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January 12, 1989

Law and Legislation Committee
City Hall
Sacramento, California

Re: **Proposed Anti-Laundering Ordinance**

Honorable Members in Session:

**SUMMARY**

At the December 15, 1988 meeting of the Law and Legislation Committee, Councilmember Joe Serna, Jr. presented a proposed anti-laundering ordinance. A request was made that this matter be placed on the calendar for the next meeting of the Law and Legislation Committee. A request was also made that this office analyze and report back to the committee on Councilmember Serna's proposed ordinance.

The proposed ordinance would require those making contributions to candidates to file declarations under penalty of perjury identifying the source of the contributed funds. The ostensible purpose of imposing this requirement is to discourage the laundering of contributions through third parties, or "intermediaries". The laundering of funds through intermediaries is prohibited by the Political Reform Act (Government Code §§81000 et seq.), and is punishable as a misdemeanor.

The proposed ordinance would establish an additional and separate sanction, a possible perjury prosecution, to discourage further the improper laundering of funds. The declarations would also provide the candidates with some tangible evidence to avoid the taint associated with the discovery of improper laundering of funds.

While there is little doubt that the City has the authority to impose additional filing requirements on candidates (and presumably their contributors), it is not clear that the City may require contributors to declare, under penalty of perjury, the source of the contributed funds for which a perjury prosecution may lie in the event

of a false declaration. As an alternative, the Committee may wish to require contributors to file a statement or certification as to the source of funds which, if false, would give rise to appropriate civil or criminal sanctions other than a perjury prosecution.

## DISCUSSION

### A. The Political Reform Act and the Passage of Propositions 68 and 73

As Councilmember Serna noted in his December 14, 1988 memorandum, the FPPC has issued a formal opinion concluding that certain provisions of Proposition 68, including the definition of "intermediaries", should be given effect, even though Proposition 73 passed by a larger number of votes. Although this opinion by the FPPC is not binding on the courts, it is an opinion that will be given weight, given the status of the FPPC as the administrative agency charged with the interpretation and administration of Propositions 68 and 73. This office generally concurs with the FPPC in its interpretation of Propositions 68 and 73.

Prior to the passage of Propositions 68 and 73, the primary purpose of the Political Reform Act (Government Code §§81000 et seq.) was to require candidates to disclose and to report the source of their contributions. Prior to Propositions 68 and 73, there were no limitations under the Political Reform Act on the amounts that an individual (or entity) could contribute to a candidate for political office. Certain individuals nevertheless found it expedient, for political reasons or otherwise, to avoid disclosure of either the very fact of, or the full amount of, their contributions to a candidate by channeling their contributions through third parties, or "intermediaries".

Since its inception in 1974, the Political Reform Act has prohibited the contribution of funds through an intermediary source without disclosure of this fact. Thus, Section 84302 provides:

> No person shall make a contribution on behalf of another, or while acting as the intermediary or agent of another, without disclosing to the recipient of the contribution both his own full name and street address, occupation, and the name of his employer, if any, or his principal place of business if he is self-employed, and the full name and street address, occupation, and the name of employer, if any, or principal place of business if self-employed, of the other person. The recipient of the contribution shall include in his campaign

> statement the full name and street address, occupation, and the name of the employer, if any, or the principal place of business if self-employed, of both the intermediary and the contributor.

With the passage of Proposition 73, operative January 1, 1989, the Political Reform Act now establishes limitations on the amount(s) of contributions that may be made to candidates.

Violation of the reporting obligations of the Political Reform Act has always constituted a criminal offense, and is punishable as a misdemeanor by imprisonment in the county jail for not more than six months, or by a fine not exceeding one thousand dollars, or both. Government Code §91000; Penal Code §19. The Act further provides that a fine of up to the greater of $10,000.00 or three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received may be imposed upon conviction of each violation. Government Code §91000(c). In addition to criminal sanctions, civil sanctions are available against the contributor and/or the candidate for violations of the reporting obligations, including violation of the intermediary disclosure requirements. Government Code §91005.

As indicated above, the passage of Proposition 73 established limitations on the size of contributions that may be made by a contributor to a candidate. Violation of these contribution limitations results in more severe criminal sanctions and penalties than the sanctions for violations of the reporting obligations of the Political Reform Act.

B. <u>The Proposed Anti-Laundering Ordinance</u>.

The primary requirement of the proposed anti-laundering ordinance is to require those contributing money to a candidate to indicate, under penalty of perjury, the source of the contributed funds. The person must declare either that the funds contributed are their own (or that the funds are ones in which they have a joint interest; in the case of a joint contribution, the proposed ordinance would require the identification of the joint contributor); or that the funds are being contributed on behalf of another individual, whose identity and employer must be disclosed. Unless and until a declaration under penalty of perjury is filed, no contribution of $25.00 or more could be accepted by a candidate.

The proposed ordinance presents two legal questions that must be addressed: (1) whether local entities may enact legislation that imposes separate filing and reporting obligations in addition to those

established by the Political Reform Act; and (2) whether a local entity may require a contributor to file a declaration under penalty of perjury concerning the source of the funds contributed, and if so, whether a contributor who falsely declares may be prosecuted for perjury. As discussed below, while an affirmative answer must be given to the first question, the second question presents a more difficult problem.

The Political Reform Act, at least insofar as its reporting obligations are concerned, applies to charter and general law cities, and cities may not enact conflicting legislation. However, the Act expressly allows local governments to enact additional legislation, provided it does not conflict with the requirements of the Act. Thus, Sections 81013 and 81009.5(b) of the Government Code provides:

> § 81003.
>
> Nothing in this title prevents the Legislature or any other state or local agency from imposing additional requirements on any person if the requirements do not prevent the person from complying with this title. If any act of the Legislature conflicts with the provisions of this title, this title shall prevail.
>
> . . . .
>
> § 81009.5(b).
>
> Notwithstanding the provisions of Section 81013, no local government agency shall enact any ordinance imposing filing requirements additional to or different from those set forth in Chapter 4 for elections held in its jurisdiction unless the additioal or different filing requirements apply only to the candidates seeking election in that jurisdiction, their controlled committees or committees formed or existing primarily to support or oppose their candidacies, and to committees formed or existing primarily to support or oppose a candidate or local ballot measure which is being voted on only in that jurisdiction, and to city or county general purpose committees active only in that city or county, respectively.

Pursuant to the foregoing sections, it appears clear that the City is not prevented by the Political Reform Act from enacting supplemen-

tal legislation imposing filing and reporting obligations to establish the source of contributed funds. The remaining question is whether the City may require a declaration under penalty of perjury that will subject a contributor to a criminal prosection for perjury if the contributor files a false declaration. Given a recent amendment to the Penal Code provisions concerning perjury, it is not clear that the City does have such authority, or that a criminal prosecution for perjury will lie against a falsely declaring contributor.

Prior to 1980, a person who wilfully testified in a false matter while under an oath that "may by law be administered" was guilty of perjury. Penal Code Section 118. In 1980, the language of Section 118 was amended to provide that the oath had to be one that "may by law of the State of California be administered." The reason for this amendment is unclear, but the language suggests that it may have been intended to restrict the use of oaths.

Under the old definition of perjury, a strong argument could be made that the City had the authority to require declarations under penalty of perjury, and the declarant falsely testifying under a City-mandated oath could be successfully prosecuted for perjury. In People v. Ziady (1937) 8 Cal.2d 149, the California Supreme Court addressed the question of whether a county board of supervisors had the authority to require an applicant for welfare to file an affidavit specifying the nature, location and value of property owned by the applicant. The issue arose when an applicant filed a declaration which was allegedly false and the district attorney sought to prosecute the applicant for perjury. The trial court held that state law did not mandate or authorize a declaration under penalty of perjury, and that the county did not have the authority to require a person to file such a declaration, and that the applicant could therefore not be prosecuted. Reversing the trial court, the Supreme Court held that the county had the authority, and that the declarant could be prosecuted. The court found that the Legislature had imposed upon the county the duty of caring for and aiding indigent persons within its boundaries; that the county charter required the county to establish a set of regulations governing the duties and operations of each county department; and that the aforementioned statutory and charter provisions were sufficient to authorize the county to require the filing of a declaration of indigency under penalty of perjury.

Applying the principles established by Ziady to the instant matter, it appears that the City of Sacramento would have had the authority, prior to the 1980 amendments, to require contributors to file declarations under penalty of perjury indicating the source of funds, and that the filing of a false declaration may subject the declarant to a perjury prosecution. As a charter city, the City of Sacramento enjoys broad powers to regulate matters pertaining to elec-

tions and other municipal affairs, and the Political Reform Act does allow the charter cities to impose supplemental requirements. California Constitution, Art. XI, §5; Charter of the City of Sacramento, §10; Code of the City of Sacramento, §62.1.

The problem presented by the 1980 amendment to the definition of perjury is whether the "law of the State of California" authorizes the City to require contributors to declare under oath the source of the contributed funds. There have been no reported cases since the amendment in which the court has addressed the issue of whether a local government may require the filing of a declaration under penalty of perjury, absent express statutory authority mandating or authorizing the imposition of an oath requirement. There are a variety of statutes which mandate or authorize oaths to be administered, and a perjury prosecution is available where a false declaration is filed [See, e.g., Unemployment Insurance Code §§2101, 2102; Vehicle Code §20 (application for driver's license), and it has been false declarations filed pursuant to such express statutory authority that has given rise to most of the reported cases.

The Committee may wish to consider alternatives that would avoid the issue of the City's authority to impose an oath requirement but still achieve the primary objectives of Councilmember Serna's ordinance. For example, consideration might be given to enacting legislation that would require the filing of a certification or unverified statement indicating the source of the contributed funds, and impose appropriate penalties for contributors filing false statements. Of course, a contributor filing such a false statement while laundering campaign funds would also be subject to the criminal and civil sanctions provided by the Political Reform Act for unlawful laundering of funds. The candidate would have the certifications or statements from the contributors as evidence to rebut any claims that the candidate was aware of the laundering scheme.

Ignoring the perjury issue discussed above, the language proposed by Councilmember Serna appears legally adequate and satisfactory, as far as it goes. Additional language will be necessary to make it clear that the declaration requirement only applies to contributions made to a candidate for a Council seat or the mayoral position. As set forth above, §81009.5(b) allows the City to enact additional filing and reporting obligations, but such additional obligations may only be imposed on candidates for local elections.

Under Proposition 73, a candidate may not accept funds unless and until he or she has filed a declaration of candidacy specifying the office for which he or she is running. The FPPC has recently issued regulations which would allow a person to announce his or her possible

candidacy for two elective positions, and to collect funds for each. An ordinance requiring declarations by contributors should specify that the declaration requirement applies only when a contribution is being made to the campaign fund for the Council or mayoral position.

The language of the proposed ordinasnce requires that the contributor sign and present a declaration with their contribution. However, there is no sanction imposed upon a candidate who accepts a contribution without a declaration. If an ordinance is to be enacted, it may be appropriate to consider the inclusion of a penalty or sanction for the candidate who accepts a contribution without the required declaration or certification from the contributor.

The proposed ordinance also fails to specify what is to be done with the declarations after they are furnished to the candidate, and how long they are to be retained, if at all. It may be appropriate to require that the declarations be retained by the candidate for the same period of time that the Political Reform Act requires candidates to retain accounting records and materials. Consideration might also be given to requiring the filing of the declarations with the City Clerk, although this may be burdensome and perhaps unnecessary.

**RECOMMENDATION**

If the Committee decides to recommend enactment of an anti-laundering ordinance similar to that proposed by Councilmember Serna, it should determine whether it wishes to include a provision imposing sanctions on the candidate who accepts a contribution without the required declaration, and it should determine how the declarations are to be handled after being presented to the candidate. As an alternative to a declaration under penalty of perjury, the Committee may wish to consider an alternative requirement that the contributor file a certificate specifying the source of contributions, with appropriate criminal and/or civil sanctions imposed for a false certification.

After resolution of the foregoing matters, and if the recommendation is to proceed with an anti-laundering ordinance similar to the one presented by Councilmember Serna, the matter should be referred to this office for preparation of a draft ordinance to be presented at the next meeting of the Committee.

Respectfully submitted,

RICHARD E. ARCHIBALD,
Deputy City Attorney

*Office of the Sacramento City Council*

MEMORANDUM

December 14, 1988

TO: Mayor and Councilmembers

FROM: Joe Serna, Jr.
Councilmember, District 5

SUBJECT: PROPOSED ANTI-LAUNDERING ORDINANCE

Recent events have shown that alleged campaign contribution laundering has occurred in a local election unbeknown to the candidate recipient. Laundering of campaign contributions is both wrong and illegal and should stop.

The Political Reform Act has long contained a requirement that an "intermediary" for a contribution disclose this fact to the recipient candidate or committee. However, until the passage of Proposition 68 there has been no specific definition of the term "intermediary." The Fair Political Practices Commission (the "FPPC") has long recognized that the recipient may be totally unaware that a contribution is actually from another source. Now that a definition of "intermediary" has been added, it seems appropriate to require contributors to disclose all the relevant information.

The provisions in the Political Reform Act (Government Code Section 84302) requiring this disclosure may be ignored and violated by the contributor and any intermediary, without the knowledge of the recipient. It seems appropriate for the City to adopt a requirement that contributions to City candidates must be accompanied by this information before they may be received.

Under the Political Reform Act, it is illegal for someone to make contributions either directly or indirectly in a name other than the name by which such person is identified for legal purposes. (Government Code Section 84301.) It is also illegal to make an anonymous contribution of $100 or more. (Government Code Section 84304.)

Furthermore, it is illegal to make a contribution on behalf of another, or while acting as the agent or intermediary of another, without disclosing to the recipient both the name of the true source of the contribution and the name of the intermediary, as well as the address, occupation and employer information for each. (Government Code Section 84302.)

Proposition 68 on the June ballot added Government Code Section

84302.5, which for the first time defines the term "intermediary" as used in Government Code Section 84302.

The FPPC has ruled that while most of Proposition 68 does not go into effect, this particular section does. Furthermore, the FPPC ruled that this section became effective and operative immediately upon its adoption (i.e., on June 8, 1988). (See Bell & Olson Opinion, 11 FPPC 1, 24; No. 88-002; November 9, 1988.)

The FPPC has long-recognized that recipients of contributions generally are not equipped to determine if a contribution is made under the name of another. In a comment to a regulation adopted in 1979, the FPPC has stated:

> This regulation sets out the duties of candidates and treasurers only with respect to campaign statements. Among the duties imposed by this regulation on candidates and treasurers with respect to committee campaign statements is to "cause to be checked, and, if necessary, corrected, any information...which a person of reasonable prudence would question based on all the surrounding circumstances of which the treasurer [candidate] is aware or should be aware by reason of his or her duties under this regulation and the Act." The circumstances that trigger a duty to inquire under this standard are limited to those actually known to the candidate or treasurer and to those of which he or she should be aware by carrying out his or her duties under the Act and regulation. They do not include circumstances a candidate or treasurer "might" or "should have known" if he or she had gone beyond his or her required duties. For example, Mr. Jones may give Mr. Smith $100 in cash and instruct him to write a check to the candidate's controlled committee and to conceal the true source of the contribution. The committee reports the contribution as received from Smith. If neither the candidate nor the treasurer has any knowledge concerning the questionable nature of the contribution and neither, through performance of their respective duties (such as monitoring campaign records or reviewing campaign statements), could have learned any facts that would lead one to question the contribution, the candidate and treasurer have no duty of inquiry with respect to the contribution. There is no duty of inquiry even though if Smith were asked he would have revealed the true source of the funds.
>
> Once the known circumstances are such that a question is raised concerning the accuracy of information on a campaign statement, an inquiry is required. It is not possible in

a regulation to describe with particularity every factual situation that might trigger such an inquiry since the variety of circumstances that could arise with respect to any particular campaign transaction are endless. By way of example, however, such circumstances might include the following in the case of a contribution: The size of the contribution, the reported source, the likelihood of that source making a contribution of the size reported, the circumstances surrounding receipt, and the manner in which the contribution is recorded in campaign records.

The burden of inquiry is likely to fall more heavily upon the treasurer because it is he, rather than the candidate, upon whom the major record keeping and reporting responsibility falls. Therefore, the treasurer is more likely than the candidate to be the person who, by reason of performance of duties, is aware of or should be aware of facts which would give rise to a duty of inquiry.

(Comment to 2 Calif. Code of Regs.
Section 18427. Emphasis added.)

As can be seen from the comment, the FPPC has acknowledged that, to a large extent, a candidate or treasurer may be a "sitting duck" for those who wish to "launder" campaign contributions by making those contributions through intermediaries who fail to disclose their status as an intermediary.

Under the Political Reform Act as amended by Propositions 68 and 73, it is now necessary for a candidate or treasurer to obtain the name, address, occupation and employer information from all contributors whose contributions must be itemized. In addition, information on intermediaries must also be obtained and records must now be kept to assure that contribution limitations are not violated. Furthermore, written fundraising solicitations must now advise contributors of the office and election for which the contribution is requested.

Therefore, it seems entirely appropriate for the City of Sacramento to amend its ordinance to provide that no contribution shall be accepted (i.e., deposited into a campaign contribution account) unless and until the contribution is accompanied by: the name, address, employer and occupation information; and a statement to the effect that the contributor is the true source of the contribution and is not acting as the agent or intermediary for any other person.

I have drafted for your review a possible amendment to the City's

ordinance which would establish such a requirement. I recognize that this will place an additional burden upon both contributors and recipients of contributions. However, the burden exists now to provide and to obtain most of this information anyway.

This amendment merely necessitates the provision of the information at the outset rather than at a later date. Under the limitations in Proposition 73, a violation could occur which would then need to be later corrected if this information is not first obtained

The amendment should enact a new section to read as follows:

(a) No contribution of $25 or more shall be deposited into a campaign contribution account (as that term is used in Government Code Section 85201) unless and until it is accompanied by a statement signed under penalty of perjury from the contributor which contains all of the following information:

(i) The contributor's name and, if the contribution is made by a check drawn upon a joint bank account, whether the contribution is made individually, or jointly with another; if made jointly, the name of the joint contributor must also be provided;

(ii) The contributor's address;

(iii) The contributor's occupation and, if a joint contribution, the other contributor's occupation;

(iv) The contributor's employer (or if self-employed, the business entity) and, if a joint contribution, the same information for the other contributor; and either

(v) A statement, signed under penalty of perjury by the contributor (or contributors if a joint contribution), that the contribution is from the contributor(s) and that it is not made as agent or intermediary for any other person or entity; or

(vi) If a contribution is delivered to the candidate or committee by someone other than the contributor (excluding delivery through the United States Postal Service or other commercial delivery service) in addition to being accompanied by the information required by subdivisions (i) through (v) for the intermediary, the contribution shall also be accompanied by a statement which states the name, address, occupation and employment information for the

source of the contribution as is required of a contributor/intermediary under subdivisions (i) through (iv).

(b) The statement required by subdivision (a) shall be in substantially the same form as that set forth below.

My proposed anti-laundering ordinance will eliminate laundering of campaign contributions, thus protecting the candidate and shifting the burden of proof to the contributor, but most importantly, this ordinance amendment will protect the campaign financing process from abuse.

I believe that this amendment (or a similar amendment drafted by the City Attorney's Office will go a long way toward preventing efforts at "laundering" campaign contributions.

cc: Walter J. Slipe, City Manager
Jim Jackson, City Attorney

## Contributor's Declaration

Name of Contributor: _____

If contribution is made from joint funds,

Name of Joint Contributor: _____

Address: _____

_____

Occupation(s) of Contributor(s): _____

_____

Employer(s) of Contributor(s): _____

_____

Check the appropriate box below.

[] This contribution is made from my own personal funds or from funds controlled jointly by myself and any joint contributor listed above. I understand that it is unlawful to make or to transmit a contribution in my name if that contribution is from someone else, unless I disclose to the recipient the name, address, occupation and employer of both myself and of the source of the contribution.

[] This contribution is made from funds which are not my personal funds or from funds controlled jointly by me. It is made by someone else for whom I am transmitting the contribution as agent or intermediary. I understand that the law requires that in such a situation I must disclose to the recipient both my name, address, occupation and employer and the same information for the person(s) for whom I am transmitting this contribution . Therefore, I am providing this information on me in the above space and for the contributor in the space below.

Name of source of contribution: _____

_____

Address: _____

_____

Occupation: _____

_____

Employer: _____

_____

I declare under penalty of perjury that I have read the foregoing and that the information provided herein is true and accurate to the best of my knowledge and belief. Executed this _____ day of _____, 19___, at _____, California.

_____

Signature of Declarant