

1 **FEDERAL ELECTION COMMISSION**

2 **FIRST GENERAL COUNSEL'S REPORT**

3 **MUR 7214**

4 COMPLAINT FILED: Feb. 8, 2017

5 NOTIFICATION DATE: Feb. 13, 2017

6 RESPONSE FILED: Mar. 3, 2017

7 ACTIVATION DATE: November 2, 2017

8 STATUTE OF LIMITATIONS: Feb. 21, 2019

9 ELECTION CYCLE: 2014

10
11 **COMPLAINANT:**

Ohio Democratic Party

12 **RESPONDENTS:**

13 Ohio Republican Party State Central & Executive
14 Committee and Tracey Winbush in her official
capacity as treasurer

15 Ohio Republican State Central & Executive
16 Committee State Account and Tracey Winbush
17 in her official capacity as treasurer

18 Ohio Republican State Central & Executive
19 Committee Restricted Fund and Tracey Winbush
20 in her official capacity as treasurer

21 Ray C. Bliss Building Trust Fund

22
23 **RELEVANT AUTHORITY:**

52 U.S.C. § 30125(b)

24 11 C.F.R. § 100.24

25 11 C.F.R. § 106.7

26 11 C.F.R. § 300.32

27 11 C.F.R. § 300.33

28 **INTERNAL REPORTS CHECKED:**

Disclosure Reports

29 **FEDERAL AGENCIES CHECKED:**

None

30 **I. INTRODUCTION**

31 Complainant alleges that the Ohio Republican Party State Central & Executive
32 Committee and Tracey Winbush in her official capacity as treasurer ("ORP") violated 52 U.S.C.
33 § 30125(b) by using nonfederal funds to finance the development of "Project Ruby," a voter-

1 targeting software database used for federal election activity.¹ The Complaint alleges that ORP's
2 use of its nonfederal funds and funds from related state accounts — the Ohio Republican State
3 Central & Executive Committee State Account ("State Account"), Ohio Republican State Central
4 & Executive Committee Restricted Fund ("Restricted Fund"), and Ray C. Bliss Building Trust
5 Fund ("Building Trust Fund") — to pay for Project Ruby violated Commission regulations
6 because the disbursements were made in connection with federal election activity.² ORP argues
7 that its actions complied with the law when it paid a data analytics firm, FactGem, \$550,000 for
8 software licensing fees with an allocation of federal and nonfederal funds, reporting those
9 disbursements as administrative costs.³ ORP did not address the allegation that some portion of
10 the money it paid FactGem was for federal election activity generally or for Project Ruby
11 specifically. As discussed fully below, based on the available record, we recommend that the
12 Commission find reason to believe that ORP violated 52 U.S.C. § 30125(b).

13 II. FACTUAL BACKGROUND

14 FactGem is a data analytics firm that developed "Project Ruby," an ORP initiative to
15 identify and target potential Ohio voters in both state and federal elections.⁴ Specifically, Project
16 Ruby was an effort to create a database using "[d]ozens of data points, such as when people vote,
17 why and for whom," collected by making in-person or phone contact with voters, purchasing

¹ Compl. at 1 (Feb. 8, 2017).

² *Id.* at 3. The Commission timely notified ORP, the State Account, and the Restricted Fund of the allegations raised in the Complaint. Due to an administrative oversight, the Building Trust Fund was late notified of the allegations on December 14, 2017. See Letter from Jeff S. Jordan, Asst. Gen. Counsel, FEC, to Treasurer, Ray C. Bliss Building Trust Fund (Dec. 14, 2017).

³ Resp. at 3 (Mar. 3, 2017).

⁴ FactGem was reportedly formed in May 2012 and is registered to Megan Kvamme. Joe Vardon, "Kvamme to use high-tech to help Ohio GOP mine votes," COLUMBUS DISPATCH (May 29, 2014), www.dispatch.com/article/20140529/NEWS/305299929 ("News Article") (attached to Complaint as Ex. A).

1 consumer data, and combing social media for information on voters' preferences, as well as
2 tracking targeted voters to make sure that they actually vote.⁵ Matt Borges, ORP's Chairman at
3 the time, described Project Ruby as "a data engine that allows us to maximize our voter contact
4 and information."⁶

5 Disclosure reports filed with the Commission show that ORP paid \$550,000 to FactGem
6 in 2014, of which \$467,500 consisted of nonfederal funds.⁷ The "Activity or Event Identifier"
7 for each disbursement entry is "Administrative," while the listed "Purpose of Disbursement" is
8 "Software purchase/license – not candidate specific."⁸ Each payment was made with 85%
9 nonfederal funds and 15% federal funds.⁹ In addition, disclosure reports filed with the Ohio
10 Secretary of State show that in 2014, the State Account paid \$5,000, the Restricted Fund paid
11 \$20,000, and the Building Trust Fund paid \$25,000 to FactGem.¹⁰

⁵ *Id.*

⁶ FactGem reportedly developed Project Ruby in anticipation of Kasich's 2016 presidential candidacy, although it was to be made available to other candidates as well. Kasich was running for reelection as Governor of Ohio in the 2014 election. *Id.*

⁷ Compl. at 1-2, Ex. B.

⁸ Compl. at Ex. B.

⁹ ORP paid FactGem \$42,500 in nonfederal funds and \$7,500 in federal funds on February 21, 2014; \$42,500 in nonfederal funds and \$7,500 in federal funds on May 1, 2014; \$170,000 in nonfederal funds and \$30,000 in federal funds on May 19, 2014; \$42,500 in nonfederal funds and \$7,500 in federal funds on June 20, 2014; \$42,500 in nonfederal funds and \$7,500 in federal funds on July 28, 2014; \$42,500 in nonfederal funds and \$7,500 in federal funds on September 2, 2014; \$42,500 in nonfederal funds and \$7,500 in federal funds on September 30, 2014; \$14,875 in nonfederal funds and \$2,625 in federal funds on October 30, 2014; and \$27,625 in nonfederal funds and \$4,875 in federal funds on November 13, 2014. Compl. at Ex. B.

¹⁰ Compl. at 3, Ex. C. Specifically, the Restricted Fund made two payments of \$10,000 each to FactGem on March 11, 2014, and March 20, 2014. The "purpose" listed for each payment was "Computer Software." The Building Trust Fund also paid FactGem \$10,000 on March 11, 2014, for "Software" and \$15,000 on March 20, 2014, for "Computer Software". In addition, the State Account paid FactGem \$5,000 on March 11, 2014, for "Software/Database."

1 **III. FACTUAL AND LEGAL ANALYSIS**

2 **A. The Available Information Provides Reason to Believe that ORP Violated the**
3 **Act By Using Nonfederal Funds to Pay for Federal Election Activity**

4 Under the Federal Election Campaign Act of 1971, as amended ("Act"), any expenditure
5 or disbursement for "federal election activity" by a state committee of a political party (including
6 an entity that is directly or indirectly established, financed, maintained, or controlled by such
7 committee) must be made from federal funds, *i.e.*, funds subject to the limitations, source
8 prohibitions, and reporting requirements of the Act, or a mixture of federal and "Levin" funds.¹¹
9 "Federal election activity" includes voter identification activity, get-out-the-vote activity, and
10 generic campaign activity conducted in connection with an election in which one or more federal
11 candidates appear on the ballot.¹² Commission regulations provide that "voter identification
12 activity" means "acquiring information about potential voters, including, but not limited to,
13 obtaining voter lists and creating or enhancing voter lists by verifying or adding information
14 about the voters' likelihood of voting in an upcoming election or their likelihood of voting for
15 specific candidates."¹³

16 A state party committee may not allocate costs for voter identification, get-out-the-vote,
17 or generic campaign activity, *i.e.*, federal election activity, between federal and nonfederal
18 accounts.¹⁴ It may, however, allocate disbursements or expenditures between federal funds and

¹¹ 52 U.S.C. § 30125(b)(1); *see also* 11 C.F.R. § 300.32(a)(2). The allocation rules for federal election activity and administrative costs also apply to district and local party committees, but only state committees are involved in this matter.

¹² 52 U.S.C. § 30101(20)(A)(ii); 11 C.F.R. § 100.24(b)(2).

¹³ 11 C.F.R. § 100.24(a)(4).

¹⁴ 11 C.F.R. § 106.7(e)(3).

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1 "Levin" funds¹⁵ for such activity, provided the activity does not refer to a clearly identified
2 federal candidate.¹⁶ In an election that does not feature a Senate or Presidential race, like the
3 2014 election in Ohio, a state party committee must allocate at least 15% of its expenses for
4 federal election activity to its federal account; by implication, it may allocate up to 85% of such
5 expenses to its Levin account.¹⁷

6 In addition to the allocation rules applicable to federal election activity, the Act and
7 Commission regulations provide more permissive allocation rules for other types of activity,
8 such as administrative expenses. State party committees may allocate "administrative costs,
9 including rent, utilities, office equipment, office supplies, postage for other than mass mailings,
10 and routine building maintenance, upkeep and repair, from their federal account, or allocate such
11 expenses between their federal and nonfederal accounts."¹⁸ In an election cycle that does not
12 feature a Senate or Presidential race, like the 2014 election in Ohio, a state party committee must
13 allocate at least 15% of its administrative costs to its federal account, and by implication may
14 allocate up to 85% of such expenses to its nonfederal account.¹⁹

15 **1. Project Ruby Was "Voter Identification Activity" and Therefore**
16 **"Federal Election Activity"**

17 ORP argues that its payments to FactGem for its Project Ruby software can be classified
18 as an administrative expense, which can be paid for with both federal and nonfederal funds,

¹⁵ "Levin" funds are funds donated to a state, district, or local party committee that are permitted under state law and do not exceed \$10,000 per contributor, per calendar year. See 52 U.S.C. § 30125(b)(2).

¹⁶ 11 C.F.R. § 300.33(a)(2); see generally 11 C.F.R. § 300.36 (reporting requirements for federal election activity).

¹⁷ 11 C.F.R. § 300.33(b)(4).

¹⁸ 11 C.F.R. § 106.7(c)(2).

¹⁹ 11 C.F.R. § 106.7(d)(2)(iv).

1 rather than a voter identification activity that must be paid for exclusively with federal funds or a
2 combination of federal and Levin funds. ORP's assertion is incorrect, however, because Project
3 Ruby clearly falls under the Commission's broad definition of voter identification activity, which
4 encompasses "acquiring information about potential voters," including by "creating or enhancing
5 voter lists."²⁰ Project Ruby meets that definition because it is described as a data-gathering
6 effort to compile a database of voter information based on in-person and phone contacts,
7 purchased consumer data, and information gathered on social media.²¹ Because the purpose of
8 Project Ruby was "acquiring information about potential voters" and "enhancing voter lists,"²² it
9 is "voter identification activity" and therefore "federal election activity."²³

10 ORP does not dispute that voter identification activity must be paid for with federal
11 funds, but argues that its disbursements for Project Ruby can be classified as payments for an
12 "office supply," *i.e.*, an administrative cost, under Commission regulations. On that basis, ORP
13 asserts that "the expenditures . . . do not meet the definition (or even the spirit) of 'voter
14 identification activity.'"²⁴ ORP contends that it followed the Commission's guidance in
15 Advisory Opinion 1993-21 (Ohio Republican Party) when it paid FactGem using nonfederal
16 funds because the Commission approved the use of nonfederal funds to pay for administrative

²⁰ 11 C.F.R. § 100.24(a)(4).

²¹ See News Article at 3-4.

²² 11 C.F.R. § 100.24(a)(4). In fact, the activities involved in compiling the Project Ruby database would likely fall within even a much narrower conception of voter identification activity, which the Commission considered and rejected when broadly defining the term. See *Prohibited and Excessive Contributions: Nonfederal Funds or Soft Money*, 67 Fed. Reg. 49064, 49069 (July 29, 2002) (Public commenters urged the Commission to restrict the definition of "voter identification" to "activities designed primarily to identify the political preferences of individuals in order to influence their voting[.]" or "only activity that involved actual contact of voters, by phone, in person or otherwise, to determine their likelihood of voting generally or their likelihood of voting for a specific Federal candidate.").

²³ 52 U.S.C. § 30101(20)(A)(ii); 11 C.F.R. § 100.24(b)(2)(i).

²⁴ Resp. at 3. See 11 C.F.R. § 106.7(c)(2).

1 costs in that opinion.²⁵ However, that advisory opinion does not stand for the broad proposition
2 that all software expenses qualify as administrative costs. Instead, in the course of examining the
3 allocation rules applicable in 1993, the Commission provided, in a footnote, examples of
4 “administrative” uses of nonfederal funds under Ohio state law, such as a state party’s “operating
5 and maintenance costs associated with political party headquarters, including . . . the purchase,
6 lease, or maintenance of computer hardware and software.”²⁶

7 Project Ruby, however, does not appear to be an operating and maintenance cost
8 associated with running ORP’s headquarters, nor does it seem akin to any of the other examples
9 of such “operating and maintenance” costs provided in the advisory opinion.²⁷ Moreover, even
10 assuming, *arguendo*, that voter identification software would have been treated as an
11 administrative cost in 1993 under both federal and Ohio state law, the addition of “federal
12 election activity” (and related nonfederal funding restrictions) to the Act in 2002 redefined
13 previously nonfederal activity as federal activity and required a wholesale revision of the
14 allocation rules with respect to state party committee spending, including the allocation

²⁵ ORP also claims that the issues raised in the Complaint were previously brought before the Ohio Elections Commission (“OEC”), which, in a summary dismissal, “found no violation.” Resp. at 3–4. The OEC’s finding apparently applied Ohio law allowing a particular type of state party committee funds to be used to purchase computer software. See Resp. at 4. Ohio’s interpretation and application of Ohio law is outside the Commission’s jurisdiction and does not bind the Commission here with respect to federal law. *Accord* Advisory Op. 1993-21 (Ohio Republican Party) at 3–5 (explaining both the jurisdictional limits of Commission’s advisory opinion authority with respect to questions of state law and the preemption of state law with respect to elections for federal office).

²⁶ Advisory Op. 1993-21 at note 2.

²⁷ The other examples of “operating and maintenance costs associated with political party headquarters” listed are “rental or leasing costs, staff salaries, office equipment and supplies, [and] postage[.]” Advisory Op. 1993-21 at note 2. The regulation’s list of examples is similar, including “rent, utilities, office equipment, office supplies, postage for other than mass mailings, and routine building maintenance, upkeep and repair[.]” 11 C.F.R. § 106.7(c)(2).

1 provisions discussed in Advisory Opinion 1993-21.²⁸ In other words, even if all software
2 programs, including voter targeting databases like Project Ruby, were administrative expenses in
3 1993, the Commission must now treat a database of likely voters' information, whose only
4 known purpose appears to be aiding in targeting voters based on their preferences, as "federal
5 election activity." Viewed in light of the 2002 amendments to the Act, Advisory Opinion 1993-
6 21 cannot reasonably be read to approve the use of nonfederal funds to pay for software designed
7 solely to facilitate federal election activity.²⁹

8 ORP thus misallocated its payments for Project Ruby as administrative costs because
9 Project Ruby is much more than an "office supply" required to run a state party headquarters: It
10 can readily be distinguished from a general-purpose software tool like a word processor, *e.g.*,
11 Microsoft Word, or a computer security program, *e.g.*, McAfee VirusScan.³⁰ Instead, Project
12 Ruby is a software database of voter information collected by FactGem exclusively for ORP's
13 use in voter identification and targeting, which clearly qualify as federal election activity.³¹ Had
14 ORP directly gathered the same voter information and compiled it into a database to use for voter
15 targeting, that conduct would constitute federal election activity, and ORP would be prohibited
16 from paying for it using nonfederal funds. The mere fact that ORP outsourced the task of

²⁸ See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49065 (July 29, 2002) (explaining that, due to addition of "federal election activity" definition and federal funds restrictions, some advisory opinions "may no longer be relied upon to the extent they conflict" with the revised statute and regulations); *id.* at 49070 (noting that Congress' 2002 statutory change "makes voter identification a subset of Federal election activity, and the regulatory implications of engaging in Federal election activity are significant"); see also 52 U.S.C. § 30108(c) (explaining that persons may rely on earlier advisory opinions if engaging in activity "indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion was rendered"); 11 C.F.R. § 112.5(a)(2) (same).

²⁹ Cf. Advisory Op. 2016-06 (Internet Association PAC) (concluding that SSF must pay connected corporation costs of "software development" for candidate-related activities to avoid prohibited corporate contribution since such costs were not "administrative expenses" of SSF).

³⁰ ORP specifically compares its conduct to paying a licensing fee to use Microsoft Office, *see* Resp. at 3.

³¹ See 11 C.F.R. § 100.24(a)(4).

1 creating such a database, and then paid a fee to use it, does not convert federal election activity
2 into an administrative cost. As such, Project Ruby constitutes federal election activity.

3 **2. The Available Information Provides Reason to Believe that ORP Used**
4 **Nonfederal Funds to Pay for Federal Election Activity**

5 The Complaint alleges, and disclosure reports substantiate, that ORP paid \$550,000 to
6 FactGem between February 21, 2014, and November 13, 2014, of which \$467,500 consisted of
7 nonfederal funds. The disclosure reports do not clarify whether some or all of these FactGem
8 payments were for Project Ruby, which is purportedly only one of the many products that
9 FactGem offers, and ORP argues that it purchased multiple FactGem products. However, the
10 news article attached to the Complaint indicates that "Project Ruby[] is being paid for by the
11 Ohio Republican Party[.], . . . [t]he Ohio GOP has already paid FactGem . . . \$55,000 for its
12 work[.]" and that "Republicans budgeted nearly \$1 million for Project Ruby[.]"³².

13 ORP does not specifically address whether it paid for Project Ruby with nonfederal
14 funds. Instead, ORP notes that since FactGem offered various products, ORP purchased
15 "different products for different purposes" and "payments [to FactGem] were made based on the
16 reasons of the purchases, and not on the name of the vendor."³³ These general assertions do not
17 refute the particular allegation that ORP paid FactGem to develop Project Ruby. The available
18 record therefore supports a reasonable inference that at least some of the \$467,000 in nonfederal
19 funds that ORP paid to FactGem specifically funded Project Ruby's development. Because
20 Project Ruby constituted federal election activity, we recommend that the Commission find
21 reason to believe that ORP violated 52 U.S.C. § 30125(b).

³² News Article at 2. The News Article was published on May 29, 2014, by which time FactGem had, in fact, already received \$300,000 from ORP, as well as payments of \$5,000 from the State Account, \$20,000 from the Restricted Fund, and \$25,000 from the Building Trust Fund.

³³ Resp. at 2.

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1 **B. The Commission Should Take No Action At This Time With Respect to the**
2 **Remaining Allegations**

3 The Complaint alleges that the State Account, Restricted Fund, and Building Trust Fund
4 also paid for Project Ruby, and thereby violated 11 C.F.R. § 106.7(e)(3). In addition, it alleges
5 that the Restricted Fund and Building Trust Fund violated 11 C.F.R. § 114.2(b) because those
6 accounts accept corporate contributions. It also alleges that the Building Trust Fund violated the
7 allocation requirements of 11 C.F.R. § 300.33, and the restrictions on the use of party committee
8 building funds at 11 C.F.R. § 300.35.³⁴

9 The available facts indicate that the State Account, the Restricted Fund, and the Building
10 Trust Fund made payments of \$5,000, \$20,000, and \$25,000 to FactGem, respectively.
11 However, unlike with ORP, which was specifically mentioned in the news article attached to the
12 Complaint, nothing in the available record links the payments from these other accounts to the
13 development of Project Ruby. Because the proposed investigation with respect to ORP would
14 likely uncover additional facts germane to the allegations against the State Account, Restricted
15 Fund, and Building Trust Fund, we recommend that the Commission take no action at this time
16 with respect to the allegations against these additional respondents.

17 **IV. PROPOSED INVESTIGATION**

18 Because the available information does not establish how much ORP paid FactGem
19 specifically for Project Ruby, and whether any other entities were involved, we will need to
20 conduct a brief investigation to establish the scope of the alleged violation. The investigation
21 would focus on how much ORP paid FactGem to develop Project Ruby, and whether Project
22 Ruby was financed entirely by ORP or partly by other accounts or entities. We will attempt to

³⁴ Compl. at 3.

1 conduct the investigation through voluntary means, but recommend that the Commission
2 authorize the use of compulsory process.

3 **V. RECOMMENDATIONS**

- 4 1. Find reason to believe that the Ohio Republican Party State Central & Executive
5 Committee and Tracey Winbush in her official capacity as treasurer violated
6 52 U.S.C. § 30125(b);
- 7 2. Take no action at this time as to the Ohio Republican State Central & Executive
8 Committee State Account and Tracey Winbush in her official capacity as treasurer
9 ("State Account"); the Ohio Republican State Central & Executive Committee
10 Restricted Fund and Tracey Winbush in her official capacity as treasurer ("Restricted
11 Fund"); and the Ray C. Bliss Building Trust Fund ("Building Trust Fund");
- 12 3. Authorize the use of compulsory process;
- 13 4. Approve the attached Factual and Legal Analysis; and
- 14 5. Approve the appropriate letters.

15 Lisa J. Stevenson
16 Acting General Counsel

17 1/31/18
18 Date

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