

September 23, 2011

Hon. Kamala D. Harris
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Dawn McFarland
Initiative Coordinator

Dear Attorney General Harris:

Pursuant to Elections Code Section 9005, we have reviewed the proposed initiative regarding public official actions (A.G. File No. 11-0031). The measure does not specify whether it seeks to amend the State Constitution or statutes or both.

Background

Federal Laws. The First Amendment of the United States and California Constitutions prohibits the enactment of any law that would restrict freedom of speech.

Pension Contracts. In many cases, pension benefits for employees or a government's promised contributions to cover the costs of these benefits constitute a contract with these employees. In particular, California courts have ruled that public employee pensions constitute an element of an employee's compensation, and a contractual right to these pensions accrues upon acceptance of employment. The U.S. Constitution and the State Constitution each contain a "contract clause." The contract clauses limit the power of the state to modify its own contracts with other parties. Accordingly, the ability of public entities to modify pension benefits for current or past employees is limited.

Proposal

The measure establishes an adjudicatory process to determine whether government officials and other parties have violated ethics codes or taken other actions contrary to the measure's requirements.

While the measure's provisions are not clear, it appears to allow private individuals to request an adjudicatory entity to review claims that another individual—defined to include state and local elected and appointed officials, candidates, judges, some public administrators, and some private sector contractors—acted with negligence, violated an ethics code, or left a campaign promise unfulfilled. Persons found by the adjudicatory entity to have taken one of these actions are deemed "offending politicians" and subject to a series of sanctions. The

measure's provisions apply retroactively and include individuals who have vacated their positions due to job change or retirement.

Under the measure, the "offending politician" would be subject to a wide range of sanctions, which appear to include:

- Being barred from voting or serving as a determining influence regarding any governmental matter for the remainder of his or her elected or appointed term of office.
- Being barred from campaigning for or serving in any public office or working for government again.
- Forfeiting all future publicly funded retirement income, employee compensation, and employee benefits.
- Serving one year in jail or prison, without eligibility for parole.
- Paying a range of punitive damages.

Offended parties would have immediate garnishment and seizure rights to all funds, accounts, or property of the offending politician up to the amounts awarded by the adjudicating entity.

Adjudicatory Entity. An adjudicatory agency may be a person, agency, arbitrator, organization, or court which the "offended party" selects. The measure specifies that costs of the adjudicatory agency shall be split evenly between the parties and that each party shall pay their own court legal fees. The measure prohibits any publicly funded staff from providing representation during the adjudicatory process or using public funds to support the defense.

Other Provisions. Under the measure, parties also may be deemed to be "offending politicians" and subject to sanctions if they (1) advocate for a change in the terms of this measure through a process other than one that includes a vote of the electorate or (2) assist an "accused politician" in a manner contrary to the act.

Fiscal Effect

Significant Uncertainties. Many provisions of the measure could have a fiscal effect on state or local government depending on how they are interpreted by the courts and implemented by adjudicatory agencies and other parties. For example, the measure could result in increased incarceration and court costs or decreased employee compensation costs for state and local government. The net fiscal effect of these provisions is not known, but could be in the range of millions of dollars annually. In addition, some provisions of the measure could be subject to significant legal challenges. For example, (1) the measure's provisions eliminating retirement income for certain individuals likely would face claims that it impairs pension and other contracts with current and past public employees and (2) the measure's provisions that could result in people being incarcerated for not fulfilling a campaign promise or advocating changes in the measure through a process other than one that includes a vote of the electorate likely would face claims that they impair individuals' First Amendment rights.

Fiscal Summary. The measure would have the following major fiscal impact:

- Potential increase in state and local government costs in the range of millions of dollars annually.

Sincerely,

Mac Taylor
Legislative Analyst

Ana J. Matosantos
Director of Finance