

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2 In the Matter of)
3)
4 The Ohio Republican Party) **MUR 7214**
5 State Central & Executive)
6 Committee and David Johnson)
7 in his official capacity as)
8 treasurer, *et al.*)
9

10 **SECOND GENERAL COUNSEL'S REPORT**

11 **I. ACTIONS RECOMMENDED**

12 Authorize the Office of the General Counsel ("OGC") to enter into pre-probable cause
13 conciliation with the Ohio Republican Party State Central & Executive Committee and David
14 Johnson¹ in his official capacity as treasurer ("ORP"); approve the attached proposed
15 conciliation agreement ; and dismiss the allegations and close the
16 file as to the remaining Respondents.

17 **II. BACKGROUND**

18 The Commission previously found reason to believe ORP violated 52 U.S.C. § 30125(b),
19 a provision of the Federal Election Campaign Act of 1971, as amended (the "Act").² The
20 Commission found that ORP paid a company, FactGem, to develop a database of voter
21 information, informally referred to as "Project Ruby," during Ohio's 2014 "FEA period," *i.e.*,
22 between February 5, 2014, and November 4, 2014.³ The Commission found that Project Ruby

¹ On June 15, 2018, ORP amended its Statement of Organization to name David Johnson as its treasurer. See ORP Amend. Statement of Org. (June 15, 2018). Tracey Winbush was ORP's treasurer from May 19, 2016, to June 15, 2018.

² Amend. Certification ¶ 1, MUR 7214 (Mar. 7, 2019).

³ Factual and Legal Analysis at 5-6, MUR 7214 (Mar. 7, 2019); see 52 U.S.C. § 30101(20)(A)(ii); 11 C.F.R. § 100.24(a)(4), (b)(2)(i) (defining "federal election activity" and "voter identification activity"). The "FEA period"

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1 involved "creating or enhancing voter lists," which constitutes "voter identification activity," and
2 that activity, in turn, when conducted during an FEA period, constitutes "federal election
3 activity."⁴ Under the Act, federal election activity must be paid for using federal funds, *i.e.*,
4 "funds subject to the limitations, prohibitions, and reporting requirements" of the Act, or a
5 permitted allocation of federal and "Levin" funds.⁵

6 Because ORP appears to have paid for Project Ruby using nonfederal funds, the
7 Commission found reason to believe ORP violated 52 U.S.C. § 30125(b).⁶ The Commission
8 also determined to take no action at the time as to ORP's related state accounts, each of which
9 were also used to make disbursements to FactGem during Ohio's 2014 FEA period: The Ohio
10 Republican State Central & Executive Committee State Account (the "State Account"), the Ohio
11 Republican State Central & Executive Committee Restricted Fund (the "Restricted Fund") and
12 the Ray C. Bliss Building Trust Fund (the "Building Trust Fund").⁷

13 Pursuant to these findings, OGC began investigating whether, and to what extent, ORP
14 used nonfederal funds to pay for federal election activity.⁸ In response to the Commission's
15 reason to believe finding, ORP retained new counsel and initiated an internal review seeking

is the period during which, under Commission regulations, activity is deemed "in connection with an election in which a candidate for Federal office appears on the ballot." 11 C.F.R. § 100.24(a)(1).

⁴ Factual and Legal Analysis at 5-6, MUR 7214.

⁵ 52 U.S.C. § 30125(b)(1); Factual and Legal Analysis at 5-6, MUR 7214; *see* 11 C.F.R. § 106.7(e)(3); *see also* 52 U.S.C. § 30125(b)(2) and 11 C.F.R. § 300.33(a)(2) (defining, and discussing the permitted allocation of, Levin funds).

⁶ Factual and Legal Analysis at 8-9, MUR 7214.

⁷ Amend. Certification, ¶ 2 (Mar. 7, 2019).

⁸ *See* First Gen. Counsel's Report at 10, MUR 7214 ("The investigation would focus on how much ORP paid FactGem to develop Project Ruby, and whether Project Ruby was financed entirely by ORP or partly by other accounts or entities.").

1 documents responsive to our informal discovery requests and written questions, provided a
2 detailed written submission, and supplied additional information during a phone conversation
3 with OGC staff. ORP also requested that the Commission enter pre-probable cause conciliation.

4 We have developed a substantially complete factual record, and further investigative
5 steps would not likely produce additional relevant information. Further, much of the activity at
6 issue is imperiled under the statute of limitations ("SOL").⁹ As such, we recommend that the
7 Commission enter into pre-probable cause conciliation with ORP to settle its violation of
8 52 U.S.C. § 30125(b).

9 III. RESULTS OF THE INVESTIGATION

10 As the Commission previously determined, ORP paid FactGem to develop "Project
11 Ruby," a software database of voter information that could be used to drive voter turnout, which
12 was created by enhancing existing voter lists with publicly available information.¹⁰ ORP entered
13 into a contract with FactGem on November 1, 2013, and agreed to pay FactGem a monthly
14 subscription fee of \$50,000 for the development of Project Ruby and the use of FactGem's
15 existing products, which could also be used for federal election activity.¹¹ ORP acknowledges
16 that it received and used some of those other products in connection with elections in which there
17 were federal candidates on the ballot.¹²

⁹ In fact, approximately \$100,000 of the activity at issue has already expired under the SOL.

¹⁰ ORP Resp. to Reason to Believe Finding (Apr. 19, 2019) ("ORP Resp.") at 2-3.

¹¹ ORP Resp. at 3. Under the terms of the contract, which ORP submitted with its Response, ORP would receive six "deliverables" from FactGem: (1) 10 Data Sets – Ohio Only, (2) Unlimited Access to GoldMiner Application, (3) Unlimited Access to Canvasser Application, (4) Unlimited Storage, (5) Unlimited Reports, (6) User Count: One thousand (1,000) Users. ORP Resp., Ex. B at 16 ("Schedule A"). Although the voter identification initiative was informally referred to as "Project Ruby," that term does not appear in the contract.

¹² ORP Resp. at 5 n.2.

1 Although ORP executed the contract and received an initial invoice for services on
2 November 1, 2013,¹³ FactGem apparently agreed to allow ORP “to defer all monthly Plan Fees
3 until February 1, 2014, at which time all Plan Fees shall be due and payable in full.”¹⁴ Thus,
4 while ORP received invoices for December 2013 and January 2014, it did not make its first
5 payment under the contract until February 21, 2014.¹⁵ Between February 21, 2014, and
6 November 13, 2014, ORP and its related accounts — the State Account, Building Trust Fund,
7 and Restricted Account — disbursed \$600,000 to FactGem, at least 85% of which consisted of
8 nonfederal funds.¹⁶ Because the monthly subscription fee covered both the development of
9 Project Ruby and the use of existing FactGem products, it is unclear what proportion of the funds
10 paid to FactGem were specifically for Project Ruby.

11 ORP contends that the proposed “Project Ruby” voter database software ultimately never
12 worked as envisioned and was never delivered.¹⁷ ORP asserts that when it became clear that
13 Project Ruby would not work, it stopped paying FactGem — although FactGem invoices and
14 ORP’s disclosure reports indicate that the payments continued through November 2014. By the

¹³ ORP Resp., Ex. C at 1. ORP submitted eight invoices from FactGem for monthly subscription services, each billing ORP the agreed-upon \$50,000 per month, and represents that there may have been other invoices that were not found during their search for responsive documents. The last monthly invoice submitted was for the month of November 2014. *Id.*, Ex. C at 9.

¹⁴ Schedule A.

¹⁵ See ORP March 2014 Monthly Report at 81 (Mar. 20, 2014).

¹⁶ ORP Resp. at 9. ORP’s payments to FactGem totaled \$550,000, of which 85% — or \$467,500 — was nonfederal money. The three state accounts paid FactGem another \$50,000 in nonfederal money. As such, the total amount of nonfederal funds that FactGem received was \$517,500, which represents just over 86% of the \$600,000 that FactGem received.

¹⁷ ORP Resp. at 3 (“This grand plan, however, never came to fruition.”); *id.* at 4 (“ORP still had no working or usable software.”).

1 time it “pulled the plug on Project Ruby,” ORP had paid FactGem \$600,000 of the \$1 million in
2 payments that ORP claims it had initially budgeted for the project.¹⁸

3 IV. LEGAL ANALYSIS

4 A. Nonfederal Funds Cannot be Used to Pay for Federal Election Activity, 5 Including Voter Identification Activity Conducted During an FEA Period

6 Under the Act, any expenditure or disbursement for “federal election activity” by a state
7 committee of a political party (including an entity that is directly or indirectly established,
8 financed, maintained, or controlled by such committee) must be made from federal funds — *i.e.*,
9 funds subject to the limitations, source prohibitions, and reporting requirements of the Act — or,
10 in some cases, a mixture of federal and “Levin” funds.¹⁹ “Federal election activity” includes,
11 among other things, “voter identification activity” conducted in connection with an election in
12 which one or more federal candidates appear on the ballot.²⁰ Commission regulations provide
13 that “voter identification activity” means “acquiring information about potential voters,
14 including, but not limited to, obtaining voter lists and creating or enhancing voter lists by
15 verifying or adding information about the voters’ likelihood of voting in an upcoming election or
16 their likelihood of voting for specific candidates.”²¹ Commission regulations also provide that
17 “[t]he date a voter list is acquired shall govern whether a State . . . party committee has obtained

¹⁸ ORP Resp. at 4; *see also* MUR 7214 Compl., Ex. A at 2 (news article indicating that “documents online show” that ORP had “budgeted nearly \$1 million for Project Ruby”).

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

²⁰ 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”).

²¹ 11 C.F.R. § 100.24(a)(4).

1 a voter list within the meaning of this section.”²² The period when activity is deemed “[i]n
2 connection with an election in which a candidate for Federal office appears on the ballot” — *i.e.*,
3 the “FEA period” — includes “[t]he period of time beginning on the date of the earliest filing
4 deadline for access to the primary election ballot for Federal candidates as determined by State
5 law.”²³ Ohio’s 2014 FEA period for voter identification activity ran from February 5, 2014, to
6 November 4, 2014.²⁴

7 A state party committee may not allocate costs for federal election activity between
8 federal and nonfederal accounts.²⁵ It may, however, allocate disbursements or expenditures
9 between federal funds and “Levin” funds for such activity, provided the activity does not refer to
10 a clearly identified federal candidate.²⁶ In an election that does not feature a Senate or
11 Presidential race, like the 2014 election in Ohio, a state party committee must allocate at least
12 15% of its expenses for federal election activity to its federal account; by implication, it may
13 allocate up to 85% of such expenses to its Levin account.²⁷

²² 11 C.F.R. § 100.24(a)(4); *see also* Definition of Federal Election Activity, 71 Fed. Reg. 8926, 8930 (Feb. 22, 2006) (“2006 FEA E&J”) (“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.”).

²³ 11 C.F.R. § 100.24(a)(1)(i).

²⁴ Federal Election Activity Dates for 2014, https://transition.fec.gov/info/charts_fea_dates_2014.shtml.

²⁵ 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).

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

²⁷ 11 C.F.R. § 300.33(b)(4).

1 **B. ORP Engaged in Federal Election Activity When It Acquired or Enhanced a**
2 **Voter List During Ohio's 2014 FEA Period**

3 The Commission found that ORP disbursed a total of \$600,000 to FactGem during the
4 2014 election cycle — \$567,500 of which was disbursed during Ohio's 2014 FEA period — and
5 ORP acknowledges that those funds paid for Project Ruby, which was an effort to enhance an
6 existing voter list with additional public information. ORP now contends, however, that its
7 disbursements were not federal election activity because (1) it "acquired" a voter list before the
8 FEA period began when it entered into the contract for FactGem's services on November 1,
9 2013; and (2) it never actually "enhanced" a voter list because the Project Ruby software never
10 worked.²⁸ These arguments are unavailing.

11 ORP "acquired" voter identification information in connection with an election featuring
12 federal candidates on the ballot when it disbursed funds to FactGem during the FEA period.
13 Although ORP entered into a contract with FactGem before Ohio's 2014 FEA period began on
14 February 5, 2014, ORP made no payments to FactGem before that date, and all but the last of its
15 payments, totaling \$567,500, were made during the FEA period.²⁹ The Commission has
16 explained that for purposes of determining the date a voter list is acquired, "State . . . committees
17 should use the date the information was purchased, rather than the date the information was used,

²⁸ ORP Resp. at 3-4. Prior to the Commission's reason to believe finding, ORP had argued that its allocation of funds for the FactGem disbursements was proper because the disbursements were for administrative expenses, as permitted under 11 C.F.R. §§ 106.7(c)(2) and 106.7(d)(2)(iv), rather than for federal election activity. The Commission rejected that argument and ORP did not raise it again in its Response to the reason to believe finding. See Factual and Legal Analysis at 8, MUR 7214 ("[T]here is reason to believe that ORP misallocated its payments for Project Ruby as administrative costs, because, as alleged, Project Ruby is much more than an 'office supply' required to run a state party headquarters' . . . Project Ruby appears to be a software database of voter information collected by FactGem exclusively for ORP's use in voter identification and targeting, which clearly qualify as federal election activity.").

²⁹ The final disbursement of \$32,500 was made on November 13, 2014, after the FEA period had ended.

1 to determine whether the acquisition of a voter list falls within the FEA timeframes.”³⁰
2 Accordingly, the relevant dates to determine when ORP engaged in “voter identification” by
3 “acquiring information about potential voters” would be the dates that it actually purchased the
4 information by making payments to FactGem, rather than the date that it initially agreed to make
5 such payments.

6 In addition, ORP’s disbursements to FactGem were voter identification activity even if
7 Project Ruby did not actually work as intended. The Commission previously determined that
8 ORP’s disbursements were voter identification activity because they were made to enhance an
9 existing voter list with additional publicly available information, in order to drive voter turnout
10 in elections featuring federal candidates. ORP now asserts that because that effort did not result
11 in a working software product, the effort was not voter identification activity.³¹ Regardless of
12 whether Project Ruby “came to fruition” as a successful product,³² ORP made disbursements to
13 FactGem for the specific purpose of “creating or enhancing voter lists by verifying or adding
14 information about the voters’ likelihood of voting in an upcoming election or their likelihood of
15 voting for specific candidates,” *i.e.*, voter identification.³³ As such, the disbursements that ORP
16 made for that voter identification activity during the FEA period were federal election activity.³⁴

³⁰ 2006 FEA E&J at 8930.

³¹ ORP Resp. at 3.

³² *Id.*

³³ 11 C.F.R. § 100.24(a)(4).

³⁴ Moreover, ORP paid FactGem a \$50,000 monthly fee for a variety of products, which included its existing FEA applications, like Canvasser, that ORP acknowledges using. ORP Resp. at 5 n.2. As such, even if we assumed, *arguendo*, that Project Ruby was not voter identification activity because it never actually worked, the \$50,000 per month that ORP paid FactGem still paid for federal election activity.

1 **C. ORP Used Nonfederal Funds to Pay for Federal Election Activity**

2 Within Ohio's 2014 FEA period, ORP disbursed \$567,500 to FactGem for federal
3 election activity, and \$489,875 of that total consisted of nonfederal funds, including the \$5,000,
4 \$25,000, and \$20,000 that the State Account, Building Trust Fund, and Restricted Fund
5 disbursed to FactGem, respectively. As such, ORP and its related accounts violated 52 U.S.C.
6 § 30125(b) by using nonfederal funds to engage in federal election activity.

7 The record in this matter is now substantially complete, and our investigation has
8 uncovered sufficient information to resolve this matter:³⁵ ORP and its related state accounts
9 disbursed \$600,000 to FactGem in monthly installments of \$50,000, which paid for the
10 development of Project Ruby and the use of FactGem's other products, and those payments
11 ended in November 2014. ORP's disbursements were federal election activity, notwithstanding
12 that ORP's contract was executed before the FEA period began, or that Project Ruby is alleged
13 to have never resulted in working software.

14 As such, and in light of the circumstances of the matter, we recommend that the
15 Commission accept ORP's request to enter into pre-probable cause conciliation in order to settle
16 ORP's violation of 52 U.S.C. § 30125(b). Because all of the activity by the State Account,
17 Building Trust Fund, and Restricted Fund has expired, we recommend that the Commission
18 dismiss the allegations and close the file as to those Respondents.³⁶

³⁵ See First Gen. Counsel's Report at 10-11, MUR 7214.

³⁶ See 28 U.S.C. § 2462. Aside from the \$50,000 in activity by the State Account, Building Trust Fund, and Restricted Fund that has expired, \$50,000 in activity by ORP — the first \$50,000 payment that ORP made on February 21, 2014 — has also expired.

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VI. RECOMMENDATIONS

1. Enter into conciliation with the Ohio Republican Party State Central & Executive Committee and David Johnson in his official capacity as treasurer prior to a finding of probable cause to believe;
2. Approve the attached proposed conciliation agreement;
3. Dismiss the allegations and close the file as to the Ohio Republican State Central & Executive Committee State Account, the Ohio Republican State Central & Executive Committee Restricted Fund, and the Ray C. Bliss Building Trust Fund; and

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1 . 4. Approve the appropriate letters.

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Lisa J. Stevenson
Acting General Counsel

4 June 6, 2019
5 Date

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Charles Kitcher
Acting Associate General Counsel
for Enforcement

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