

1 **FEDERAL ELECTION COMMISSION**
2
3 **FIRST GENERAL COUNSEL'S REPORT**

4
5 RAD REFERRAL: 17L-02R
6 DATE RECEIVED: August 4, 2017
7 DATE OF NOTIFICATION: January 12, 2017
8 DATE ACTIVATED: December 15, 2017
9

10 EARLIEST SOL: June 13, 2021
11 LATEST SOL: June 13, 2021
12 ELECTION CYCLE: 2016

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14 **SOURCE:** Internally Generated
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16 **RESPONDENT:** Jack Graham for U.S. Senate and Cheryl S. Klein in
17 her official capacity as treasurer
18
19 **RELEVANT STATUTES:** 52 U.S.C. § 30104(a)(1), (b)(4)
20 11 C.F.R. § 104.1(a)
21 11 C.F.R. § 104.3(b)
22 11 C.F.R. § 111.43
23
24 **INTERNAL REPORTS CHECKED:** Disclosure Reports
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26 **FEDERAL AGENCIES CHECKED:** None
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28 **I. INTRODUCTION**

29 The Reports Analysis Division (“RAD”) referred Jack Graham for U.S. Senate and
30 Cheryl S. Klein in her official capacity as treasurer (“Committee”) to the Office of General
31 Counsel (“OGC”) for failing to disclose disbursements totaling \$252,571 on its original 2016
32 12-Day Pre-Primary Report. The Committee acknowledges the inaccurate reporting but states
33 that it has not violated the Federal Election Campaign Act of 1971, as amended (the “Act”),
34 because it filed reports on time and filed amendments to correct mistakes when the mistakes
35 were found.¹ For the reasons set forth below, we recommend that the Commission open a MUR
36 and find reason to believe that the Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R.

¹ Jack Graham for U.S. Senate Resp. (Feb. 3, 2017).

1 § 104.3(b). Additionally, we recommend that the Commission enter into pre-probable cause
2 conciliation with the Committee and approve the attached conciliation agreement.

3 **II. FACTS**

4 The Committee is the principal campaign committee of John Collins Graham, who was
5 an unsuccessful candidate in the Republican Primary for the U.S. Senate seat from Colorado in
6 2016.² On June 13, 2016, the Committee filed its original 2016 12-Day Pre-Primary Report
7 covering the period from April 1, 2016, through June 8, 2016, which disclosed \$683,817 in
8 disbursements.³ On July 16, 2016, the Committee filed an Amended 2016 12-Day Pre-Primary
9 Report that disclosed \$936,388 in disbursements, an increase of \$252,571 over the original
10 amount reported.⁴

11 On October 5, 2016, RAD sent the Committee a Request for Additional Information
12 ("RFAI") seeking clarification regarding the substantial increase in disbursements disclosed on
13 the Amended 2016 12-Day Pre-Primary Report.⁵ On November 3, 2016, the Committee filed a
14 Miscellaneous Report ("Form 99") in response to the RFAI explaining that in the course of
15 reviewing reporting data, the Committee found several disbursement entries that were
16 improperly coded in its internal database.⁶

² See Jack Graham for U.S. Senate, Statement of Organization (Jan. 29, 2016),
<http://docquery.fec.gov/pdf/011/201602040200058011/201602040200058011.pdf>.

³ Referral at 1 (Jan. 10, 2017).

⁴ *Id.*

⁵ *Id.* at 1-2.

⁶ *Id.* at 2.

1 RAD referred the Committee to OGC, which notified the Committee of the referral.⁷ The
2 Committee's response acknowledges the inaccurate reporting but states that it has not violated
3 the Act because it filed reports on time and filed amendments to correct mistakes when the
4 mistakes were found.⁸ On May 2, 2017, OGC transferred the referral to the Alternative Dispute
5 Resolution Office ("ADRO") and notified the Committee.⁹ The Committee declined to
6 participate in ADR,¹⁰ so ADRO referred the Committee back to OGC.¹¹ The Committee filed a
7 supplemental response in which it repeats the explanation it previously offered.¹² The
8 Committee further asserts that the "compressed time-frame" between when the mistakes
9 occurred and when the report was due "gave us little lee-way to find and correct the
10 discrepancy;" the inaccurate report had no effect of the outcome of the election; and there was no
11 intent to advantage the campaign by misreporting disbursements.¹³

⁷ RAD referred the matter to OGC pursuant to the *2015-2016 RAD Review and Referral Procedures* at 74 (Standard 7) (the "Referral Procedures"). See Cover Memo to Referral at 1; Letter from Jeff S. Jordan, OGC, to Cheryl Klein, Treasurer for the Committee (Jan. 12, 2017); see also *Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters*, 74 Fed. Reg. 38,617 (Aug. 4, 2009).

⁸ Jack Graham for U.S. Senate Resp..

⁹ See Memorandum from Patricia C. Orrock and Lynn M. Fraser to the Commission, ADR 825 (May 11, 2017); Letter from Krista J. Roche, ADRO, to Cheryl Klein, Treasurer for the Committee (May 18, 2017).

¹⁰ Letter from Cheryl Klein, Treasurer for the Committee, to Krista J. Roche, ADRO (July 20, 2017) (noting that the Committee elected not to participate in ADR out of concern that it would not be able to "receive full recognition that the infraction was a completely inadvertent mistake that was corrected as soon as possible after it was discovered").

¹¹ See Memorandum from Krista J. Roche, ADRO, to Jeff S. Jordan, OGC (Aug. 15, 2017).

¹² Jack Graham for U.S. Senate Supp. Resp. at 1-2 (Aug. 7, 2017) ("Supp. Resp."). For instance, the Committee stated that when entering a \$250,754 payment for TV advertising into their internal database, the operator pressed "P" intending to select Subtype "Payment" but instead selected Subtype "Presidential Library" as the category of the disbursement. *Id.* at 2-3. This error caused the \$250,754 disbursement not to appear in the report pulled from the Committee's software that was used to create its 12-Day Pre-Primary Report. *Id.* The mistake was later found after the Committee did a broader data pull that included all Subtypes. *Id.* at 3. Once the Committee discovered the mistake, it amended its report to the Commission. The Committee has provided a copy of the internal report that helped identify the mistake. *Id.*, Appendix D.

¹³ Supp. Resp. at 1-2.

1 **III. LEGAL ANALYSIS**

2 The Act requires committee treasurers to file reports of receipts and disbursements in
3 accordance with the provisions of 52 U.S.C. § 30104.¹⁴ These reports must include, *inter alia*,
4 the total amount of disbursements.¹⁵

5 Here, the Committee did not comply with the Act's reporting requirements when it failed
6 to disclose disbursements totaling \$252,571 on its original 2016 12-Day Pre-Primary Report, an
7 election-sensitive report.¹⁶ The Committee's explanations for their inaccurate reporting are
8 unavailing. The Committee is ultimately responsible for filing accurate reports with the
9 Commission. Its lack of bad faith is not germane here as we are not recommending that the
10 Commission make a knowing and willful finding.¹⁷ Further, its other arguments, such as the fact
11 that the error did not have an effect on the election, do not excuse the violation.

12 We therefore recommend that the Commission open a MUR and find reason to believe
13 that the Committee violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b).

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¹⁴ 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1(a).

¹⁵ 52 U.S.C. § 30104(b)(4); 11 C.F.R. § 104.3(b).

¹⁶ Election-sensitive reports include pre-election reports for primary, general, and special elections. 11 C.F.R. § 111.43(d)(1).

¹⁷ See Factual & Legal Analysis at 5, MUR 7043 (Put Alaska First); Factual & Legal Analysis at 4, MUR 6966 (Democratic Party of Wisconsin).

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2 **V. RECOMMENDATIONS**

- 3 1. Open a MUR;
- 4 2. Find reason to believe that Jack Graham for U.S. Senate and Cheryl S. Klein in
5 her official capacity as treasurer violated 52 U.S.C. § 30104(b) and 11 C.F.R.
6 § 104.3(b);
- 7 3. Approve the attached Factual and Legal Analysis;
- 8 4. Enter into conciliation with Jack Graham for U.S. Senate and Cheryl S. Klein in
9 her official capacity as treasurer prior to a finding of probable cause to believe;
- 10 5. Approve the attached conciliation agreement; and
- 11 6. Approve the appropriate letter.

12
13 Lisa J. Stevenson
14 Acting General Counsel

15
16 Kathleen M. Guith
17 Associate General Counsel
18 for Enforcement

19
20
21 02-08-18
22 Date

23
24 BY: Stephen Gura
25 Stephen A. Gura
Deputy Associate General Counsel
for Enforcement

Mark Allen by SG

Mark Allen
Assistant General Counsel

Nicholas O. Mueller

Nicholas O. Mueller
Attorney

Attachments:

1. Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**

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4 **RESPONDENT:** Jack Graham for U.S. Senate **MUR:** _____
5 and Cheryl S. Klein in her official
6 capacity as treasurer
7

8 **I. INTRODUCTION**

9 This matter was generated based on information ascertained by the Federal Election
10 Commission ("Commission") in the normal course of carrying out its supervisory
11 responsibilities.¹ The Reports Analysis Division ("RAD") referred Jack Graham for U.S. Senate
12 and Cheryl S. Klein in her official capacity as treasurer ("Committee") to the Office of General
13 Counsel ("OGC") for failing to disclose disbursements totaling \$252,571 on its original 2016 12-
14 Day Pre-Primary Report. The Committee acknowledges the inaccurate reporting but states that it
15 has not violated the Federal Election Campaign Act of 1971, as amended (the "Act"), because it
16 filed reports on time and filed amendments to correct mistakes when the mistakes were found.²
17 For the reasons set forth below, the Commission finds reason to believe that the Committee
18 violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b).

19 **II. FACTS**

20 The Committee is the principal campaign committee of John Collins Graham, who was
21 an unsuccessful candidate in the Republican Primary for the U.S. Senate seat from Colorado in
22 2016.³ On June 13, 2016, the Committee filed its original 2016 12-Day Pre-Primary Report

¹ See 52 U.S.C. § 30109(a)(2).

² Jack Graham for U.S. Senate Resp. (Feb. 3, 2017).

³ See Jack Graham for U.S. Senate, Statement of Organization (Jan. 29, 2016),
<http://docquery.fec.gov/pdf/011/201602040200058011/201602040200058011.pdf>.

1 covering the period from April 1, 2016, through June 8, 2016, which disclosed \$683,817 in
2 disbursements.⁴ On July 16, 2016, the Committee filed an Amended 2016 12-Day Pre-Primary
3 Report that disclosed \$936,388 in disbursements, an increase of \$252,571 over the original
4 amount reported.⁵

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7 the Amended 2016 12-Day Pre-Primary Report.⁶ On November 3, 2016, the Committee filed a
8 Miscellaneous Report (“Form 99”) in response to the RFAI explaining that in the course of
9 reviewing reporting data, the Committee found several disbursement entries that were improperly
10 coded in its internal database.⁷

11 RAD referred the Committee to OGC, which notified the Committee of the referral. The
12 Committee’s response acknowledges the inaccurate reporting but states that it has not violated
13 the Act because it filed reports on time and filed amendments to correct mistakes when the
14 mistakes were found.⁸ The Committee filed a supplemental response in which it repeats the
15 explanation it previously offered.⁹ The Committee further asserts that the “compressed time-

⁴ Referral at 1 (Jan. 10, 2017).

⁵ *Id.*

⁶ *Id.* at 1-2.

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⁸ Jack Graham for U.S. Senate Resp.

⁹ Jack Graham for U.S. Senate Supp. Resp. at 1-2 (Aug. 7, 2017) (“Supp. Resp.”). For instance, the Committee stated that when entering a \$250,754 payment for TV advertising into their internal database, the operator pressed “P” intending to select Subtype “Payment” but instead selected Subtype “Presidential Library” as the category of the disbursement. *Id.* at 2-3. This error caused the \$250,754 disbursement not to appear in the report pulled from the Committee’s software that was used to create its 12-Day Pre-Primary Report. *Id.* The mistake was later found after the Committee did a broader data pull that included all Subtypes. *Id.* at 3. Once the Committee

1 frame” between when the mistakes occurred and when the report was due “gave us little lee-way
2 to find and correct the discrepancy;” the inaccurate report had no effect of the outcome of the
3 election; and there was no intent to advantage the campaign by misreporting disbursements.¹⁰

4 **III. LEGAL ANALYSIS**

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6 accordance with the provisions of 52 U.S.C. § 30104.¹¹ These reports must include, *inter alia*,
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10 election-sensitive report.¹³ The Committee’s explanations for their inaccurate reporting are
11 unavailing. The Committee is ultimately responsible for filing accurate reports with the
12 Commission. Its lack of bad faith is not germane here as the Commission is not making a
13 knowing and willful finding.¹⁴ Further, its other arguments, such as the fact that the error did not
14 have an effect on the election, do not excuse the violation.

15 Accordingly, the Commission finds reason to believe that the Committee violated
16 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.3(b).

discovered the mistake, it amended its report to the Commission. The Committee has provided a copy of the internal report that helped identify the mistake. *Id.*, Appendix D.

¹⁰ Supp. Resp. at 1-2.

¹¹ 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1(a).

¹² 52 U.S.C. § 30104(b)(4); 11 C.F.R. § 104.3(b).

¹³ Election-sensitive reports include pre-election reports for primary, general, and special elections. 11 C.F.R. § 111.43(d)(1).

¹⁴ See Factual & Legal Analysis at 5, MUR 7043 (Put Alaska First); Factual & Legal Analysis at 4, MUR 6966 (Democratic Party of Wisconsin).