THE FEDERAL ELECTION COMMISSION
Washington, DC 20002

MEMORANDUM

TO: The Commission

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SUBJECT: MUR 7299 (Wexton for Congress, *et al.*)
Supplemental Memorandum Regarding Response to Additional Notification Letter

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I. INTRODUCTION

The Complaint in this matter alleges that Wexton for Congress and Joan Kowalski in her official capacity as treasurer ("Federal Committee"), Wexton for State Senate and Thomas Rock in his official capacity as treasurer ("State Committee"), and Jennifer Wexton violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by making contributions to state and local candidates and party committees using non-federal funds and improperly directing non-federal funds from the State Committee to the Federal Committee. On October 31, 2018, the Office of General Counsel ("OGC") circulated the First General Counsel's Report ("FGCR"), recommending the Commission find reason to believe that Respondents violated 52 U.S.C. §§ 30125(e)(1)(A) and (B) and 11 C.F.R. § 110.3(d).[1]

At the Executive Session held on August 20, 2019, the Commission considered the FGCR and directed OGC to send a letter to Respondents notifying them that OGC reviewed their disclosure reports and that Respondents had the opportunity to respond to the additional

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[1] First Gen. Counsel's Rpt. at 2, MUR 7299 (Wexton for Congress, *et al.*) (Oct. 31, 2018) ("FGCR").

information in the disclosure reports (hereinafter "Additional Notification").[2] On October 16, 2019, OGC sent the Additional Notification to Respondents.[3] On November 11, 2019, Respondents submitted their Supplemental Response, contending that the information presented in the Additional Notification did not indicate that Respondents violated the soft money prohibition at section 30125(e).[4] This memorandum addresses arguments presented in the Supplemental Response. As discussed below, Respondents' arguments do not affect the analysis or recommendations in the FGCR currently pending before the Commission.

II. BACKGROUND

The pending FGCR recommends that the Commission find reason to believe that Jennifer Wexton and the State Committee violated 52 U.S.C. § 30125(e)(1)(B) by spending non-federal funds in connection with the disbursements to state and local committees, and that the State Committee and the Federal Committee violated 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 110.3(d) when the State Committee transferred funds to the Federal Committee.[5] The FGCR also recommends that the Commission authorize pre-probable cause conciliation.[6] The recommendations were based on information from Respondents' state and federal disclosure reports indicating that: (1) the State Committee raised soft money and, after Wexton became a federal candidate, made soft money contributions to state and local party committees in connection with Virginia state elections other than Wexton's; and (2) the State Committee made direct contributions which were accepted by the Federal Committee.[7]

The Additional Notification explained that the State Committee's disclosure reports indicated that after Ms. Wexton became a federal candidate, the State Committee made $58,202 in disbursements, which included two $1,000 contributions to the Federal Committee and 22 contributions to Virginia state and local candidates and state party committees totaling $34,900.[8] The Additional Notification explained that the State Committee's disclosure reports appear to indicate that the committee had insufficient federally permissible funds to cover those disbursements, and thus Wexton and the State Committee may have violated 52 U.S.C. § 30125(e)(1)(B) by transferring or spending soft money in connection with a non-federal election other than Wexton's own Virginia State Senate election.[9] The Notification also stated that, should the Commission determine that the State Committee made contributions or transfers

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2 *See* MUR 7299 Certification (Aug. 23, 2019).

3 Letter from Charles Kitcher, Acting Assoc. Gen. Counsel, FEC, to Brad C. Deutsch, Esq., Counsel, Garvey Schubert Barer, P.C. (Oct. 16, 2019) at 1-2 ("Additional Notification").

4 MUR 7299 Supp. Resp. (Nov. 11, 2019) ("Supp. Resp.").

5 First GCR at 8.

6 *Id.*

7 *Id.* at 1-2.

8 Additional Notification at 1-2.

9 *Id.* at 2-3.

to the Federal Committee, the State Committee and the Federal Committee could be deemed to have violated 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 110.3(d) by making and accepting impermissible transfers in the form of direct contributions.[10]

Counsel for Respondents filed a Supplemental Response to the Additional Notification letter on November 11, 2019, on behalf of Wexton, the State Committee, and the Federal Committee.[11] The Supplemental Response denies that Respondents violated the Act and argues that the State Committee's 22 contributions to state and local candidates and state party committees were permissible under the "dual candidate exception" at section 30125(e)(2) because they were solely in connection with Ms. Wexton's then re-election to state office; did not refer to any person; and were permitted under state law.[12] Additionally, the Supplemental Response argues that the two direct transfers from the State Committee to the Federal Committee were permissible because they were "contributions" rather than "transfers" and were made with federally permissible funds.[13]

III. ANALYSIS

A. Wexton and the State Committee Appear to Have Improperly Spent Non-Federal Funds in Connection with State and Local Elections

The Act prohibits federal candidates, their agents, and entities that are established, financed, maintained, or controlled ("EFMC'd") by federal candidates from soliciting, receiving, directing, transferring, or spending funds in connection with any federal or non-federal election, unless the funds are from sources consistent with state law and comply with the Act's contribution limitation and source prohibitions.[14] The Act, however, provides an exception to this prohibition for "dual candidates" — *i.e.*, candidates who concurrently run for federal and state offices. Under that exception, dual candidates and entities that have been EFMC'd by such candidates may solicit, receive, or spend non-federal funds so long as the solicitations, receipts, or spending: (1) are solely in connection with that candidate's own state or local election; (2) "refer[] only" to such candidate or to other candidates running for the same state or local office;

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10 *Id.* at 3.

11 Supp. Resp.

12 *Id.* at 2-3.

13 *Id.* at 3. The Supplemental Response notes that the Additional Notification inquires about Respondents' spending of non-federal funds, which the Supplemental Response argues is not alleged in the Complaint. *Id.* at 1 n.2. However, after alleging that Wexton became a federal candidate who was raising "unlimited personal and corporate contributions," the Complaint states, "[i]f a candidate or officeholder is simultaneously running for both federal and state or local offices, then the candidate or his or her agents may only raise *and spend* funds within the limits, prohibitions and reporting requirements of the Federal Election Campaign Act for the federal election." Compl. at 1 (citing 11 C.F.R. § 300.63, AO 2007-01, AO 2005-12, AO 2005-02) (emphasis added). Consequently, the Complaint appears to sufficiently allege that Respondents improperly spent non-federal funds.

14 52 U.S.C. § 30125(e)(1)(B).

and (3) are consistent with state law.[15] When a dual candidate's state committee engages in activities that are "in connection" with an election that is *not* that candidate's own state or local election, the dual candidate exception does not apply,[16] and a federal candidate's state committee must spend only federally permissible funds in its account for such activities, as identified by using a reasonable accounting method.[17]

Respondents do not dispute that the State Committee's disclosure reports indicate that the committee likely had insufficient federally permissible funds to cover the 22 contributions listed in the Additional Notification. Rather, Respondents contend that the State Committee's 22 contributions to Virginia state and local committees made after Wexton became a federal candidate were solely in connection with Wexton's state election. Respondents, however, do not explain how the contributions to state and local candidates who were not running for the same office as Wexton relate to Wexton's own state election. None of the precedents that Respondents rely upon support their position. Respondents, citing to MUR 5411 (Winters), argue that OGC generally applies a "totality of the circumstances" analysis when determining whether expenses are "solely in connection with" a dual candidate's own state election. But Respondents do not describe any specific circumstances that indicate that the State Committee's contributions to other state campaigns or state party committees relate solely to Wexton's own state campaign. Further, MUR 5411 involved determining whether a public communication paid for by a dual candidate was "solely in connection" with the candidate's state election and did not involve direct contributions to state candidates and party committees.[18] Thus, Respondents' reliance on MUR 5411 is misplaced.

Similarly, Respondents contend that the checks written by the State Committee did not "refer" to anyone at all,[19] but this argument lacks merit given that the "refers to" language in 52 U.S.C. § 30125(e)(2) and 11 C.F.R. § 300.63 addresses the content of communications paid for by dual candidates, not the payee of a check or other instrument for making contributions, and was included in the Act to prevent "laundering of soft money through State candidate campaigns" through paid communications that reference other candidates.[20] Because there are

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[15] *Id.* § 30125(e)(2); 11 C.F.R. § 300.63 (applying rule to dual federal-state candidates and entities EFMC'd by those candidates). *See also* Advisory Op. 2016-25 (Pence) at 2 (determining that state campaign of a former state officeholder who was also a federal officeholder could spend non-federal funds for state campaign's expenses).

[16] *See, e.g.,* Advisory Op. 2005-02 (Corzine II) at 4 (superseded in part on other grounds) ("any solicitation, receipt, or spending of funds by a Federal officeholder that refers to State or local candidates running for entirely different offices does not come within the exception"); AO 2007-26 (Schock) at 4; AO 2006-38 (Casey State Committee) at 4.

[17] AO 2007-26 at 3; AO 2006-38 at 3. For this purpose, the Commission has approved as reasonable the "first in, first out" and "last in, first out" accounting methods. AO 2006-38 at 3. Other accounting methods may also be reasonable.

[18] First Gen. Counsel's Rpt. at 3-5, MUR 5411 (Winters).

[19] Supp. Resp. at 2.

[20] BCRA sponsor Sen. Feingold stated that, in reference to identical language prohibiting dual candidates from spending soft money on electioneering communications, "[a]ll we are trying to prevent with this provision is the laundering of soft money through State candidate campaigns for advertisements promoting, attacking, supporting

no communications at issue in this matter, the FGCR does not rely on a determination that the 22 contributions at issue "refer to" other candidates, but rather simply that contributions to other candidates and committees are not "in connection with" Wexton's own state election.

Respondents further claim that applying the Act's soft money prohibition to the 22 contributions at issue would undermine the purpose of the dual candidate exception, which is "to provide an equitable basis for a Federal officeholder or candidate to conduct his or her campaign for non-Federal office so that he or she is not financially disadvantaged when competing with a non-Federal opponent who may raise and spend funds without the same restrictions that [the Act] imposes on Federal candidates and officeholders."[21] However, as Respondents appear to acknowledge, the Commission has determined that the dual candidate exception applies to a dual candidate's own state or local campaign, not another campaign for a different office.[22] Consequently, the advisory opinions cited by Respondents actually support the analysis in the FGCR. For example, in Advisory Opinion 2007-26 (Schock), the Commission found that the dual candidate's state committee could only use federally permissible funds to make donations to the non-federal accounts of state and local party committees. There, the Commission stated:

> Donations by the Schock Committee to the non-Federal accounts of State and local party committees and to non-Federal candidates would involve spending and disbursing funds in connection with an election other than a Federal election. Therefore, any funds that are donated by the Schock Committee to the non-Federal party committee accounts or the non-Federal candidates . . . must not have been received by the Schock Committee in amounts in excess of those permitted with respect to contributions to Federal candidates and must not be from sources prohibited by the Act.[23]

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or opposing Federal candidates." 148 Cong. Rec. S2143 (Mar. 20, 2002). Sen. Feingold went on to explain that the phrase "refers to," as used in the bill, addresses the content of communications. *Id.* at S2144 (stating that "In the bill, the phrase 'refers to' precedes the phrase 'clearly identified' candidate. That latter phrase is precisely defined in the Federal Campaign Election Act to mean a communication that includes the name of a federal candidate for office, a photograph or drawing of the candidate, or some other words or images that identify the candidate by 'unambiguous reference.' A communication that 'refers to a clearly identified candidate' is one that mentions, identifies, cites, or directs the public to the candidate's name, photograph, drawing, or otherwise makes an 'unambiguous reference' to the candidate's identity.").

[21] Supp. Resp. at 2 (quoting AO 2016-25 at 2-3).

[22] *See, e.g.,* AO 2007-26 at 4 ("Donations … to the non-Federal accounts of State and local party committees and to non-Federal candidates would involve spending and disbursing funds in connection with an election other than a Federal election"); AO 2006-38 at 4 ("Donating to a State or local candidate or to the non-Federal account of any State or local Democratic party organization would involve transferring, spending, or disbursing funds in connection with a non-Federal election").

[23] AO 2007-26 at 4.

And Advisory Opinion 2016-25 (Pence) concerned only disbursements for the state committee's own operating expenses that were in connection with the dual candidate's state election, not contributions or donations made to other non-federal candidates.[24]

Given that the Supplemental Response does not adequately explain how the State Committee's 22 contributions to other state and local candidates and party committees qualify for the dual candidate exception at section 30125(e)(2), the State Committee could only spend federally permissible funds in its account to make those contributions, using a reasonable accounting method.[25] But the Supplemental Response offers no information indicating that these contributions were funded with permissible funds or that the State Committee had a reasonable accounting method in place at the time it made the contributions.

B. The State Committee Appears to have Made, and the Federal Committee Appears to have Accepted, Impermissible Transfers

Commission regulations explicitly prohibit "[t]ransfers of funds or assets from a candidate's campaign committee or account for a nonfederal election to his or her principal campaign committee or other authorized committee for a federal election."[26] The FGCR recommends that the Commission find reason to believe that the State Committee and the Federal Committee violated 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 110.3(d) when the State Committee made impermissible transfers in the form of two $1,000 direct contributions to the Federal Committee.[27]

Respondents state that the two transfers in question were funded with federally permissible funds.[28] But the Commission has explained that the rule at section 110.3(d) is designed to prohibit *all* transfers from a candidate's state campaign to that candidate's federal campaign in order to prevent a federal committee's indirect use of soft money.[29] Thus, even

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[24] AO 2016-25 at 3 (finding that proposed spending was "solely in connection with Mr. Pence's campaign for Governor"). Respondents also rely on *McCutcheon v. FEC*, 572 U.S. 185 (2014), for the proposition that "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies," and that state and local candidates often make contributions to other like-minded candidates. Supp. Resp. at 3 (quoting *McCutcheon*, 572 U.S. at 192)). *McCutcheon*, however, addressed an entirely different question regarding the constitutionality of aggregate limits for contributions made with federal funds and did not concern restrictions pertaining to the raising or spending of non-federal funds. *See McCutcheon*, 572 U.S. at 193 (holding that the Act's aggregate limits for federal contributions are unconstitutional).

[25] *See* First GCR at 5.

[26] 11 C.F.R. § 110.3(d).

[27] First GCR at 8.

[28] Supp. Resp. at 3. As noted in the FGCR, the Federal Committee reported receiving both transfers with "permissible funds," but appears to have misconstrued the soft money prohibitions. *See* First GCR at 7 n.22

[29] *See* Transfers of Funds from State to Federal Campaigns, 58 Fed. Reg. 3474, 3474-3475 (Jan. 8, 1993) (explaining, also, that Commission was adopting total prohibition in this circumstance because of practical difficulty in linking or otherwise accounting for federally permissible funds available for transfer); *see also* Factual and Legal Analysis at 4, MUR 5426 (Dale Shultz for Congress) (determining that while state committee may have contained

though the State Committee may have had some federally permissible funds at the time of the transfers, its transfers to the Federal Committee were still impermissible.

Lastly, Respondents' argument that the State Committee's $1,000 disbursements were "contributions" rather than "transfers," and thus outside the scope of section 110.3(d), is without merit. Although this regulation uses the word "transfers," the conduct it seeks to prohibit falls within the definition of "contribution," which the Act defines as, *inter alia*, "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[30] Furthermore, the Commission has routinely found that in-kind contributions by a dual candidate's state committee to the candidate's federal committee violate the Act's soft money prohibitions and section 110.3(d)'s prohibition on transfers.[31]

IV. CONCLUSION

As set forth above, the Supplemental Response does not provide any information that requires a change to the recommendations in the FGCR that the Commission find reason to believe that: (1) Wexton and the State Committee violated 52 U.S.C. § 30125(e)(1)(B) in connection with the disbursements to the state and local committees; and (2) the State Committee and the Federal Committee violated 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 110.3(d) when the State Committee transferred funds to the Federal Committee.

federally permissible funds, "11 C.F.R. § 110.3(d) flatly prohibits a candidate's state campaign from transferring funds to the candidate's federal campaign.").

[30] 52 U.S.C. § 30101(8)(A(i).

[31] *E.g.* Factual & Legal Analysis at 4-5, MUR 6267 (Jonathan Paton for Congress) (finding reason to believe that dual candidate's state committee made, and federal committee accepted, prohibited in-kind contributions in violation of 2 U.S.C. § 441i(e), renumbered as 52 U.S.C. § 30125(e), and 11 C.F.R. § 110.3(d)); Factual and Legal Analysis at 3-4, MUR 5480 (Levetan) (finding reason to believe that state committee payments for polling benefiting the federal committee was an improper transfer under section 110.3(d) and resulted in an in-kind contribution to the federal committee).