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MEMORANDUM

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TO: Republican County Central Committee Chairmen and Treasurers

FROM: Ashlee Titus, California Republican Party Counsel

RE: Caution regarding fundraising “earmarking” legal risks

Under both California and Federal campaign finance laws, political parties enjoy a unique status which affords them the opportunities to raise funds in larger quantities (or unlimited), and to coordinate with candidates in larger quantities (or unlimited), than non-party political actors. For this reason, campaign finance enforcement authorities – the Fair Political Practices Commission in California and the Federal Election Commission in DC – more closely scrutinize political party activities. An attorney with the FPPC’s enforcement division recently conveyed to me “A big perk of being a central committee is having a very high contribution limit – compared to other committees and campaign contributors.... In order to enjoy the higher contribution limit of the central committee, the central committee needs to have full possession, custody, and control of the funds.” State parties, county parties, donors, and the candidates political parties coordinate with are constantly at the receiving end of enforcement investigations to confirm the party committee is not soliciting or accepting contributions “earmarked” for specific candidates. These investigations are intrusive, expensive, time consuming (often dragging out for years), potentially embarrassing, and in a worse-case scenario can result in a large financial penalty against the party, its treasurer, its principal officers, involved donors and candidates. This memorandum is to assist Republican County Central Committees with avoiding this type of investigation, obtaining a quick dismissal of a complaint alleging illegal “earmarking”, and to ensure a party is operating in such a way that it can ultimately be exonerated if an “earmarking” investigation is opened.

A contribution to a political party is “earmarked” under any of the following circumstances:

- The political party receiving the contribution solicited the contribution for the purpose of making a contribution to another specifically identified committee, ballot measure, or candidate, the party requested the contributor expressly consent to such use, and the contributor consents to such use;
- The contribution was made to the political party subject to a condition or agreement with the contributor that all or a portion of the contribution would be used to make a contribution to another specifically identified committee, ballot measure, or candidate; and/or
- After a contribution is received by a political party, the contributor and the political party reach a subsequent agreement that all or a portion of the contribution will be used to make a contribution to another specifically identified committee, ballot measure, or candidate.

(California Gov. Code § 85704; see also 52 USC § 30116(a)(8), 11 CFR § 110.6.)

A fundamental tenet of every campaign finance law is to mandate public disclosure of the “true source” of a campaign contribution. (E.g. California Gov. Code §§ 84301, 84302; 52 USC § 30116(a)(8).) When a contribution is “earmarked” through another person, such as a political party, and this is not disclosed to the receiving party and the public, the authorities categorize this violation as “money laundering,” which is among the most serious violations of campaign finance rules, because it conceals the true source of the funds and almost always constitutes a violation of the contribution limit applicable to the receiving candidate.

In 2010, the FPPC opened a wide-ranging investigation into two county central committees, a state assemblymember, and a state senator for conduct which occurred in 2008. In 2014, after an administrative hearing, an administrative law judge imposed a fine of \$40,000 collectively on the parties and officeholders for money laundering, making and accepting over-the-limit contributions, and false reporting. The thrust of the allegation was that one candidate made contributions to the two county central committees *on the condition that* the central committees contribute similar amounts to the second candidate, such that the county central committees did not exercise their own discretion in making contributions to the second candidate. Facts which led to the outcome:

- At a fundraiser for first candidate, first candidate directed attendees to support second candidate financially by contributing to county central committee. Second candidate and county central committee chairman were both present.
- On the day following the fundraiser, first candidate, county central committee chairman and, county central committee treasurer exchanged text messages regarding a contribution from first candidate to the county central committee. Subsequently, first candidate and the campaign consultant for second candidate exchanged messages stating: “Think I can get money [sic] earlier.” The following day, county central committee treasurer received the contribution from the first candidate, and chairman directed the contribution of the same amount to second candidate. Without the contribution from the first candidate, the county central committee did not have sufficient funds to make the contribution to the second candidate.
- On the same day the first central committee issued a contribution to the second candidate, the first candidate made a contribution to a second central committee. Emails and phone calls were exchanged between the candidates’ campaigns and the central committee and other Republican party operatives over the next 24 hours regarding the transmittal of this contribution and its timing, so the central committee could turn around and make a contribution to the second candidate, which it did not have sufficient funds to make without the contribution from the first candidate.
- In interviews with the FPPC, the first candidate asserted an understanding that the California Republican Party and various county central committees were all independent legal entities with separate leadership responsible for deciding how and where to disburse contributions received; denied that he engaged in any earmarking; that the second candidate’s race became “the only game in town” the month prior to the election, and thus it was logical *without any earmarking* that the race would be the recipient of central committee support. The chairman of one county central committee testified about historical awareness of previous close races and close losses, that the current race fit this familiar pattern, and instructed the treasurer, “Whatever we can give, give...It’s a targeted race. We have a job to support our candidate any way we can.” The chairman did not consult with other executive committee members in giving this direction. The administrative law judge and the FPPC did not accept these narratives as sufficient evidence that no earmarking occurred.
- The administrative law judge ruled that “the question remains whether earmarking could only occur if the central committees failed to exercise their discretion in making their contribution decisions. The short answer is no.” Further, “when a committee receives a contribution that

has been earmarked for a particular candidate, the committee cannot ‘un-earmark’ the contribution by claiming that the committee exercised its own discretion, direction or control...a committee must return the earmarked funds to the donor if the committee wishes to retain its sole discretion...Once a committee receives an earmarked contribution, it cannot give the contribution to the intended recipient without being an intermediary for the original donor.”

- The administrative law judge also ruled: “A committee should not be prevented from communicating to the public, and therefore potential donors and supporters, the essential political information about whom it may support, what it considers targeted races and other basic campaign information...”

With this enforcement precedent in mind, I offer the following reminders and best practices as we enter the next campaign cycle:

- County central committees should adopt a policy of not soliciting or accepting any “earmarked” contribution. This policy should be included in writing on every fundraising solicitation, including online donation pages. When making fundraising calls, sending emails, having in-person events, or otherwise making solicitations in any manner, central committee officers and members, including ex officios and their designees/alternates, should refrain from soliciting support through the party for specific candidates. A central committee may solicit support for itself to ensure sufficient funding to campaign for all of its targeted races, including naming potential targeted races and candidates, and any other race that becomes tight as the campaign unfolds. Such solicitations, however, should convey that the committee retains its discretion to change its mind.
- County central committees should return any “earmarked” contribution to the donor. A contribution should be returned if the donor provides direction on how they’d like it to be used, such as in the memo line on the check or in a transmittal letter.
- The central committee officers must ultimately retain the authority to spend the committee’s funds and must actually follow their own procedures each and every time. It’s the times that such formalities aren’t followed that tend to give rise to enforcement cases.
- County central committees can make unlimited contributions to state legislative and statewide candidates, but this is only permissible from their all-purpose (limited funds) accounts. (California Gov. Code § 85303(b), FPPC Reg. § 18534.) County central committees supporting federal candidates may only use federal funds and are subject to a limit on the amount of support under contribution or coordination rules, unless the support falls within the exempt party activities category. (52 USC §§ 30116, 30101(9)(B)(iv) and (viii).)
- To support a state legislative or statewide candidate using restricted use funds (unlimited funds), a committee must engage in a truly *independent* expenditure—by implementing a firewall policy, and without any coordination or prior communication with the candidate or any campaign agent of the candidate. This is an extremely fraught activity that should involve careful consultation with legal counsel in advance of launching the campaign. (Gov. Code § 85501, FPPC Reg. § 18225.7.) Issue ads are another alternative, but this approach is also legally nuanced and a trap for mistakes and violation of campaign laws if not handled properly from the outset. (Gov. Code §§ 82025(c)(2), 85310.) Federal law does not permit a county central committee to spend any funds raised without respect to the Federal limits and source prohibitions in support of Federal candidates, even if the spending is considered an independent expenditure. (52 USC § 30116.)
- Understand that in an investigation for earmarking and money laundering, the FPPC or FEC may obtain emails, text messages, phone records, bank records, and may interview donors, consultants, and other witnesses. These investigations take many years. Often, the people who are involved in creating an enforcement situation – candidates, donors, county chairs, treasurers, consultants – have all moved on and are long gone by the time the investigation moves toward a

settlement or other resolution, and the central committee and its current voluntary officers are left to hold the bag. As members of the board, remember your fiduciary duties to the central committee, your responsibility to be stewards of central committee funds, and to act solely in the best interests of the central committee and abide by Federal and California campaign finance laws. This obligation is paramount to getting a “win” in any campaign.

Going forward, please exercise utmost caution before accepting contributions that come with any expectation that the funds will support a particular candidate. It is vital to preserve your independent discretion and maintain a clear separation from candidate campaigns to comply with the law and avoid potential enforcement actions. Avoid making any statements or asks that appear to be solicitations for earmarked contributions, return any contribution in which the donor communicates any intent on the use of the contribution by the central committee, and follow and document formally established procedures for all decisions on campaign spending.

If you are approached regarding funding that raises legal concerns, I recommend consulting with legal counsel or contacting the FPPC or FEC for guidance *before* engaging in any risky activity.

Thank you for your attention to this important issue and for your ongoing commitment to ensuring that your committee operates in full compliance with applicable laws and the principles of transparency and integrity that guide our Party.