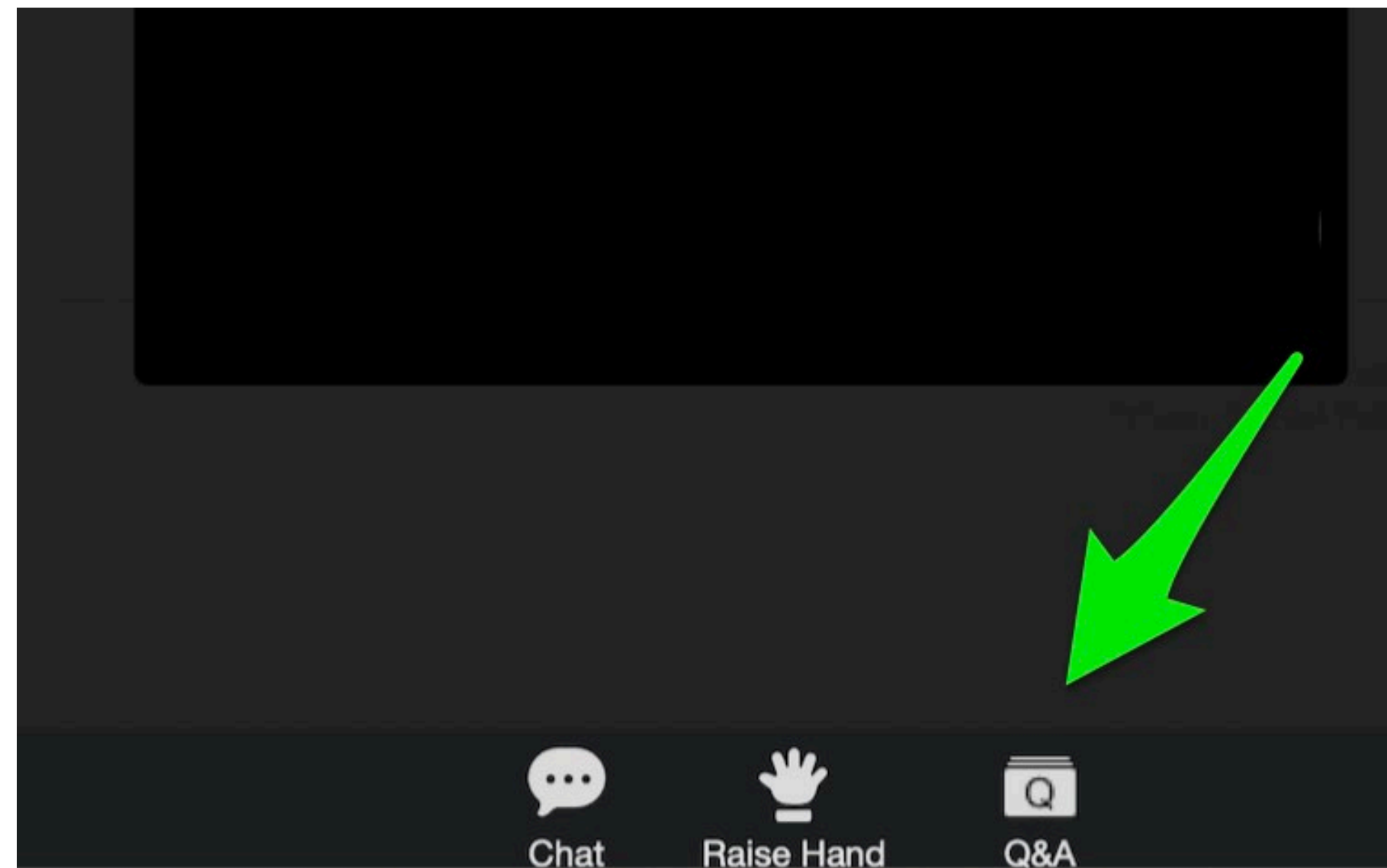
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**Wrap Up & Adjourn**

*We welcome your written questions and comments in the Q&A throughout the webinar*

# TECH OVERVIEW & HOUSEKEEPING

- All webinar participants will be on **MUTE** for the duration of the event.
- Please type any questions for into the **Q&A BOX** at any time during the session.



- A recording of the session will be available shortly after the webinar.

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- We provide practical and easy-to-use resources so local agencies can effectively implement policies on the ground



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# TODAY'S PRESENTERS



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Best Best & Krieger LLP



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Associate  
Best Best & Krieger LLP



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# Agenda



1. Overview of the Levine Act and SB 1439
2. Overview of the types of proceedings and individuals subject to the Levine Act and the differences between them
3. New FPPC Regulations
4. Best Practices and Outstanding Issues

# The Levine Act (Gov. Code § 84308)



- **Previous Rule:**

- Political Reform Act – A campaign contribution is not a source of income and therefore does not give rise to a conflict
- Levine Act (Part of PRA) – If the board is *appointed*, not *elected*, then there is a conflict of interest in those who made a campaign contribution of more than \$250
- Applies to proceedings for licenses, permits, entitlements and most contracts
  - ❖ Contract exceptions: competitively bid, labor and personal employment

- **New Rule (SB 1439):**

- The Levine Act applies to **both** elected and appointed boards
- Intended to combat “pay-to-play” through campaign contributions

# The Levine Act - SB 1439



- While a proceeding is pending, and for 12 months following the final decision, an officer **must not accept, solicit, or direct a contribution of more than \$250** from a party, party's agent, or participant or participant's agent (if the officer knows the participant has a financial interest)
  - Applies to contributions to the officer and to contributions to others directed by the officer
  - For contributions following the final decision, the official can cure the violation if contribution is returned within 14 days if certain conditions are met

# The Levine Act - SB 1439



- Prior to rendering a decision in a proceeding, officer must **disclose** on the record any contributions of more than \$250 received within the prior 12 months from a party or participant in the proceeding, or their agents
- Officer must **not participate** in any proceeding if the officer has willfully or knowingly received a contribution of more than \$250 from a party, party's agent, or participant or participant's agent (if the officer knows the participant has a financial interest) within past 12 months
  - Does not apply if the contribution is returned within 30 days

# Proceedings the Levine Act Applies To



- The restrictions and requirements **only** apply in a specific context: proceedings involving a license, permit, or other entitlement for use, such as certain contracts.
- Section 84308 **does not apply** to proceedings involving general policy decisions (i.e., ordinances, or rules where the interests affected are many and diverse). It also **does not apply to** ministerial (i.e., completely objective) decisions.

# Common Examples



- Land use actions relating to specific properties (e.g., zoning change, conditional use permits, etc.), as well as other licenses and permits
- Franchises
- Contracts
  - Includes **most agency contracts**: professional services, agreements with developers, real property transactions (e.g., easements), etc.
  - Exceptions: Competitively bid (awarded to lowest responsive, responsible bidder), labor, personal employment
- Agency formation or reorganization actions, including annexations
- Rules affecting a small industry with limited businesses

# Who Does Section 84308 Apply to?



Officers



Parties



Participants



Agents



# Officers

- Section 84308 defines **officer** to include two categories:
  - 1) Candidates for office; and
  - 2) Officers of the agency
- FPPC regulations further define **officer of the agency** to include:
  - 1) Elected Officials;
  - 2) Board & Commission Members;
  - 3) Chief Executives of the Agency; and
  - 4) Agency employees with decisionmaking authority in the proceeding, who are candidates for office or have been candidates within the preceding 12 months



# Parties and Participants



- **Party** means any person who files an **application for, or is the subject of**, a proceeding involving a license, permit, or other entitlement for use.
- **Participant** means any person who is not a party but who **actively supports or opposes** a particular decision in a proceeding involving a license, permit, or other entitlement for use **and who has a financial interest in the decision**

- A person is the **agent** of a party to, or a participant in, a pending proceeding involving a license, permit or other entitlement for use **only if**:
  - the person represents that party or participant **for compensation** and
  - **appears before or otherwise communicates** with the governmental agency for the purpose of influencing the pending proceeding.
- If an individual acting as an agent is also acting as an employee or member of a law, architectural, engineering or consulting firm, or a similar entity or corporation, both the entity or corporation and the individual are “agents.”

# Example



- A non-profit focused on recreation has submitted an application to the City's Parks and Recreation Committee for an event permit that would allow the non-profit to host a large fundraising and issue awareness event at the City's main park.
  - **The non-profit is a party to the proceeding.**
- The non-profit has an employee who serve as the organization's Community Outreach Coordinator. In her capacity as an employee, she writes to the City's Director of Parks and Recreation and appears at a Parks and Recreation Committee meeting to express support for the application and how the event will benefit the City.
  - **The Outreach Coordinator is an agent in the proceeding.**

# Example



- Another employee of the nonprofit is not authorized or tasked with speaking on behalf of the organization, but submits a public comment in their personal capacity because the issue is important to them and they believe the event will be beneficial to the community. Because the employee’s source of income—the nonprofit organization—is the subject of the proceeding, the employee automatically has a financial interest in the proceeding.
  - **The employee qualifies as a participant in the proceeding.**
- At the same Parks and Recreation Committee meeting, a City resident offers a public comment, stating that while they agree that the issue is important, they think a different park located in a less residential neighborhood is a more appropriate venue. The resident explains that he lives directly access the street from the entrance of the park where the event is proposed, and traffic from the proposed event would prevent him from hosting his weekly garage sale.
  - **Here, the resident also qualifies as a participant in the proceeding.**

# How is the \$250 Contribution Calculated?



- The \$250 limit applies to any 12-month period.
  - Example: A consulting company contributes \$100 to a Supervisor on January 1, then submits a proposal to the County on January 2. At that point, an entitlement for use proceeding is pending with respect to the company. During the next 12 months, the company may only contribute an additional \$150 to that Supervisor.
  - Example: A developer submits a request for annexation into the City on January 1, 2024, and on January 2, 2024 contributes \$250 to a Councilmember on January 2. On January 2, 2025, the request is still pending with no final decision having been made. The developer may contribute another \$250 to the Councilmember, even though the proceeding is still pending, because it has been 12 months since any contribution was made.

# Penalties



- Administrative enforcement proceeding by FPPC, including penalties of up to \$5,000 per violation
- Criminal misdemeanor proceeding
- Civil action

# New FPPC Regulations

2 Cal. Code Regs. §§ 18438-18438.8



# New FPPC Regulations



- Adopted June 15, 2023
- The FPPC amended existing Regulations and adopted new Regulations
- Provide new and revised definitions and clarify certain details about the disclosure and disqualification process

# Definition of “Pending” Proceeding (Reg. 18438.2)



- A context-specific approach to determining when a proceeding is “pending”
  - **Officers** – a proceeding is considered “pending” when:
    - the decision is before the officer for the officer’s consideration (for governing body - any item on the agenda); or
    - the officer knows or has reason to know that the proceeding is before the jurisdiction of the agency and it is reasonably foreseeable that the decision will come before the officer in the officer’s decisionmaking capacity.
  - **Party or participant (and agents)** – a proceeding is “pending” once the entitlement for use decision is before the jurisdiction of the agency for its decision or other action (e.g., once the application has been filed).

# Knowledge of a Financial Interest (Reg. 18438.7)



- While a proceeding is pending, and for 12 months after the decision, an officer who **knows or has reason to know** that a participant has a financial interest in a proceeding is prohibited from accepting, soliciting, or directing a contribution exceeding \$250 from the participant.
- An officer is prohibited from taking part in a proceeding if, within the preceding 12 months, the officer has willingly or knowingly received a contribution exceeding \$250 from a party or party's agent, or participant or participant's agent if the officer **knows or has reason to know** of the participant's financial interest in the decision.

# Knowledge of a Financial Interest (Reg. 18438.7)



- “Knows or has reason to know”:
  - Actual knowledge of the financial interest, or the **participant reveals facts during the proceeding** before the officer that make the person’s financial interest apparent.
- An official **aware of the following facts** has reason to know of a participant’s potential financial interest and **may not take part** in the proceeding if the official has received a disqualifying contribution from that participant or participant’s agent:
  - The participant has an interest in property within 500 feet of the real property at issue in the proceeding
  - The participant has an economic interest in a business entity that may see a significant increase or decrease in customers as a result of the proceeding; or
  - The participant has a business relationship with the applicant that may result in additional services provided to the applicant.

# Knowledge of a Financial Interest (Reg. 18438.7)



- An officer **does not** know or have reason to know of a participant's financial interest in a decision solely as a result of the participant identifying an economic interest located in the general vicinity of a business entity or real property at issue in the proceeding.
- Officer may take part in the proceeding if clear and convincing evidence known by the officer establishes it is not reasonably foreseeable the decision will have material financial effect on the participant's interests.

# Willful or Knowing Receipt of a Contribution (Reg. 18438.7)



- Actual knowledge of the contribution
- Contribution has been disclosed by the **party** as required by the Levine Act
- The party, participant, or other person informed the officer of the contribution
- The party or participant previously made two or more contributions of more than \$250 to the officer
- The officer personally solicited or accepted the contribution

# Willful or Knowing Receipt of a Contribution (Reg. 18438.7)



- An officer **without actual knowledge** of the contribution from a party or participant does not have reason to know of the contribution based solely on the fact that the contribution was reported as required by campaign finance law.
- However, an officer does have reason to know of a contribution previously reported by a **party** in a proceeding **noticed on an agenda** for a public meeting before the body or board
  - For officers not on a body or board, this applies when the proceeding is otherwise before the officer

# Return of Contribution (Reg. 18438.7)



- Officer may return a contribution if:
  - Received from a **party** prior to the officer knowing or having reason to know that the proceeding involving the party had commenced
  - Received from a **participant** prior to the officer knowing or having reason to know that the participant had a financial interest in the proceeding
- Must be returned within 30 days from the time the officer knows or should have known about the contribution and proceeding



# Taking Part in Proceeding Prior to Return (Regs. 18438.8 and 18438.7)



- Officer serving on a governing body or board may take part in the proceeding prior to returning the contribution if:
  - The decision is made at a public meeting of the governing body or board
  - The officer has known or should have known about the contribution and proceeding for fewer than 30 days
  - After learning of the contribution or proceeding, and prior to taking part in any further discussion or decision, the officer discloses the disqualifying contribution on the record, confirms that it will be returned within 30 days following the time the officer knew or should have known about the contribution, and the contribution is returned within that timeframe.

# Party's Obligation to Disclose Contributions (Reg. 18438.8.)



- On the date a party to a proceeding files an application or other request initiating the proceeding, the party must disclose the amount of any contribution(s) made within the preceding 12 months and the names of the contributors.
- For a contribution made during any stage of the proceeding, the party must disclose the contribution within 30 days of making the contribution, or on the date on which the party makes its first appearance before or communication with the agency regarding the proceeding following the contribution, whichever is earliest.
- Contributions from a party or participant **are aggregated with contributions from their agents** (See also 2 Cal. Code Regs. § 18438.5)

# Legal Challenge to AB 1439



- *Family Business Association of California, et al. v. Fair Political Practices Commission* (Case No. 34-2023-00335169-CU-MC-GDS)
  - Alleged that updated version of Levine Act was unconstitutional and an unlawful amendment to the PRA, among other claims
  - Dismissed on June 16, 2023
  - Deadline to file an appeal has passed

# Pending Legislation



- AB 2911 (McKinnor)  
Would raise \$250 threshold to \$1,500
- SB 1243 (Dodd)  
Would narrow application (contributions of \$1,000+, changes time periods, exempts housing developments)
- SB 1181 (Glazer)  
Would require information about Levine Act disclosure to be included on agendas



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# Best Practices and Outstanding Issues

# Best Practices



- Revise application forms and RFPs to require applicants and proposers to disclose any contributions made to officers or candidates when they submit the application
- Add a standing agenda item reminding officers to disclose contributions
- Provide training to officers

# Notable FPPC Advice Letters



- Applies to contributions to candidates for a political party's county central committee
- Applies to proceedings for small contracts like purchase orders
- Strong mayor may participate in proceeding due to necessity, but still may not solicit, direct or receive prohibited contributions
- Contracts or proceedings under delegated authority are still subject to the \$250 limit (e.g., party cannot donate more than \$250 to Board members while a contract proposal is pending with the General Manager or department head or 12 months after)
- Competitively bid contract for sale of property is exempt

# Outstanding Issues

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- Proceedings arising out of a closed session item (e.g., settlement agreement)
- Change orders to competitively bid contracts



# Other Election Year Reminders



- Behested payments - Form 803
  - Elected officials' disclosure of payments for charitable, legislative or governmental purposes when the official is involved in requesting the payments
- Prohibition on expenditure of public funds or resources for or against ballot measures
  - Government Code §§ 82013, 82015, 82025, 82031, 82041.5, 89001, 89002; 2 CFR 18420.1, 18901.1; *Stanson v. Mott, etc.*
- Mass mailings at public expense
  - 200+ tangible items featuring an elected official using public funds
  - Exceptions further limited within 60 days of election (letterhead/roster, meeting announcement, event announcement, business cards)



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## Questions?

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# AUDIENCE Q&A

What questions or comments do you have for us?



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