



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MAR 14 2019

RE: MUR 7214

Dear Ms. Armstrong:

On February 13, 2017, the Federal Election Commission ("Commission") notified your clients, the Ohio Republican Party State Central & Executive Committee and Tracy Winbush in her official capacity as treasurer ("ORP"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time. Upon review of the allegations contained in the complaint and information provided by your clients, the Commission, on March 7, 2019, found reason to believe that ORP violated 52 U.S.C. § 30125(b), a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is enclosed for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's further consideration of this matter. Please submit such materials, along with responses to the enclosed questions and document requests, to the Office of the General Counsel within 15 days of receiving this notification. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation. See 52 U.S.C. § 30109(a)(4).

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

If you are interested in pursuing conciliation prior to finding of probable cause to believe a violation has occurred, you should make such a request by letter to the Office of the General Counsel. See 11 C.F.R. § 111.18(d). Upon receiving such a request, the Office of the General Counsel will recommend either that the Commission enter into an agreement in settlement of the matter or decline to pursue pre-probable cause conciliation at this time. The Office of the General Counsel may recommend not pursuing pre-probable cause conciliation in order to complete its investigation of the matter. Further, the Commission will not entertain requests for

pre-probable cause conciliation after briefs on probable cause have been delivered to the respondents.

Requests for extensions of time are not routinely granted. Requests must be made in writing at least five days prior to the due date of the response and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days. Pre-probable cause conciliation, extensions of time, and other enforcement procedures and options are discussed more comprehensively in the Commission's "Guidebook for Complainants and Respondents on the FEC Enforcement Process," which is available on the Commission's website at http://www.fec.gov/em/respondent_guide.pdf.

Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.¹

This matter will remain confidential in accordance with 52 U.S.C. §§ 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. For your information, we have enclosed a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Saurav Ghosh, the attorney assigned to this matter, at (202) 694-1643 or sghosh@fec.gov

On behalf of the Commission,



Ellen L. Weintraub
Chair

Enclosures

Factual and Legal Analysis

¹ The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 **RESPONDENTS:** Ohio Republican Party State Central & Executive **MUR 7214**
6 Committee and Tracey Winbush in her official
7 capacity as treasurer
8

9 **I. INTRODUCTION**

10 This matter was generated by a complaint filed with the Federal Election Commission
11 (“Commission”) by the Ohio Democratic Party, *see* 52 U.S.C. § 30109(a)(1). Complainant
12 alleges that the Ohio Republican Party State Central & Executive Committee and Tracey
13 Winbush in her official capacity as treasurer (“ORP”) violated 52 U.S.C. § 30125(b) by using
14 nonfederal funds to finance the development of “Project Ruby,” a voter-targeting software
15 database used for federal election activity.¹ The Complaint alleges that ORP’s use of its
16 nonfederal funds and funds from related state accounts — the Ohio Republican State Central &
17 Executive Committee State Account (“State Account”), Ohio Republican State Central &
18 Executive Committee Restricted Fund (“Restricted Fund”), and Ray C. Bliss Building Trust
19 Fund (“Building Trust Fund”) — to pay for Project Ruby violated Commission regulations
20 because the disbursements were made in connection with federal election activity.² ORP argues
21 that its actions complied with the law when it paid a data analytics firm, FactGem, \$550,000 for
22 software licensing fees with an allocation of federal and nonfederal funds, reporting those
23 disbursements as administrative costs.³ ORP did not address the allegation that some portion of

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).

1 the money it paid FactGem was for federal election activity generally or for Project Ruby
2 specifically. As discussed fully below, based on the available record, the Commission finds
3 reason to believe that ORP violated 52 U.S.C. § 30125(b).

4 **II. FACTUAL BACKGROUND**

5 FactGem is a data analytics firm that developed “Project Ruby,” an ORP initiative to
6 identify and target potential Ohio voters in both state and federal elections.⁴ Specifically, Project
7 Ruby was an effort to create a database using “[d]ozens of data points, such as when people vote,
8 why and for whom,” collected by making in-person or phone contact with voters, purchasing
9 consumer data, and combing social media for information on voters’ preferences, as well as
10 tracking targeted voters to make sure that they actually vote.⁵ Matt Borges, ORP’s Chairman at
11 the time, described Project Ruby as “a data engine that allows us to maximize our voter contact
12 and information.”⁶

13 Disclosure reports filed with the Commission show that ORP paid \$550,000 to FactGem
14 in 2014, of which \$467,500 consisted of nonfederal funds.⁷ The “Activity or Event Identifier”
15 for each disbursement entry is “Administrative,” while the listed “Purpose of Disbursement” is
16 “Software purchase/license – not candidate specific.”⁸ Each payment was made with 85%

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).

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.

1 nonfederal funds and 15% federal funds.⁹ In addition, disclosure reports filed with the Ohio
2 Secretary of State show that in 2014, the State Account paid \$5,000, the Restricted Fund paid
3 \$20,000, and Building Trust Fund paid \$25,000 to FactGem.¹⁰

4 III. FACTUAL AND LEGAL ANALYSIS

5 A. The Available Information Provides Reason to Believe that ORP Violated the 6 Act By Using Nonfederal Funds to Pay for Federal Election Activity

7 Under the Federal Election Campaign Act of 1971, as amended (“Act”), any expenditure
8 or disbursement for “federal election activity” by a state committee of a political party (including
9 an entity that is directly or indirectly established, financed, maintained, or controlled by such
10 committee) must be made from federal funds, *i.e.*, funds subject to the limitations, source
11 prohibitions, and reporting requirements of the Act, or a mixture of federal and “Levin” funds.¹¹
12 “Federal election activity” includes, among other things, voter identification activity conducted
13 in connection with an election in which one or more federal candidates appear on the ballot.¹²
14 Commission regulations provide that “voter identification activity” means “acquiring

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.”

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); *see also* 11 C.F.R. § 100.24(c)(5) (excepting certain “voter identification activity” from the definition of “federal election activity”).

1 information about potential voters, including, but not limited to, obtaining voter lists and creating
2 or enhancing voter lists by verifying or adding information about the voters' likelihood of voting
3 in an upcoming election or their likelihood of voting for specific candidates."¹³ Commission
4 regulations provide that "[t]he date a voter list is acquired shall govern whether a State . . . party
5 committee has obtained a voter list within the meaning of this section."¹⁴ "In connection with an
6 election in which a candidate for Federal office appears on the ballot" includes "[t]he period of
7 time beginning on the date of the earliest filing deadline for access to the primary election ballot
8 for Federal candidates as determined by State law."¹⁵

9 A state party committee may not allocate costs for federal election activity between
10 federal and nonfederal accounts.¹⁶ It may, however, allocate disbursements or expenditures
11 between federal funds and "Levin" funds¹⁷ for such activity, provided the activity does not refer
12 to a clearly identified federal candidate.¹⁸ In an election that does not feature a Senate or
13 Presidential race, like the 2014 election in Ohio, a state party committee must allocate at least

¹³ 11 C.F.R. § 100.24(a)(4).

¹⁴ *Id.*; see also Definition of Federal Election Activity, 71 Fed. Reg. 8926, 8930 (Feb. 22, 2006) ("Under these revised rules, State . . . committees should use the date the information was purchased, rather than the date the information was used, to determine whether the acquisition of a voter list falls within the FEA timeframes.").

¹⁵ 11 C.F.R. § 100.24(a)(1)(i).

¹⁶ 11 C.F.R. § 106.7(e)(3). In certain circumstances, state party committees may allocate between federal and non-federal accounts to pay for voter identification expenses that do not qualify as federal election activity. 11 C.F.R. § 106.7(c)(5); see Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49079 (July 29, 2002).

¹⁷ "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).

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

1 15% of its expenses for federal election activity to its federal account; by implication, it may
2 allocate up to 85% of such expenses to its Levin account.¹⁹

3 In addition to the allocation rules applicable to federal election activity, the Act and
4 Commission regulations provide more permissive allocation rules for other types of activity,
5 such as administrative expenses. State party committees may allocate “administrative costs,
6 including rent, utilities, office equipment, office supplies, postage for other than mass mailings,
7 and routine building maintenance, upkeep and repair, from their federal account, or allocate such
8 expenses between their federal and nonfederal accounts.”²⁰ In an election cycle that does not
9 feature a Senate or Presidential race, like the 2014 election in Ohio, a state party committee must
10 allocate at least 15% of its administrative costs to its federal account, and by implication may
11 allocate up to 85% of such expenses to its nonfederal account.²¹

12 **1. Project Ruby Was “Federal Election Activity”**

13 ORP generally argues that its payments to FactGem for its Project Ruby software can be
14 classified as an administrative expense, which can be paid for with both federal and nonfederal
15 funds, rather than a voter identification activity that must be paid for exclusively with federal
16 funds or a combination of federal and Levin funds. ORP’s assertion is incorrect, however,
17 because Project Ruby clearly falls under the Commission’s broad definition of voter
18 identification activity, which encompasses “acquiring information about potential voters,”
19 including by “creating or enhancing voter lists.”²² Project Ruby meets that definition because, as

¹⁹ 11 C.F.R. § 300.33(b)(4).

²⁰ 11 C.F.R. § 106.7(c)(2).

²¹ 11 C.F.R. § 106.7(d)(2)(iv).

²² 11 C.F.R. § 100.24(a)(4).

1 described in the complaint, it is described as a data-gathering effort to compile a database of
2 voter information based on in-person and phone contacts, purchased consumer data, and
3 information gathered on social media.²³ Because the alleged purpose of Project Ruby was
4 “acquiring information about potential voters” and “enhancing voter lists,”²⁴ it appears to be
5 “voter identification activity.”

6 Further, the ORP’s payments fell within Ohio’s 2014 FEA period,²⁵ and were thus in
7 connection with an election in which one or more federal candidates appear on the ballot.
8 Therefore, Project Ruby appears to be “federal election activity.”²⁶

9 ORP does not dispute that voter identification activity, when in connection with an
10 election in which a candidate for federal office appears on the ballot, must be paid for with
11 federal funds, but argues that its disbursements for Project Ruby can be classified as payments
12 for an “office supply,” *i.e.*, an administrative cost, under Commission regulations. On that basis,
13 ORP asserts that “the expenditures . . . do not meet the definition (or even the spirit) of ‘voter
14 identification activity.’”²⁷ ORP contends that it followed the Commission’s guidance in

²³ See News Article at 3–4.

²⁴ 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.”).

²⁵ Federal Election Activity Dates for 2014, https://transition.fec.gov/info/charts_fea_dates_2014.shtml (identifying Ohio’s FEA period for voter identification as running from February 5, 2014, to November 4, 2014).

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

²⁷ Resp. at 3. See 11 C.F.R. § 106.7(c)(2).

1 Advisory Opinion 1993-21 (Ohio Republican Party) when it paid FactGem using nonfederal
2 funds because the Commission approved the use of nonfederal funds to pay for administrative
3 costs in that opinion.²⁸ However, that advisory opinion does not stand for the broad proposition
4 that all software expenses qualify as administrative costs under the Act. Instead, in the course of
5 examining the allocation rules applicable in 1993, the Commission provided, in a footnote,
6 examples of “administrative” uses of nonfederal funds under Ohio state law, such as a state
7 party’s “operating and maintenance costs associated with political party headquarters,
8 including . . . the purchase, lease, or maintenance of computer hardware and software.”²⁹

9 Even assuming, *arguendo*, that voter identification software would have been treated as
10 an administrative cost in 1993 under both federal and Ohio state law, the addition of “federal
11 election activity” (and related nonfederal funding restrictions) to the Act in 2002 redefined
12 previously nonfederal activity as federal activity and required a wholesale revision of the
13 allocation rules with respect to state party committee spending, including the allocation
14 provisions discussed in Advisory Opinion 1993-21.³⁰ In other words, even if all software

²⁸ 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).

²⁹ Advisory Op. 1993-21 at note 2.

³⁰ 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).

1 programs, including voter targeting databases like Project Ruby, were administrative expenses in
2 1993, the Commission must now treat a database of likely voters' information, whose only
3 known purpose appears to be aiding in targeting voters based on their preferences, as "federal
4 election activity." Viewed in light of the 2002 amendments to the Act, Advisory Opinion 1993-
5 21 cannot reasonably be read to approve the use of nonfederal funds to pay for software designed
6 solely to facilitate federal election activity.³¹

7 Thus, there is reason to believe that ORP misallocated its payments for Project Ruby as
8 administrative costs, because, as alleged, Project Ruby is much more than an "office supply"
9 required to run a state party headquarters: It can readily be distinguished from a general-purpose
10 software tool like a word processor, *e.g.*, Microsoft Word, or a computer security program, *e.g.*,
11 McAfee VirusScan.³² Instead, Project Ruby appears to be a software database of voter
12 information collected by FactGem exclusively for ORP's use in voter identification and
13 targeting, which clearly qualify as federal election activity.³³

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

16 The Complaint alleges, and disclosure reports substantiate, that ORP paid \$550,000 to
17 FactGem between February 21, 2014, and November 13, 2014, of which \$467,500 consisted of
18 nonfederal funds. The disclosure reports do not clarify whether some or all of these FactGem
19 payments were for Project Ruby, which is purportedly only one of the many products that

³¹ 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).

³² ORP specifically compares its conduct to paying a licensing fee to use Microsoft Office, *see* Resp. at 3.

³³ *See* 11 C.F.R. § 100.24(a)(4).

1 FactGem offers, and ORP argues that it purchased multiple FactGem products. However, the
2 news article attached to the Complaint indicates that “Project Ruby[] is being paid for by the
3 Ohio Republican Party[.]. . . [t]he Ohio GOP has already paid FactGem . . . \$55,000 for its
4 work[,]” and that “Republicans budgeted nearly \$1 million for Project Ruby.”³⁴

5 ORP does not specifically address whether it paid for Project Ruby with nonfederal
6 funds. ORP does not identify how much it paid to FactGem for Project Ruby or what
7 specifically ORP received in return for those payments. Instead, ORP notes that since FactGem
8 offered various products, ORP purchased “different products for different purposes” and
9 “payments [to FactGem] were made based on the reasons of the purchases, and not on the name
10 of the vendor.”³⁵ These general assertions do not refute the particular allegation that ORP paid
11 FactGem to develop Project Ruby. The record evidence therefore suggests that at least some of
12 the \$467,000 in nonfederal funds that ORP paid to FactGem specifically funded Project Ruby’s
13 development. Because Project Ruby constituted federal election activity, the Commission finds
14 reason to believe that ORP violated 52 U.S.C. § 30125(b).

³⁴ 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.

³⁵ Resp. at 2.