

November 12, 2009

Hon. Edmund G. Brown Jr.  
Attorney General  
1300 I Street, 17<sup>th</sup> Floor  
Sacramento, California 95814

Attention: Ms. Krystal Paris  
Initiative Coordinator

Dear Attorney General Brown:

Pursuant to Elections Code Section 9005, we have reviewed the proposed constitutional initiative related to the truthfulness of specified state, local, and media employees (A.G. File No. 09-0049).

## PROPOSAL

This measure amends the State Constitution to address matters concerning the truthfulness of specified persons who function “within the ‘public trust.’”

*Persons Defined as Functioning Within the Public Trust.* The measure defines persons included as functioning within the public trust to include:

- Candidates and persons elected or appointed to state or local government offices.
- State or local employees, including civil servants, teachers, and others.
- Californians elected to the U.S. Senate and the U.S. House of Representatives, as well as their staff members.
- Journalists (although the measure appears to exclude some media entities operating exclusively via the Internet).

*Public Trust Persons Prohibited From Making Certain False Statements.* With certain exemptions, as described below, the measure prohibits persons functioning within the public trust from knowingly and intentionally making a “false statement of a material fact to the public that is reasonably likely to influence the public regarding the passage or repeal of legislative act(s), election or nonelection of a candidate for public office, retention of a person in public office, or the employment or dismissal of a person in a public position including employment by any California state, county, or local government.”

***Exemptions From the False Statements Prohibition.*** The measure exempts certain false statements by persons acting within the public trust from its requirements. Specifically, opinions accompanied by a disclaimer and private communications, as defined, are exempted.

***Criminal and Other Penalties for False Statements.*** The measure allows the Attorney General or any citizen or group in California to criminally prosecute persons functioning within the public trust for making impermissible false statements. If convicted, the person having made these false statements shall be sentenced to prison for two to ten years and/or fined \$10,000 to \$500,000. That person, if convicted, shall be prohibited for life from any employment related to the public trust. If the criminal prosecution is conducted by a private citizen or group, the convicted person shall be liable for all of the citizen's or group's costs and attorney fees. If a prosecution by the private citizen or group results in acquittal, all costs and attorney fees of the defense "shall be awarded to the accused" from a source that is not defined in the measure. The measure acknowledges that removal of a U.S. Senator or Representative or their employees under this measure may conflict with federal law, but requires any such conviction to be brought to the attention of the U.S. Congress.

***Potential Conflicts With U.S. Constitution.*** There are potential conflicts between the proposed measure and the U.S. Constitution, which is the supreme law of the land. For example, the Bill of Rights contains guarantees concerning the freedoms of speech and of the press. Moreover, Congress alone is empowered to pass certain laws related to interstate commerce, including some parts of the mass media, which may cover stories and issues and employ persons in various states—not just California. Given these potential conflicts, among other factors, courts would have a significant role in determining how exactly this measure could be implemented lawfully, particularly with regard to the press.

## **FISCAL EFFECTS**

The direct and indirect fiscal effects of this measure on state and local governments would depend to a large extent on how actively the Attorney General and other individuals and groups pursue officials and media personnel, as well as how the courts interpret the measure.

***Increased Judicial and Prison Costs, Offset by Fines.*** This measure would directly increase costs of California's state-funded criminal justice systems. Specifically, charges of criminal conduct against persons affected by the measure would increase court system costs by an unknown amount—perhaps as much as thousands or millions of dollars per year—depending largely on the volume of claims pursued by the Attorney General and others. In addition, if convicted, each person sentenced to prison under this measure could cost the state several tens of thousands of dollars per year. These costs

could be partially or entirely offset by fines levied against convicted false statement makers, which could total as much as \$500,000 per convicted individual.

*Unknown Indirect Fiscal Effects.* The measure likely would affect the actions and public statements of state and local office holders and employees in California. These changes could result in the public receiving different information regarding public policy issues in California and could, therefore, affect how individuals vote on public policy matters and candidates. Convicted office holders, moreover, would be removed from their political office. This could result in unknown changes to state and local policies, with an unknown indirect fiscal impact.

### **Summary of Fiscal Effect**

The measure would have the following direct fiscal effects for state government:

- Unknown increase in state criminal justice costs offset partially or entirely by fines levied against persons convicted under the measure.

Sincerely,

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Mac Taylor  
Legislative Analyst

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Michael C. Genest  
Director of Finance