



## I. BACKGROUND

The complaint in this Matter made a number of allegations. For some of them, OGC concluded there was insufficient evidentiary support for a reason-to-believe finding, a position adopted by the Commission.<sup>4</sup> We divided with our colleagues, however, on the question of whether the Commission should “[f]ind reason to believe that Rebuilding America Now and Ryan Call in his official capacity as treasurer violated 52 U.S.C. §§ 30116(a), 30118(a), 30104(b) by making and failing to report an excessive and prohibited in-kind contribution in the form of republishing the [2016 Donald] Trump campaign logo in a digital and television advertisement.”<sup>5</sup>

In 2016, Rebuilding America Now, an independent-expenditure-only political committee, ran an advertisement that contained eight seconds of footage that displayed the Donald Trump for President, Inc. campaign logo. OGC contended that because Rebuilding America Now included this logo in its own ads, it made an in-kind contribution to the Trump for President campaign committee by republishing campaign materials under 11 C.F.R. § 109.23(a).<sup>6</sup>

That regulation implements statutory language stating that “the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered an expenditure.”<sup>7</sup> However, 11 C.F.R. § 109.23(a) states that the republication of campaign materials “shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure.”<sup>8</sup> As we have noted elsewhere, there are “serious legal

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necessarily states the agency’s reasons for acting as it did”) (citation omitted); *Campaign Legal Ctr. & Democracy 21 v. Fed. Election Comm’n*, 952 F.3d 352, 355 (D.C. Cir. 2020).

<sup>4</sup> First Gen’l Counsel’s Report (“FGCR”) at 37-38, MUR 7147 (Make Am. Number 1, *et al.*), June 5, 2019. Where OGC recommends that the Commission “[t]ake no action at this time,” it is implicitly stating that there is not enough evidence to find RTB on the record before us, although investigation into another aspect of the MUR may unearth further support for the complaint’s allegations. Because we disagreed that the circumstances warranted further investigation, we voted to dismiss these insufficiently supported allegations.

<sup>5</sup> *Id.* at 37.

<sup>6</sup> *Id.* at 23-24.

<sup>7</sup> 52 U.S.C. § 30116(a)(7)(B)(iii).

<sup>8</sup> 11 C.F.R. § 109.23(a).

infirmities in th[is] regulation,”<sup>9</sup> which ignores the coordination element and analysis required by the plain text of the statute and other portions of our regulations in order for republication to constitute an in-kind contribution.<sup>10</sup>

OGC also requested that we authorize an expansive investigation into “the circumstances surrounding the [alleged] republication of the Trump campaign logo” in Rebuilding America Now’s advertisements.<sup>11</sup> It also advised us that the statute of limitations would begin to run on April 25, 2021 and expire entirely by July 19, 2021—146 days from the date on which we undertook the preliminary votes in this matter.<sup>12</sup>

## II. LEGAL ANALYSIS

We do not share OGC’s belief that the mere display of a candidate’s logo constitutes republication of campaign materials, and we were unwilling to hitch our consideration of this Matter to 11 C.F.R. § 109.23(a), a flawed regulation that we believe exposes the Commission to significant litigation risk.

And while OGC did suggest that the activity here could plausibly run afoul of our garden-variety coordination regulation, 11 C.F.R. § 109.21, it also advised us that it did “not have sufficient information to conclude whether the republication” of the logo “was coordinated with the Trump campaign under section 109.21, though investigation of the circumstances surrounding the” production and distribution of the ad might “provide such information.”<sup>13</sup>

But the clock simply would not allow us to conduct the investigation that OGC believed necessary. Even the swiftest of investigations would not have left us with enough time to return to this Matter, revisit our RTB vote, and either conciliate or pursue a probable cause finding and eventual litigation, before the statute of limitations expired in July.

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<sup>9</sup> Statement of Reasons of Chairman Dickerson and Comm’rs Cooksey and Trainor at 2, MUR 7139 (Maryland USA), Feb. 17, 2022; *id.* at n.9.

<sup>10</sup> *See, e.g.*, 11 C.F.R. § 109.21(c)(2), (d)(6).

<sup>11</sup> FGCR at 36.

<sup>12</sup> *Id.* at 1 (“EXPIRATION OF SOL: Earliest: 4/25/21 Latest: 7/19/21”).

<sup>13</sup> FGCR at 24.

Moreover, in February 2021, at one of our first executive sessions after the reconstitution of the quorum, our enforcement resources were unusually meager. At that time, as has been noted publicly, the Commission faced a substantial backlog of enforcement cases.<sup>14</sup> In that position, we determined that our agency's enforcement resources would be best spent addressing other matters where the Commission had a realistic chance of vindicating the interests of the United States in a timely fashion.<sup>15</sup>

## CONCLUSION

For the foregoing reasons, we voted to dismiss this Matter.



Allen Dickerson  
Chairman

April 11, 2022

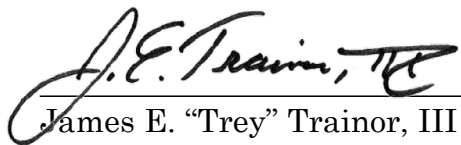
Date



Sean J. Cooksey  
Commissioner

April 11, 2022

Date



James E. "Trey" Trainor, III  
Commissioner

April 11, 2022

Date

<sup>14</sup> See Statement of Comm'r Weintraub on the Senate's Votes to Restore the Federal Election Commission to Full Strength, Dec. 9, 2020, available at: <https://www.fec.gov/resources/cmscontent/documents/2020-12-Quorum-Restoration-Statement.pdf>.

<sup>15</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985)