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1
2 **BEFORE THE FEDERAL ELECTION COMMISSION**
3

4 In the Matter of)
5) DISMISSAL AND
6 MUR 6420) CASE CLOSURE UNDER THE
7 Markey for Congress and John M. Ericson, Jr.,) ENFORCEMENT PRIORITY
8 as treasurer) SYSTEM
9 Saint Vrain Valley Education Association Fund)
10 — Small Donor Committee)
11

12 **GENERAL COUNSEL'S REPORT**
13

14 Under the Enforcement Priority System ("EPS"), the Commission uses formal scoring
15 criteria to allocate its resources and decide which cases to pursue. These criteria include, but are not
16 limited to, an assessment of (1) the gravity of the alleged violation, both with respect to the type of
17 activity and the amount in violation, (2) the apparent impact the alleged violation may have had on
18 the electoral process, (3) the legal complexity of issues raised in the case, (4) recent trends in
19 potential violations of the Federal Election Campaign Act of 1971, as amended ("Act"), and (5)
20 development of the law with respect to certain subject matters. It is the Commission's policy that
21 pursuing low-rated matters, compared to other higher-rated matters on the Enforcement docket,
22 warrants the exercise of its prosecutorial discretion to dismiss certain cases. The Office of General
23 Counsel has scored MUR 6420 as a low-rated matter and has also determined that it should not be
24 referred to the Alternative Dispute Resolution Office. This Office therefore recommends that the
25 Commission exercise its prosecutorial discretion to dismiss MUR 6420.

26 In this matter, the complainant, Benjamin T. DeGrow, alleges that, according to a Report of
27 Contributions and Expenditures filed with the Colorado Secretary of State, the Saint Vrain Valley
28 Education Association ("SVVEA") Fund—Small Donor Committee, which is not registered with
29 the Commission, made a \$2,000 contribution to Markey for Congress ("the Committee")¹ and John

¹ Former Representative Betsy Markey unsuccessfully sought re-election to Congress from Colorado's Fourth Congressional District.

1 M. Ericson, Jr., in his official capacity as treasurer. Included with the complaint is what appears to
2 be a portion of the report filed with the state of Colorado, which discloses that SVVEA made the
3 \$2,000 contribution to the Committee on October 13, 2010. The complainant appears to suggest
4 that it was illegal for the SVVEA to make a federal campaign contribution in excess of \$1,000
5 without registering with the Commission.

6 The Committee and the SVVEA, which according to its website is a professional/advocacy
7 organization for public educators and is affiliated with the Colorado Education Association and the
8 National Education Association, *see* <http://www.svvea.org/>, filed responses. In SVVEA's response,
9 it explains that its newly-elected president, Trip Merklein, was unfamiliar with the FECA rules and
10 prohibitions pertaining to contributions by state-registered small donor committees to federal
11 candidates.² According to SVVEA, its small donor committee made a \$2,000 contribution to the
12 Committee on or about October 13, 2010, which it subsequently reported to Colorado's Secretary of
13 State, as required by state law.

14 Just nine days later, however, on October 22, the Committee returned the contribution with a
15 letter explaining that small donor committees are "intended to be used for in-state campaigns and
16 not Federal candidates." SVVEA Response Attachment C. Thereafter, SVVEA's small donor
17 committee filed an amended report with Colorado's Secretary of State disclosing that the
18 Committee had returned the \$2,000 check. Additionally, Fran Docherty, a SVVEA staffer, wrote a

² According to the Colorado Secretary of State's website, small donor committees are a form of political committee, with contributions to such committees limited to \$50 per year per individual. *See* <http://www.sos.state.co.us/pubs/elections/FAQs/CampaignFinance.html>.

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1 letter to the Committee acknowledging the error and confirming that SVVEA had received the
2 returned check.³

3 The Committee's response acknowledges that it received the check, but states that it was
4 never cashed, because the Committee's internal controls, which are designed to ensure that it
5 accepts only contributions that are permissible under the Act, flagged the check as an impermissible
6 contribution. The Committee also points out that it returned the check within ten days. Attached to
7 the Committee's response is another copy of the letter, the check, and a copy of the envelope in
8 which the check was mailed, with the word "Problem" handwritten on the front of the envelope.

9 The Act, 2 U.S.C. § 431(4)(A), defines a "political committee" as any committee, club,
10 association or other group of persons that receives contributions or make expenditures aggregating
11 in excess of \$1,000 per calendar year. An organization will not be considered a "political
12 committee" unless its "major purpose is Federal campaign activity (i.e., the nomination or election
13 of a Federal Candidate)." Political Committee Status Supplemental E&J, 72 FR 5595, 5597 (Feb. 7,
14 2007). See *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*
15 (*MCFL*), 479 U.S. 238, 262 (1986). Political committees must register with the Commission, as set
16 forth in 2 U.S.C. § 433(a). SVVEA's small donor committee made a contribution greater than
17 \$1,000 to a federal candidate and was not registered with the Commission at the time it made the
18 contribution. It appears from the available information concerning its contribution history and
19 mission, however, that the small donor committee's major purpose was not the nomination or

³ Appended to SVVEA's response are copies of the following: the original report disclosing the \$2,000 contribution to the Committee; the Committee's letter explaining its return of the \$2,000 check, dated October 22, 2010, along with a copy of the check; and a copy of a report filed by SVVEA Fund's Small Donor Committee disclosing that the contribution had been returned. Also included was a letter dated November 17, 2010 from Ms. Docherty, confirming that SVVEA had received the returned check, apologizing for the inadvertent error, and stating that SVVEA had placed a stop payment order on the check.

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1 election of federal candidates. Therefore, the small donor committee would not have been required
2 to register and report with the Commission as a political committee.

3 Based on our review of the publicly available information, however, it appears that SVVEA
4 collected funds for its small donor committee from dues that were required as a condition of
5 membership and were refundable upon request. Thus, the contribution may have been
6 impermissible pursuant to 11 C.F.R. § 114.5(a), which prohibits federal contributions stemming
7 from "fees or monies paid as a condition of acquiring or retaining membership or employment . . .
8 even though they are refundable upon request of the payor." *See* 2 U.S.C. § 441b(b).

9 The Committee acted properly by not cashing the contribution check and returning it within
10 ten days, as required by 11 C.F.R. § 103.3(a). Further, it appears that SVVEA's small donor
11 committee took swift precautionary action, including placing a stop payment order on the check and
12 correcting its state reports to reflect that the contribution had been returned.

13 In light of the prompt action taken by SVVEA's small donor committee, as well as the
14 relatively low dollar amount at issue in this case, further Enforcement action does not appear to be
15 warranted. Accordingly, under EPS, the Office of General Counsel has scored MUR 6420 as a low-
16 rated matter and in furtherance of the Commission's priorities, as discussed above, recommends that
17 the Commission exercise its prosecutorial discretion and dismiss this matter as it concerns a
18 potentially impermissible contribution made by SVVEA's small donor committee. *See Heckler v.*
19 *Chaney*, 470 U.S. 821 (1985).

20 Additionally, the Office of General Counsel recommends that the Commission find no
21 reason to believe that SVVEA's small donor committee failed to register and file reports with the
22 Commission, in violation of 2 U.S.C. §§ 433 and 434(a). Finally, it appears that the Markey
23 Committee took all the necessary steps to return the contribution within the time period prescribed

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under the Act and Commission regulations. Accordingly, this Office recommends that the Commission find no reason to believe that Markey for Congress and John M. Ericson, Jr., in his official capacity as treasurer, violated the Act or Commission regulations.

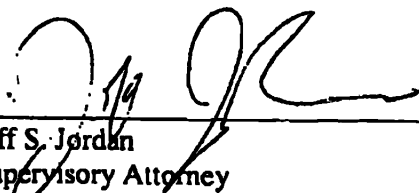
RECOMMENDATIONS


1. Find no reason to believe that Markey for Congress, and John M. Ericson, Jr., in his official capacity as treasurer, violated the Act or Commission regulations.
2. Find no reason to believe that Saint Vrain Valley Education Association Fund—Small Donor Committee violated 2 U.S.C. §§ 433 and 434(a).
3. Dismiss the allegation that Saint Vrain Valley Education Association Fund—Small Donor Committee violated 2 U.S.C. § 441b(b) and C.F.R. § 114.5(a).
4. Close the file and approve the appropriate letters.

Anthony Herman
General Counsel

Date 3/30/11

BY: 
Gregory R. Baker
Special Counsel
Complaints Examination
& Legal Administration


Jeff S. Jordan
Supervisory Attorney
Complaints Examination
& Legal Administration


Ruth Heilizer
Attorney