FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

APR 3 0 2007

Mark Graul
Green for Wisconsin
PO Box 22366
Green Bay, WI 54305

27044163467

RE: MUR 5826
Mark Green for Congress and Richard W. Johnson, in his official capacity as treasurer
Green for Wisconsin
Mark Green

Dear Mr. Graul:

On October 3, 2006, the Federal Election Commission (the "Commission") notified your clients, Mark Green for Congress and Richard W. Johnson, in his official capacity as treasurer, Green for Wisconsin, and Mark Green, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). On April 12, 2007, the Commission found, on the basis of the information in the complaint, that there is no reason to believe that Mark Green for Congress and Richard Johnson, in his official capacity as treasurer, or Mark Green, violated 2 U.S.C. § 439a(a). In addition, the Commission on April 24, 2007, found no reason to believe that Green for Wisconsin violated the Federal Election Campaign Act of 1971, as amended, in connection with this matter. Accordingly, on April 24, 2007, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analyses, which more fully explain the Commission's finding, are enclosed for your information.

If you have any questions, please contact Adam Schwartz, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Thomasenia P. Duncan
Acting General Counsel

BY: Ann Marie Terzaken
Acting Associate General Counsel
for Enforcement

Enclosures
Factual and Legal Analyses

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

Respondent: Mark Green for Congress and Richard Johnson, in his official capacity as treasurer
Mark Green

MUR: 5826

I. BACKGROUND

This matter involves the transfer of approximately $1.29 million from Mark Green for Congress (the "Federal Committee"), the principal campaign committee of former Rep. Mark Green, to his state gubernatorial campaign committee, Green for Wisconsin (the "State Committee") in January 2005. The complainant, the Wisconsin Democracy Campaign Education Project, alleges that the funds received by the State Committee from the Federal Committee were subject to and in violation of Wisconsin state contribution limits. The complainant further alleges that, because the transfer was impermissible under Wisconsin law, the Federal Committee violated 2 U.S.C. § 439a(a) of the Federal Election Campaign Act of 1971, as amended, (the "Act" or "FECA"), which permits contributions accepted by a candidate to be used by the candidate for donations to State and local candidates subject to the provisions of State law.

II. FACTUAL INFORMATION

Mark Green represented Wisconsin's 8th District as a United States Congressman from 1999 to 2007. On May 1, 2005, he formally announced his intention to run for Governor of Wisconsin in 2006. Before this announcement, on January 25, 2005, the Federal Committee transferred $1,285,973.70 to the State Committee.[1]

[1] On January 3, 2006, the Federal Committee was terminated pursuant to 2 U.S.C. § 433(d) and 11 C.F.R. § 102.3.

At the time the transfer was made, Wisconsin law permitted transfers from federal political committees to state campaign committees.[2] On the following day, however, the Wisconsin State Elections Board ("Elections Board") promulgated an Emergency Rule that retroactively invalidated part of the transfer, and in a later Order, required the State Committee to divest itself of approximately $468,000 of the transferred funds.[3] In response, the State Committee and Mark Green filed suit in Wisconsin state court challenging the constitutionality of the Order and the Emergency Rule and seeking an injunction. When this request was denied, Green and the State Committee filed an original jurisdiction suit in the Wisconsin Supreme Court. The Supreme Court had not decided the case as of the date of this Report.[4]

The complaint alleges that the transfer violated 2 U.S.C. § 439a(a) because state law only permitted contributions from political committees to a candidate for Governor in amounts up to

[2] The transfer was made pursuant to Wisconsin Administrative Code § ElBd 1.39 (2004) and upon receiving the transferred funds, the State Committee filed a timely and complete disclosure report with the Wisconsin State Elections Board.

[3] The Emergency Rule disallowed transfers from a federal committee to a Wisconsin state committee if the money transferred could not have been given directly to the state committee under Wisconsin law. Emergency Rule ElBd 1.395; *see also* Cary Spivak & Dan Bice, *A Political Emergency, at Least*, MILWAUKEE JOURNAL SENTINEL, January 27, 2005, at A2. Under Wisconsin state law, a state committee may only accept up to $485,190 from PACs registered in Wisconsin and may not accept any contributions from PACs not registered in Wisconsin. The Elections Board therefore ordered Green for Wisconsin to divest itself "of all amounts received from PACs that were not registered in Wisconsin," (totaling $467,844.60) and of "all PAC money received in excess of the PAC limit of $485,190 including amounts received from the federal campaign fund." September 6, 2006 Order.

[4] On October 31, 2006, the Supreme Court issued an opinion in which it declined to decide the case prior to the November election, and asked a reserve judge to clarify issues of law and fact for subsequent briefing by the parties. *Green v. State Elections Bd.*, 723 N.W.2d 418, 419 (Wis. 2006). Further briefing by the parties is scheduled to be completed by March 26, 2007. Wisconsin Supreme Court and Court of Appeals Case Access, *Green for Wisconsin v. State of Wisconsin Elections Board*, http://wscca.wicourts.gov/appealHistory.xsl;jsessionid=7F5E30D0BA43B0654EEC00DD4F1CD52B?caseNo=2006AP002452 (last visited February 20, 2007).

$43,128, and, therefore, all amounts above this limit violated state law.[5] Although the respondents have not filed a response, court filings indicate that respondents believed that the transfer was explicitly permitted under Wisconsin law, and, thus, that it complied with Section 439a(a)(5).

III. LEGAL ANALYSIS

The threshold issue in this matter is whether the clause "subject to the provisions of State law" in Section 439a(a)(5) should be read to prohibit a federal-to-state transfer if that transfer violates state law, or whether the clause merely makes clear that state law is not preempted in this context. For three principal reasons, we believe that the clause signifies the latter and that a violation of state law does not create a violation of Section 439a(a)(5). First, Section 439a(a)(5) is permissive, particularly when compared to the prohibitions contained in Section 439a(b) and the qualified campaign expense provisions of 11 C.F.R. § 9002.11(a). Second, consistent with the Commission's Advisory Opinions, the "subject to...State law" clause serves merely to advise a transferor that state law is not preempted with respect to federal-to-state transfers. Third, states are uniquely situated to address violations of their own laws and can adequately do so here.

[5] The Elections Board, in its Orders and in the ensuing litigation, only challenges the amounts transferred by the Federal Committee that derived from PACs that were not registered in Wisconsin, or $467,844.60, and total PAC contributions, an unstipulated amount. The precise grounds for violation in the Order are thus different from those alleged by the complainant, though each alleges a violation of state law.

A. THE LANGUAGE OF SECTION 439a(a)(5) GRANTS PERMISSION TO TRANSFER FUNDS BUT DOES NOT EXPRESSLY PROHIBIT THE VIOLATION OF STATE LAW

Under the Act, the donation of federal campaign funds to state candidates is included among permitted non-campaign uses of those funds. Specifically, Section 439a contains two subsections related to non-campaign uses of federal campaign funds: permitted uses and prohibited uses. 2 U.S.C. § 439a; *see also* 11 C.F.R. § 113.2. Subsection 439a(a) details the five specifically permissible non-campaign uses of federal funds, including donations to a state or local candidate, and also gives permission to use funds for "any other lawful purpose unless prohibited by subsection (b) of this section." Subsection 439a(b) defines a singular prohibited use – personal use of funds. No provision related to the violation of state law is included among the "prohibited uses" of section 439a(b) or in the regulations that define such prohibitions. *See* 11 C.F.R. § 113.1(g).

This omission is notable in light of the prohibition on spending funds in violation of state law that is specifically detailed in the Presidential Election Campaign Fund ("PECF") regulations. When a presidential candidate elects to take public funding from the PECF, she is specifically limited to spending those funds on "qualified campaign expenses," and is penalized if her expenses do not qualify. 11 C.F.R. § 9002.11(a). An expense does not qualify if it "violat[es] any law of the State in which such expense is incurred or paid." *Id.* at (a)(3). The regulations detail the consequences if this prohibition is violated: the Commission may demand the return of the funds to the U.S. Treasury, 11 C.F.R. § 9007.2(b)(2)(ii)(D), and the amount in violation is "count[ed] against the candidate's expenditure limitation." 11 C.F.R.

§ 9002.11(a)(3). In the PECF expenditure context, a violation of state law is thereby explicitly prohibited and made subject to Commission enforcement.

Unlike the PECF regulations, the "subject to...State law" clause in Section 439a(a)(5) does not specifically prohibit the violation of state law, either by statutory placement or by crafting a penalty in the event a federal-to-state transfer violates state law. Thus, as placed within Section 439a and as compared to a prohibition on violating state law contained in other parts of the Act, Section 439a(a)(5) permits federal-to-state transfers and does not prohibit the violation of state law.

This reading is consistent with the Commission's stated reasons for recommending that section 439a(a)(5) be added to the Act and its permissive treatment of federal-to-state transfers in its Advisory Opinions ("AOs").[6] Before the passage of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), campaign funds could be used for "any...lawful purpose," so long as they were not converted to personal use. *See* 2004 Legislative Recommendations ("2004 Recommendations"). Under this scheme, the Commission consistently found that the donation of federal funds to a state candidate was permitted as a "lawful purpose." For example, in AO 1986-5 (Barnes for Congress), the Commission found that, under pre-BCRA Section 439a, a federal congressional campaign committee could transfer its funds to a local campaign committee, subject to state law. *See also* AO 1980-113 (Miller for Senate) (finding that a sitting Senator's federal campaign committee could use excess campaign fund for his future state or local campaigns).

[6] There have been no MURs or AOs that have discussed Section 439a(a)(5) in its current form.

As stated in the 2004 Recommendations, after BCRA was adopted in 2002, the Commission "had no choice but to interpret" the provisions of Section 439a as exhaustive because it did not contain a section permitting campaign funds to be used for "any...lawful purpose," and, thus, any uses outside of those detailed in Sections 439a(a)(1) through (a)(4) were not permitted. AO 2003-26 (Voinovich for Senate); AO 2003-30 (Fitzgerald for Senate); AO 2004-3 (Dooley for the Valley). Accordingly, the Commission recommended the addition of subsections (a)(5) and (a)(6) in order to make Section 439a consistent with the intention of the Senate, which had sought to mimic the Commission's then-current regulations on the use of campaign funds, but may have "inadvertently" narrowed them. *See* 2004 Recommendations.

The Commission's historical allowance of federal-to-state transfers and its recommendation that the statutory framework explicitly do the same supports the conclusion that Section 439a(a)(5) was primarily added to permit, rather than to prohibit, certain usage of federal campaign funds.

B. THE "SUBJECT TO...STATE LAW" CLAUSE WAS INCLUDED TO NOTIFY A TRANSFEROR THAT STATE LAW IS NOT PREEMPTED BY THE ACT, NOT TO PROHIBIT THE VIOLATION OF STATE LAW

Based on the Act's general preemption language and the Commission's previous statements regarding the transfer of federal funds to a state campaign committee, the "subject to...state law" clause should be read as a reminder that federal law does not preempt state law in this context. This reading is consistent with 11 C.F.R. § 113.2, which implements Section 439a and expressly provides that "[n]othing in this section modifies or supersedes...relevant State laws that may apply to the use of campaign or donated funds by candidates or Federal

officeholders." *See* 11 C.F.R. § 113.2(f). In effect, this regulation and the "subject to...State law" clause in the statute make an exception to the general preemption provision at 2 U.S.C. § 453, which provides that federal law will generally preempt or supersede state law in matters related to federal elections, such that even though a federal-to-state transfer may be permitted under FECA, a state can choose to regulate or prohibit it under its own laws. Thus, the "subject to...State law" clause is neither gratuitous nor does it set out that a violation of state law constitutes a violation of FECA.

This reading of the "subject to...State law" clause is consistent with guidance provided in the Commission's pre-BCRA Advisory Opinions. In AO 1986-5 (Barnes for Congress), the Commission allowed a federal-to-state transfer but also "emphasize[d] that if any provisions of Indiana law are applicable to the proposed transfer, such provisions would not be preempted by 2 U.S.C. § 453 and 11 C.F.R. § 108.7." In noting that state law was not preempted, the Commission's AOs did not, however, discount the fact that, for purposes of the federal law, the transfer was permissible. For instance, in AO 1993-10 (Comite Amigos Tito Colorado), the Commission concluded that "the use of the Committee's excess campaign funds for purposes related to Mr. Colorado's 1996 Gubernatorial campaign would be permitted," but separately cautioned that "if any provisions of Puerto Rican law are applicable...such provisions would not be preempted...."

The lack of analysis of state law in these AOs further demonstrates that the mention of state law is advisory and does not contribute to the determination of whether a federal-to-state transfer is lawful under FECA. Although in each of the AOs addressing federal-to-state transfer the Commission noted that state law could limit a transfer, in none did the Commission analyze

the effect of that state law on the matter before it. This treatment indicates that the mention of state law in these AOs, and by extension in Section 439a(a)(5), was included to alert a transferor that state law may separately apply to its actions, not to make state law a subject of enforcement for the Commission.

C. THE COMMISSION SHOULD NOT ENFORCE STATE LAW WHERE THE STATE CAN ADEQUATELY SO DO ON ITS OWN AUTHORITY AND THE ACTIVITY IS OTHERWISE PERMISSIBLE UNDER FECA

Given that a state can adequately address violations of its own laws through the enforcement power of its Elections Board (or similar body) and judicial system, the Commission does not believe it should expend its resources to investigate alleged violations of state law. This is particularly true where, as here, the state is already pursuing the matter.

IV. CONCLUSION

Based on the above, the Commission finds no reason to believe that Mark Green for Congress or Richard Johnson, in his official capacity as treasurer, or Mark Green violated 2 U.S.C. § 439a(a).

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

Respondent: Green for Wisconsin **MUR:** 5826

I. FACTUAL INFORMATION

This matter involves the transfer of approximately $1.29 million from Mark Green for Congress, the principal campaign committee of former Rep. Mark Green, to his state gubernatorial campaign committee, Green for Wisconsin, in January 2005. The complainant, the Wisconsin Democracy Campaign Education Project, alleges that the funds received by Green for Wisconsin from Mark Green for Congress were subject to and in violation of Wisconsin state contribution limits. The complaint contains no information to suggest that Green for Wisconsin violated the Federal Election Campaign Act of 1971, as amended, (the "Act"), by accepting the funds from Mark Green for Congress.

II. CONCLUSION

Based on the above, the Commission finds no reason to believe that Green for Wisconsin violated the Act in connection with this matter.