CITY AND COUNTY OF SAN FRANCISCO OFFICE OF THE CITY ATTORNEY

DENNIS J. HERRERA
City Attorney

MEMORANDUM

TO: ALL ELECTED OFFICIALS
ALL BOARD AND COMMISSION MEMBERS
ALL DEPARTMENT HEADS

FROM: DENNIS J. HERRERA
City Attorney

DATE: September 7, 2005

RE: Political Activity By City Officers and Employees

As the November election approaches, the City Attorney's Office would like to take the opportunity again to remind City officers and employees of the laws that restrict their use of City resources for political activities. To this end, I am providing to you this information sheet, which outlines the basic rules and principles governing the political activities of City officers and employees. These materials are intended as a general guide and are not a substitute for legal advice. Please contact the City Attorney's Office with any questions related to these materials or participation in political activities.

Misuse of City Resources and Personnel

State law prohibits government employees from using City resources to support or oppose a ballot measure or the election or defeat of a candidate at the federal, state, or local level. Local law also prohibits City officers and employees from engaging in political activity during working hours or on City premises.

- **What is a misuse of City resources?**

Any use of City resources or personnel for political activity is prohibited. This ban prohibits any use of telephones, copiers, fax machines, computers, office supplies or any other City resources for political purposes. City personnel's time and attention may not be diverted from their City duties for political purposes. Addressing envelopes, circulating petitions, making telephone calls, or engaging in similar types of campaign activity on City time is prohibited.

> ***Example:*** On his lunch hour, a City employee uses his City computer to send invitations to a fundraiser for a candidate. The employee has misused City resources by using his City computer for political activity. The fact that he was on his lunch hour does not change this.

- **May a Board or Commission take a position on a ballot measure**?

The prohibition on use of City resources for political activity also means that City officers and employees may not use their official positions to influence elections. Thus,

appointed boards and commissions may not vote to endorse a measure or a candidate.[1] Nor may City officials distribute campaign literature at City events or include campaign literature in official mailings to employees or members of the public.

> ***Example:*** Members of a City Commission feel strongly about the merits of a measure appearing on the ballot that relates to matters within their jurisdiction. The Commission may not vote on a resolution to support or oppose the ballot measure because the use of the City's resources necessary to facilitate the vote would constitute a misuse of City resources for political activity. The Commission may ask staff for information about the impact of the ballot measure on the City and individual commissioners may support or oppose the measure on their own time using their own resources.

- **May City officers and employees analyze a ballot measure's effects?**

City officers and employees may lawfully use City resources (where budgeted for such a purpose) to investigate and evaluate objectively the potential impact of a ballot measure on City operations. The analysis may be made available to the public.

> ***Example:*** A City Department wants to inform its Commission about the potential impacts on the Department if a ballot measure passes. If the Department has money budgeted for the purpose, the Department may research the potential impact of the measure and present objective information to the Commission. The analysis may also be made available to the public.

- **May City officers and employees respond to inquiries about a measure?**

City officers and employees may respond to public requests for information, including requests to participate in public discussions about ballot measures, if the officer's or employee's statements are limited to an *accurate, fair, and impartial* presentation of relevant facts to aid the voters in reaching an informed judgment regarding the measure.

> ***Example.*** A City Department wants to prepare a powerpoint presentation about a ballot measure explaining the Department's view that the measure could have a significant negative impact on the City. Any such presentation must be limited to an accurate, fair and impartial presentation of the relevant facts.

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[1] In contrast to appointed Commissions and Boards, the legislative body of the City and County may take a position on a ballot measure.

- **What is an objective and impartial presentation?**

Courts will evaluate materials prepared or distributed by a public entity in terms of whether they make a balanced presentation of facts designed to enhance the ability of the voters intelligently to exercise their right to vote, or whether the communications promote a particular position for or against a ballot measure. City officers and employees who are considering providing the public with an informational presentation regarding a ballot measure should consult in advance with the City Attorney's Office.

- **What are the penalties for violating the law?**

Courts may impose considerable penalties for violation of these laws. Under State law, misappropriating public funds is a felony punishable by imprisonment and a ban on holding public office in the State. Under local law, use of City funds for political or election activities also may be deemed official misconduct that justifies removal of a public officer, or cause to fire a public employee. The conduct of City officers and employees also may risk liability for the City. For example, the Fair Political Practices Commission ("FPPC") fined the County of Sacramento $10,000 for failing to report the use of public funds to prepare and distribute pamphlets on pending ballot measures.

Off-Duty Political Activities By City Officers and Employees

City officers and employees have a First Amendment right to engage in political activities while off duty. As a general rule, officers and employees may take a public position, as private citizens, on an electoral race or a ballot measure. Federal law imposes some restrictions on the political activities of local employees whose principal employment is in connection with federally funded activity. San Francisco also restricts the off-duty political activities of certain officers and employees, including the Ethics and Election Commissions and their employees, and the City Attorney. Finally, local law imposes some off-duty restrictions on all City officers and employees.

- **May City officers and employees use their official titles in campaign communications?**

As long as they are not otherwise using City resources to do so, City officers and employees may use their official titles in campaign communications. But it must be clear from the tenor and nature of the communication that the City officer or employee is making the communication in his or her personal capacity and that his or her title is being used for identification purposes only.

- **May City officers and employees solicit campaign contributions from other City officers and employees?**

City officers and employees may not directly or indirectly solicit campaign contributions from other City officers or employees or from persons on City employment lists. This prohibition does not preclude a City officer or employee from requesting campaign contributions

from other City officers or employees if the request is part of a solicitation made to a significant segment of the public that may include officers or employees of the City and the requestor does not use City resources in making the solicitation.

> ***Example.*** An incumbent City officer sends an invitation to a fundraiser to a list of all graduates from the local college he attended. A number of City employees, who also happened to attend that college, receive invitations. Although the officer sent the solicitation to some City employees, the solicitation is lawful because it was made to a significant segment of the public that included City employees.

- **May City officers and employees engage in political activities on City premises?**

City officers and employees may not participate in political activities of any kind while on City premises. For the purposes of this prohibition, the term "City premises" includes all City property other than property that is made available to the general public to use for political purposes.

> ***Example.*** A City employee seeks endorsements for the employee's candidacy for a political party's central committee in the hallways of City Hall. This activity violates the ban on political activity on City premises because it is being done inside City Hall, which is City property that is not made available to the general public for political purposes. Conversely, if the City employee engages in this same activity on the steps of City Hall, the employee would not violate the ban on political activity because the steps of City Hall are made available to the general public to use for political purposes.

- **May City officers and employees engage in political activities while in uniform?**

City officers and employees may not participate in political activates of any kind while in uniform. For the purposes of this prohibition, a City officer or employee is in uniform any time he or she is wearing all or any part of a uniform that he or she is required or authorized to wear when engaged in official duties.

- **What are the penalties for violating these laws?**

A knowing or willful violation of these laws is a misdemeanor, which could result in fines of up to $10,000 per violation and incarceration in the county jail for up to one year. Violations of these laws may also subject an individual to civil and administrative penalties of up to $5,000 per violation.

OTHER ELECTION RELATED LAWS

The following laws frequently present questions during an election period:

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Mass Mailings at Public Expense

In addition to the general prohibition against using public resources or personnel to engage in political activity, City officers and employees are prohibited from sending at public expense, non-political newsletters or mass mailings that feature or make reference to an elected official. A non-political newsletter or mass mailing is prohibited if all of the following four requirements are met:

- **Sent or delivered.** The item is sent or delivered by any means to the recipient at his or her residence, place of employment of business, or post office box.

- **Features an elected official**. The item sent either features an elected officer affiliated with the agency that produces or sends the mailing, or includes the name, office, photograph, or other reference to an elected officer affiliated with the agency that produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

- **Paid for with public funds.** Any of the cost of distribution is paid for with public moneys or costs of design, production, and printing exceeding $50 are paid with public money, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.

- **More than 200 items in a single month**. More than 200 substantially similar items are sent in a single calendar month.

Taken literally, this prohibition would preclude any large mailing at public expense, including many mailings essential to the operation of government, such as tax notices, sample ballots, and meeting agendas. To avoid this result, the FPPC has promulgated clarifying regulations that exempt certain types of mailings. For example, the prohibition does not apply to press releases and intra-office communications. Please check with the City Attorney's office if you have any questions about the mass mailing rule.

Campaign Contributions

In addition to generally applicable campaign finance laws, City officials should be aware of two important restrictions on campaign contributions that relate to government decisionmaking. The first is San Francisco's restriction on City contractors making contributions to officials who approve their contracts. The second is California Government Code section 84308, which restricts the solicitation of campaign contributions by appointed members of boards and commissions. These two provisions are discussed below.

- **May a City contractor give a campaign contribution to a public official who approves the contract?**

Local law restricts the ability of a person or entity that contracts with the City to make a campaign contribution to a City elective officer if the contract would require approval by that

officer. The contractor may not make a campaign contribution to the officer at any time from the commencement of negotiations for the contract until either: (1) negotiations are terminated and no contract is awarded; or (2) three months have elapsed since the award of the contract.

- **May members of appointed boards and commissions solicit contributions from persons in a proceeding pending before them?**

Members of appointed boards and commissions may not solicit, accept or direct campaign contributions of more than $250 from any party to or participant in any use entitlement proceeding pending before the board or commission, *during the proceeding or for three months after the final decision is rendered* in the proceeding. The prohibition does not apply to a body, such as the Board of Supervisors, whose entire membership is elected. But the prohibition would apply to members of the Board of Supervisors when they sit as members of an appointed body.

This rule applies whether the contributions are sought for the official or for someone else, and whether the contributions come directly from the party or participant, or are made by an agent acting on behalf of the party or participant. The prohibition applies to contributions for candidates or ballot measures in federal, state, or local elections.

An official does not violate this rule if the official makes a request for contributions in a mass mailing sent to members of the public, to a public gathering, in a newspaper, on radio or television, or in any other mass medium, provided it is not targeted to persons who appear before the board or commission. An official does not engage in a solicitation solely because his or her name is printed with other names on stationery or letterhead used to ask for contributions.

- **What is a "use entitlement proceeding?"**

A "use entitlement proceeding" is a government action granting, denying, revoking, restricting or modifying a license, permit, or other entitlement for use. Use entitlement proceedings include proceedings on all business, professional, trade and land use licenses and permits, as well as other entitlements for land use, all contracts (other than competitively bid, labor or personal employment contracts) and all franchises. Decisions on general plans, general building or development standards, or other rules of general application are not use entitlement proceedings.

- **Who is a party or participant?**

A "party" is a person, including a business entity, who files an application for, or is the subject of a use entitlement proceeding. A "participant" is any person who is not a party to a proceeding but who: (1) actively supports or opposes a particular decision (*i.e.*, lobbies the officers or employees of the agency, testifies in person before the agency, or otherwise acts to influence the decision of the officers of the agency); and (2) has a financial interest in the decision. An "agent" is an individual who represents a party or participant in a proceeding. If an individual agent is also acting as a member of a law, architectural, engineering or consulting firm, or a similar entity, both the entity and the individual are considered agents.

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- **When is a member of an appointed board or commission disqualified from proceedings involving a contributor?**

A member of an appointed board or commission may not participate in any use entitlement proceeding involving a party or participant (or their agent) from whom the official received a contribution of more than $250 in the 12 months before the proceeding. The $250 threshold applies to the combined total of all contributions from the party or participant and from an agent of the party or participant. Disqualification is required only if the official received a contribution for himself or herself in the 12 months before the proceeding. Soliciting contributions before a proceeding begins does not, by itself, require disqualification.

A member of an appointed board or commission may avoid disqualification if he or she returns the contribution (or the portion in excess of $250) within 30 days of learning of the contribution and the pendency of a use entitlement proceeding involving the contributor. Before the body renders a decision in a use entitlement proceeding, members of appointed boards and commissions must disclose on the record all campaign contributions totaling more than $250 received in the preceding 12 months from parties to or participants in the proceeding. If there is a public hearing, the official must make the disclosure on the public record at the beginning of the hearing. If no public hearing is held, the disclosure must be included in the written record of the proceeding.