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FEDERAL ELECTION COMMISSION

999 E Street, N.W.

Washington, D.C. 20463

CELA

FIRST GENERAL COUNSEL'S REPORT

Pre-MUR: 486

DATE RECEIVED: April 23, 2009

DATE ACTIVATED: May 26, 2009

RESPONSE TO PRE-RTB

LETTER RECEIVED: September 2, 2009

EXPIRATION OR SOL: Earliest June 23,
2013/Latest September 8, 2013

COMPLAINANTS:

Republican Party of Virginia, Inc. and
Richard F. Neel, Jr., in his official capacity as
treasurer

RESPONDENTS:

Republican Party of Virginia, Inc. and
Richard F. Neel, Jr., in his official capacity as
treasurer
Gen-X Strategies, Inc. (a.k.a. GKS Strategies, Inc.)
Jeffrey M. Frederick

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 432(b)
2 U.S.C. § 432(h)(1)
2 U.S.C. § 434(b)
2 U.S.C. § 441b(a)
2 U.S.C. § 441c
11 C.F.R. § 102.8(b)
11 C.F.R. § 103.3(a)
11 C.F.R. § 104.3(a)

INTERNAL REPORTS CHECKED:

Disclosure Reports

OTHER AGENCIES CHECKED:

N/A

I. INTRODUCTION

This matter arose out of a ~~separate~~ submission filed by the Republican Party of
Virginia, Inc. and Richard F. Neel, Jr., in his official capacity as treasurer ("RPV"), disclosing

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1 possible violations of the Federal Election Campaign Act of 1971, as amended ("the Act") and
2 the Commission's regulations. Specifically, RPV's *sua sponte* submission describes violations
3 relating to the untimely transmittal and inaccurate disclosure of online contributions as well as
4 the making and acceptance of a prohibited in-kind contribution. According to RPV, these
5 violations arose out of work performed for the party committee by one of its vendors, Gen-X
6 Strategies, Inc. ("Gen-X").¹ *Sua Sponte Submission* ("Submission") at 6. Gen-X, which also
7 does business as GXS Strategies, is registered as a corporation with the Virginia State
8 Corporation Commission. www/scc.virginia.gov; Dun & Bradstreet Information Report on Gen-
9 X Strategies, Inc. (November 9, 2009), <http://www.dnb.com>. Gen-X provides online, technology
10 and communication services to political committees and organizations, corporations and federal
11 agencies. <http://www.gxs.net/clients.asp>. Jeffrey M. Frederick, who served as RPV's chairman
12 during the relevant time period, is also the Chief Executive Officer ("CEO") of Gen-X.
13 Submission at 3; Response at 1.

14 RPV's submission states that after Mr. Frederick's election as RPV's chairman on May
15 31, 2008, he unilaterally stopped RPV's use of PayPal as its "gateway" for processing
16 contributions made on its website and transferred this responsibility to a division of Gen-X
17 called ChargeContributions.com. Submission at 3. Pursuant to RPV's arrangement with
18 PayPal, online contributions were processed, deposited directly into RPV's bank account within
19 24 hours, and an e-mail report was generated notifying the party committee of all contributions
20 processed in that time period. *Id.* Unlike the arrangement with PayPal, Gen-X did not deposit
21 RPV's online contributions directly into RPV's bank account, but instead transferred the funds

¹ RPV informed this Office that its Executive Committee decided not to file a separate complaint against Gen-X and Mr. Frederick. CELA determined that it would not interpret RPV's submission as a complaint against those respondents. See Submission at 2.

1 into a merchant account maintained by ChargedContributions.com before disbursing the funds to
2 RPV in the form of two checks drawn from ChargedContributions.com's bank account. *Id.* at
3 Exhibits 1 and 2. Although Gen-X eventually began sending automatically generated e-mails
4 listing RPV's online contributions to RPV's office manager, she was unable to match the
5 contribution reports to the party committee's online bank records because Gen-X did not directly
6 deposit the online contributions. *Id.* at 4.

7 The first check issued by ChargedContributions.com, dated July 8, 2008, was in the
8 amount of \$1,269.45 (representing 18 online contributions totaling \$1,365, less \$95.55 in fees).
9 Submission at 3; Exhibit 1. RPV's office manager deposited this check on the date of receipt,
10 July 10, 2008. *Id.* Based on the Gen-X-generated spreadsheet that accompanied the check, it
11 appears the company received these 18 online contributions between June 23, 2008 and June 29,
12 2008. *Id.* On October 8, 2008, RPV received the second check issued by
13 ChargedContributions.com, dated October 1, 2008, in the amount of \$18,386.10 (representing 40
14 online contributions totaling \$19,770 less \$1,383.90 in fees). *Id.* at 4; Exhibit 2. RPV also
15 deposited this check on the date of receipt. *Id.* Gen-X's spreadsheet appears to indicate that it
16 received these 40 online contributions between July 8, 2008 and September 22, 2008. *Id.* In
17 sum, from June through September 2008, Gen-X processed 58 online contributions totaling
18 \$21,135. Because Gen-X forwarded these online contributions to RVP on only two occasions
19 during that period, RVP received 33 out of the 58 contributions between 11 and 92 days after the
20 contributions were actually made by contributors. *Id.* at 3 and 4. Due in part to Gen-X's delay
21 in forwarding the 58 online contributions, RPV also filed inaccurate disclosure reports with the
22 Commission from July through October 2008. *Id.* at 2 and 5. Specifically, RPV disclosed these
23 online contributions on either its 2008 August Report or its 2008 Pre-General Report, reporting

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1 as the dates of receipt for those contributions the dates on which it deposited the two checks,
2 rather than the dates the contributions were made by the contributors. *Id.* at 2, 3 and 4.

3 RPV's submission also describes the receipt of a prohibited in-kind corporate and
4 government contractor contribution from Gen-X valued at \$17,717. Submission at 5. In
5 September 2008, Mr. Frederick, as the chairman of RPV, evidently instructed the party
6 committee's staff to report a \$17,717 in-kind contribution from Gen-X on its state election
7 reports. *Id.* at 5. This in-kind contribution was described in RPV's state disclosure report as
8 "website email and online contribute setup - actual cost." October 15, 2008 Report, Schedule B.
9 Although RPV states that it is unable to confirm the specific services Gen-X performed or the
10 precise value of this in-kind contribution, the available documents indicate that Gen-X provided
11 services that included "activist web set up," "charged contribution set up," and a website e-mail
12 service relating to the issuance of broadcast e-mail messages. Submission at 2, 5 and Exhibit 4;
13 and Supplemental Submission, dated August 3, 2008 ("Supplemental Submission"). Some of
14 these broadcast e-mail messages mentioned federal candidates and elections. Supplemental
15 Submission. On April 4, 2009, the State Central Committee of RPV removed Mr. Frederick as
16 chairman, and RPV, in what it characterized as an abundance of caution, transferred \$17,717
17 from its federal account to its non-federal account to reimburse the in-kind contribution.² *Id.* at 2
18 and 3. RPV reported Gen-X's in-kind contribution as a federal contribution in an attachment to
19 RPV's 2009 May Monthly Report filed with the Commission.

20 Following the receipt of RPV's *sua sponte* submission, this Office sent a notification
21 letter to Gen-X and its CEO, Mr. Frederick, stating that the Commission had obtained

² According to RPV, the State Central Committee removed Mr. Frederick as chairman "in large part" due to the violations outlined in its submission, including the party committee's failure to properly report and/or allocate the receipt of the in-kind contribution from Gen-X. Submission at 6.

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1 information that Gen-X may have violated the Act by making a prohibited corporate contribution
2 and a prohibited contribution from a government contractor. See 2 U.S.C. §§ 441b and 441c. In
3 response, Mr. Frederick stated that Gen-X provided \$17,717 in services to RPV related to an
4 interim online platform for RPV's "website and other online technologies." Response at 1.

5 Although Mr. Frederick's response does not describe these services in any more detail or
6 indicate whether the expenses related in any way to the processing of the online contributions, it
7 does reference the "hours that my [GXN] staff and I spent implementing" the RPV project. *Id.* at
8 2. While Mr. Frederick asserts that Gen-X's in-kind contribution was not intended as a federal
9 contribution, he appears to acknowledge there was a federal component to Gen-X's work. *Id.* at
10 1 and 2. Mr. Frederick states that he understood that the in-kind contribution would be reported
11 "as a state contribution" and that the party committee's federal account would need to reimburse
12 the state account with federal dollars "for the required split amount of the contribution/expense
13 that could be construed as applying to the Party's activities in federal campaigns." *Id.* at 1.

14 As described below, since making its submission, RPV has continued to work with us to
15 ensure we have a complete record of the circumstances and violations in this matter. This
16 cooperation includes answering follow-up questions, meeting with staff from our office, and
17 providing a copy of an independent audit of RPV for our review. Supplemental Submission. In
18 addition, RPV has taken steps to address a number of financial issues, including adopting
19 stronger financial controls recommended by its independent auditor and refunding the subject 58
20 on-line contributions.³ Submission at 6 – 8.

³ In its submission, RPV states that it was not required to refund the 58 contributions. Submission at 8. The Commission has previously advised committees that where the failure to comply with transmittal rules was inadvertent, it would be acceptable to amend the reports filed with the Commission to reflect the correct date of receipt. See Advisory Opinions 2000-11 (Georgia – Pacific) and 1999-33 (MediaOne PAC).

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Based on the available information, we recommend that the Commission open a Matter Under Review, find reason to believe that the Republican Party of Virginia, Inc. and Richard F. Neel, Jr., in his official capacity as treasurer, violated 2 U.S.C. §§ 432(b), 434(b), and 441b(a) by failing to ensure the timely transmittal of contributions, by failing to accurately report these contributions, and by accepting an in-kind corporate contribution. We further recommend that the Commission find reason to believe that Gen-X Strategies, Inc. a corporation and a federal contractor at the time of the violations, violated 2 U.S.C. §§ 441b(a) and 441c by making a prohibited in-kind contribution to RPV and that Jeffrey Frederick violated 2 U.S.C. § 441b(a) by consenting to the in-kind corporate contribution. We believe that we have obtained sufficient information from the respondents, including RPV's *sua sponte* submission, supplemental submission, and follow-up communications, as well as Mr. Frederick's response, to allow the

In its submission, RPV suggested that the matter be transferred to ADR if the Commission concluded that sanctions were necessary. Submission at 9. This matter, however, is not an appropriate candidate for ADR

II. FACTUAL AND LEGAL ANALYSIS

A. Transmittal and Reporting Violations

The Act requires every person who receives a contribution in excess of \$50 for an unauthorized political committee to forward the contribution to the committee no later than 10 days after receiving the contribution. If the amount of the contribution is \$50 or less, that person must forward such contribution to the committee no later than 30 days after receipt. 2 U.S.C. § 432(b)(2)(A) and (B); 11 C.F.R. § 102.8(b)(1) and (2). The Act also requires political committees to deposit all receipts into a designated banking depository within ten days of the treasurer's receipt of the contributions.⁵ See 2 U.S.C. § 432(h)(1); 11 C.F.R. § 103.3(a).

The Act and Commission regulations anticipate that political committees will use agents to accept contributions and make expenditures on their behalf. 2 U.S.C. § 432(a) and 11 C.F.R. § 102.9(b). A contributor relinquishes control over the contribution, *i.e.* makes the contribution, when it is delivered by the contributor to the political committee or to an agent of that political committee. 11 C.F.R. § 110.1(b)(6).

Political committees are required to report the total amount of receipts received during the reporting period, including contributions from individuals. 2 U.S.C. § 434(b); 11 C.F.R. § 104.3(a)(2)(i)(A). Such committees are also required to disclose contributions aggregating in excess of \$200 per election cycle and identify contributors by including his or her name, address, occupation, the name of his or her employer, if any, and the date of receipt and amount of the

⁵ It appears that RPV complied with these requirements by depositing the subject contributions into its designated banking depository within ten days of receipt. Submission at Exhibits 1 and 2. Gen-X forwarded the 58 online contributions to RPV in two separate checks. RPV deposited the first check (dated July 8, 2008) on July 10, 2008, the same day it arrived in the mail. *Id.* at 4, Exhibit 1. RPV deposited the second check (dated October 1, 2008) on October 8, 2008, the same day it was hand-delivered by Mr. Frederick. *Id.*; Exhibit 2. 11 C.F.R. § 103.3(a). See Advisory Opinion 2006-30 (ActBlue) (upon receipt of a check for the total amount of contributions, a committee must either deposit the contributions or return them within 10 days). 11 C.F.R. § 103.3(a).

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1 contribution. 2 U.S.C. § 434(b)(3); 11 C.F.R. § 104.3(a)(4)(i). The date of receipt for a
2 contribution is the date on which the person receiving the contribution on behalf of a political
3 committee obtains possession of that contribution. 11 C.F.R. § 102.8(b)(2). The date of receipt
4 is the recording and reporting date for contributions. *Id.*; 11 C.F.R. § 104.8(a) and (b).

5 RPV is responsible for the untimely transmittal of the online contributions at issue in the
6 matter. 2 U.S.C. § 432(b)(2)(A) and (B). From June – September 2008, contributors making
7 contributions on RPV's website relinquished control of those contributions to Gen-X, RPV's
8 agent for purposes of accepting and processing online contributions. 11 C.F.R. § 119.1(b)(6).
9 Gen-X, as RPV's agent, was obligated to forward contributions of \$50 or less to RPV within 30
10 days of receiving those contributions and to forward contributions exceeding \$50 to RPV within
11 10 days of its receiving those contributions. 2 U.S.C. § 432(b)(2)(A) and (B); 11 C.F.R.
12 § 102.8(b)(1) and (2). However, Gen-X forwarded 33 (totaling \$18,960) out of the 58 online
13 contributions it accepted and processed for RPV between 11 and 92 days after they were made
14 by the contributors online, which is beyond the aforementioned 30/10 day deadlines.
15 Submission at 3 and 4; Exhibits 1 and 2. For its part, RPV failed to ensure that its agent Gen-X
16 complied with 2 U.S.C. § 432(b)(2) and 11 C.F.R. § 102.8(b) and forwarded those contributions
17 to the party committees within the required 30/10 day deadlines. *See* MUR 6121
18 (AdvaMed)(separate segregated fund responsible for commercial vendor's collection of multiple
19 contributions, which were periodically forwarded in a single check, resulting in the untimely
20 transfer of those contributions); *and see* MUR 5229 (SEIU)(separate segregated funds as well as
21 collecting agents liable for failing to adhere to applicable transmittal requirements). Therefore,
22 we recommend that the Commission find reason to believe that the Republican Party of Virginia,

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1 Inc. and Richard F. Neel, Jr., in his official capacity as treasurer, violated 2 U.S.C. § 432(b) with
2 regard to the untimely transmittal of 33 online contributions.

3 The Commission could also find reason to believe that Gen-X violated the Act by failing
4 to timely transmit the subject online contributions to RPV based on the plain language of
5 2 U.S.C. § 432(b) (e.g. "every person who receives a contribution for an authorized political
6 committee shall ... forward to the treasurer such contribution") and its implementing regulation
7 11 C.F.R. § 102.8. Nevertheless, in a recent similar matter, the Commission held the recipient
8 committee liable for the transmittal violations of its contribution processing agent, which
9 happened to be a commercial vendor, and did not pursue that commercial vendor for violations
10 of 2 U.S.C. § 432(b) and 11 C.F.R. § 102.8. See MUR 6121 (AdvaMed). Thus, we make no
11 recommendation with respect to Gen-X for violations of 2 U.S.C. § 432(b).

12 RPV violated 2 U.S.C. § 434(b) in connection with its receipt of the online contributions
13 at issue. RPV reported receiving all 58 of these online contributions (totaling \$21,135) on the
14 dates (July 10, 2008 and October 8, 2008) it deposited the two checks it received from Gen-X
15 instead of the dates the contributors actually made their online contributions. Submission at
16 Exhibits 1 and 2. As a result, RPV filed inaccurate reports with Commission. Specifically, RPV
17 reported online contributions received between June 23, 2008 and June 29, 2008 in its 2008
18 August Monthly report instead of its 2008 July Monthly report and reported online contributions
19 received between July 8, 2008 and September 22, 2008 in its Pre-General report instead of its
20 2008 August, September and October Monthly reports. Therefore, we also recommend that the
21 Commission find reason to believe that that the Republican Party of Virginia, Inc. and Richard F.
22 Neel, Jr., in his official capacity as treasurer, violated 2 U.S.C. § 434(b) when it failed to
23 accurately report \$21,135 in online contributions.

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B. Prohibited Contributions

The Act prohibits corporations from making contributions or expenditures from their general treasury funds. 2 U.S.C. § 441b(a).⁶ Corporate officers are prohibited from consenting to contributions made by the corporation. *Id.* Similarly, political committees are prohibited from accepting contributions from this prohibited source. *Id.* The Act also prohibits contributions by government contractors. 2 U.S.C. § 441c; 11 C.F.R. § 115.2. The statute is silent with respect to whether the acceptance or receipt of a contribution from a government contractor is prohibited. *Id.* As discussed *supra* at 2, Gen-X is an active corporation in Virginia. 2 U.S.C. § 441b. The available information also indicates that Gen-X was a federal contractor during the relevant time period. 11 C.F.R. § 115.1; Submission at 3 and Supplemental Submission; www.fpds.gov/common/html; *see also* www.gxs.net/clients.asp.

RPV disclosed the transfer of \$17,717 from its federal account to its nonfederal account representing an in-kind contribution ("for certain services including website e-mail and online contributions setup") from Gen-X in an attachment to its 2009 May Monthly report. Although there is some dispute concerning the nature, extent, and exact value of the services provided and whether RPV would have allocated the Gen-X costs between federal and non-federal accounts, it appears that both RPV and Gen-X acknowledge that Gen-X made, and RPV accepted, an in-kind contribution. In light of the facts that (1) RPV appears willing to concede that Gen-X provided services to the party committee, by virtue of its *sua sponte* filing; and (2) that the contribution

⁶ On September 9, 2009, the Supreme Court heard rearguments in *Citizens United v. FEC*, S. Ct., No. 08-205, regarding whether it should overrule either or both *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and part of *McConnell v. FEC*, 540 U.S. 93 (2003) that addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 441b. Because the *Citizens United* case relates to the prohibition on corporate independent expenditures and corporate funding of electioneering communications and does not encompass the issue of direct corporate contributions, an adverse ruling in that case will not impact the instant matter.

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1 was related to federal activity (*i.e.* Gen-X processed online federal contributions and provided
2 services such as a broadcast e-mail message service that, in part, discussed federal candidates
3 and elections, Gen-X acknowledges that there was a federal component to its services, and RPV
4 reported the transaction in an FEC disclosure report), it appears that RPV accepted a prohibited
5 contribution when it failed to timely reimburse its nonfederal account for the in-kind
6 contribution from its federal account. See AO 1992-33 (DNC/RNC)(to ensure the prohibited
7 "doer" does not "pay for" the federal portion of allocable administrative and fundraising
8 expenses, party committees must transfer the amount from their federal account to their
9 nonfederal account in advance or on receipt of the goods or services.) Consequently, we
10 recommend that the Commission find reason to believe that the Republican Party of Virginia,
11 Inc. and Richard F. Neel, Jr., in his official capacity as treasurer, violated 2 U.S.C. § 441b(a).

12 We also recommend that the Commission find reason to believe that Gen-X Strategies,
13 Inc. violated 2 U.S.C. §§ 441b(a) and 441c and Jeffrey M. Frederick violated 2 U.S.C. 441b(a)
14 as a corporate officer. It appears undisputed that Gen-X provided services to RPV's federal
15 account for services related to its processing of online contributions and the aforementioned
16 broadcast e-mail message service. Further, in this instance, Gen-X and its CEO knew the
17 services were related to federal activity and thus knew that Gen-X was potentially making a
18 prohibited in-kind contribution to the federal account. Therefore, under these circumstances, we
19 believe the Commission should make findings against Gen-X and Mr. Frederick.

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IV. RECOMMENDATIONS

1. Open a MUR
2. Find reason to believe that the Republican Party of Virginia, Inc. and Richard F. Neel, Jr., in his official capacity as treasurer violated 2 U.S.C. §§ 432(b), 434(b), and 441b(a).
3. Find reason to believe that Gen-X Strategies, Inc. (*a.k.a.* GXS Strategies, Inc.) violated 2 U.S.C. §§ 441b(a) and 441c and Jeffrey Frederick violated 2 U.S.C. § 441b(a) as a corporate officer.
4. _____
5. _____
6. Approve the attached Factual and Legal Analyses.

7. Approve the appropriate letters.

Thomasenia P. Duncan
General Counsel

12/9/09
Date

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