



FEDERAL ELECTION COMMISSION
 1050 FIRST STREET, N.E.
 WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 8056
 Bob Healey for Congress, *et al.*)
)

**STATEMENT OF REASONS OF
 COMMISSIONERS ALLEN J. DICKERSON AND JAMES E. “TREY” TRAINOR, III**

INTRODUCTION

This Matter concerns allegations that Robert Healey, Jr., his Congressional campaign committee, and the Viking Yacht Company violated the Federal Election Campaign Act of 1971 (“FECA” or “Act”), as amended, by making and accepting in-kind corporate contributions “in the form of corporate logo and facilities use,” and that Mr. Healey and Viking conspired together to violate the Act’s “soft money” prohibitions.¹ On the recommendation of our Office of General Counsel (“OGC”), four of our colleagues voted to invoke our prosecutorial discretion regarding those claims.²

We disagreed. Respondents’ actions were lawful, and we accordingly voted that there was no reason to believe (“no-RTB”) they had violated FECA. We provide this Statement to explain our disagreement with our colleagues.³

I. Standard of Review

FECA provides that the Commission may “vote to dismiss” a complaint, or find, “by an affirmative vote of 4 of its members, that it has reason to believe a person has

¹ First Gen’l Counsel’s Report (“FGCR”) at 13-14, MUR 8056 (Bob Healey for Congress, *et al.*), May 16, 2023.

² Certification at 1-2, MUR 8056 (Bob Healey for Congress, *et al.*), July 11, 2023; *Heckler v. Chaney*, 470 U.S. 821 (1985).

³ We voted with our colleagues, and in accord with OGC’s recommendation, to find no-RTB concerning internet posts produced by the Viking Yacht Company. Certification at 1, MUR 8056 (Bob Healey for Congress, *et al.*), July 11, 2023.

committed, or is about to commit, a violation.”⁴ The Commission has added additional voting options: (1) “[f]ind ‘reason to believe’... (2) dismiss the matter, (3) dismiss the matter with admonishment; or (4) find ‘no reason to believe’ a respondent has violated the Act.”⁵ And under current practice, our dismissal votes may also explicitly invoke the agency’s “prosecutorial discretion” where a matter does “not merit the additional expenditure of Commission resources.”⁶

Because none of these fine distinctions are present in the Act, commissioners and the public have had to grapple with their differences, if any. Our view is that, under current practice, the Commission should find no-RTB where a complaint fails to meet the RTB standard, whether because its allegations fail as a matter of law or because they are unsupported by sufficient evidence. Conversely, where a complaint does meet the RTB standard, the Commission is obligated to engage in a “complicated balancing” of factors, including whether “agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.”⁷

Here, we did not believe the RTB standard was met as a matter of law. “In such circumstances, [t]o have invoked prosecutorial discretion... would have implicitly suggested, contrary to our statute, that the Commission could have proceeded but declined to do so.”⁸

II. There Was No Reason To Believe Respondents Arranged An In-Kind Corporate Contribution.

The relevant portion of this Matter concerned four seconds in a video ad produced by Healey for Congress.⁹ This “digital advertisement... contains scenes from

⁴ 52 U.S.C. § 30109(a)(1)-(2).

⁵ Fed. Election Comm’n, “Statement of Policy Regarding Comm’n Action in Matters at the Initial Stage in the Enforcement Process,” 72 Fed. Reg. 12545, 12545 (Mar. 16, 2007) (“Initial Stage Policy”).

⁶ *Id.* at 12546.

⁷ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

⁸ Statement of Reasons of Vice Chair Dickerson and Comm’r Cooksey and Trainor at 4, MURs 7859/7860 (Citizens for Working Am./Jobs and Progress Fund), Dec. 17, 2021 (quoting Statement of Reasons of Vice Chair Dickerson and Comm’r Trainor at 3, MUR 6992 (Donald J. Trump, *et al.*), Aug. 31, 2021) (brackets and ellipses in original).

⁹ FGCR at 4-6.

inside a manufacturing facility in which Healey is seen wearing a polo shirt with the Viking logo visible on its front.”¹⁰ The complaint “posit[ed] that the manufacturing facility in the advertisement” was “a Viking facility.”¹¹

The theory of legal liability was simple. Wearing a polo shirt with a corporate logo, and filming in a corporate facility, involved an unlawful in-kind corporate contribution. And FECA prohibits “any corporation whatever” from “mak[ing] a contribution” in any federal election.¹² This ban encompasses so-called in-kind contributions, such as “the provisions of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods and services,” including “[s]ecurities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists.”¹³

Here, the relevant allegations fail for independent reasons.

First, there is no indication, beyond the complaint’s bare speculation, that facilities depicted in the advertisement belong to Viking.¹⁴ The fleeting backdrop is of a plain industrial space, indistinguishable from many thousands of others, without even an indication that it is used for the manufacture of watercraft. The mere suggestion that this location may belong to Viking plainly fails to meet the Commission’s longstanding understanding of the evidentiary standard at the RTB stage.¹⁵

Turning to Mr. Healey’s polo shirt: the logo on his shirt is unquestionably that of the Viking Yacht Company, even if the average viewer would have to pause the

¹⁰ *Id.* at 4.

¹¹ *Id.*

¹² 52 U.S.C. § 30118(a).

¹³ 11 C.F.R. § 100.52(d)(1).

¹⁴ The Complaint simply states that Mr. Healey “*appears* to have used the company’s manufacturing facility for an advertisement.” Complaint at 7 (emphasis supplied).

¹⁵ *See, e.g.*, Statement of Reasons of Comm’rs Mason, Sandstrom, Smith, and Thomas at 2, MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Comm.), Dec. 21, 2000 (“Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true”) (internal citations omitted); *cf. Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 392 (2000) (“We have never accepted mere conjecture as adequate to carry a First Amendment burden”).

video and squint to be certain.¹⁶ But the mere appearance of a corporate logo is not a violation of the Act. Rather, FECA explains that a “contribution” is “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.”¹⁷

As we have explained, the Supreme Court imposed a limiting construction on the Act’s terms.¹⁸ The phrase “anything of value,” in particular, must be read through “the limiting connotation created by the general understanding of what constitutes a political contribution. Funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary constitute a contribution. In addition, dollars given to another person or organization that are earmarked for political purposes are contributions under the Act.”¹⁹

Against this backdrop, our regulations provide a list of “goods and services” that constitute “in-kind contributions.”²⁰ At the threshold, neither logos nor anything remotely analogous is listed in the regulation.²¹ Nor do we believe that the brief and barely-legible display of a corporate logo on a shirt conforms with the Supreme Court’s “general understanding” of a contribution²² or our understanding that “‘things of value’ under the Act” are limited to goods and services “given in-kind that hold a specific monetary value and are available on the market.”²³ Without additional evidence to the contrary, there was no reason to believe that Healey’s fleeting display of Viking’s logo had any value to his campaign whatsoever.

¹⁶ FGCR at 10 (“Both Responses note, and [OGC’s] review of the digital advertisement confirms, that the Viking logo appears in the digital advertisement for approximately four seconds and that the Viking logo is not legible for the majority of those four seconds”).

¹⁷ 52 U.S.C. § 30101(8)(A)(i).

¹⁸ Statement of Reasons of Chairman Dickerson and Comm’rs Cooksey and Trainor at 5-7, MURs 7645/7663/7705 (Donald J. Trump, *et al.*), Aug. 31, 2022; Statement of Reasons of Vice Chair Dickerson and Comm’rs Cooksey and Trainor at 10, MUR 7271 (Dem. Nat’l Comm.), June 10, 2021.

¹⁹ *Buckley v. Valeo*, 424 U.S. 1, 23, n.24 (1976) (*per curiam*).

²⁰ 11 C.F.R. § 100.52(d)(1).

²¹ *Id.* (listing “securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists” as illustrative examples).

²² *Buckley*, 424 U.S. at 23, n.24.

²³ Statement of Reasons of Chairman Dickerson and Comm’rs Cooksey and Trainor at 6, MURs 7645/7663/7705 (Donald J. Trump, *et al.*), Aug. 31, 2022.

Furthermore, contributions are gifts, not bargained-for exchanges. And the Commission has found that the provision of a candidate’s “participation” and “likeness” in a nonprofit mailer serves as “adequate consideration” to offset allegations of an illegal in-kind contribution.²⁴ The same logic applies here. Healey’s shirt is just as much an endorsement of Viking as it is Viking’s endorsement of him. Even if Healey wore that particular polo shirt at Viking’s suggestion or instruction, there was (extremely slight) value on both sides of the transaction.

Accordingly, we do not believe Healey’s use of the Viking’s corporate logo qualified as an in-kind contribution.

III. There Was No Reason To Believe These Facts Constituted A “Soft Money” Violation

Finally, the complaint alleged that these four seconds of footage violated the Act’s “soft money” ban.²⁵ In campaign finance parlance, money raised pursuant to a source-and-amount limit (such as the \$3,300 limit an individual may give, per election, to a candidate committee) is “hard money.” Money raised and spent outside those limits is known as “soft money.”

Under the Act, candidates are generally prevented from raising or spending soft money.²⁶ To prevent circumvention of this bar, the Act also provides that an “entity directly or indirectly established, financed, maintained, or controlled by or acting on behalf of 1 or more candidates...shall not...solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.”²⁷

The complaint alleged that because Mr. Healey served as the chairman of Viking, Viking was “controlled by” him, and therefore the alleged facilities use and logo display constituted the solicitation, receipt, direction, transfer, or spending of “funds in connection with an election to Federal office” which were not “subject to the limitations, prohibitions, and reporting requirements of this Act.”²⁸

²⁴ Statement of Reasons of Chair Lindenbaum, Vice Chairman Cooksey, and Comm’rs Dickerson and Trainor at 4, MUR 7943 (Common Good Va.), July 27, 2023.

²⁵ 52 U.S.C. § 30125(e)(1).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*; *cf.* Comp. at 7.

We disagree for two reasons.

First, the soft money ban does not include the “anything of value” catch-all that applies to contributions. Rather, it is expressly limited to “funds,” a term the Act repeats throughout its discussion of soft money. The alleged use of company facilities and the fleeting appearance of a corporate logo are not “funds” within the ordinary understanding of that term, because they neither take the form of, nor consist of, money.²⁹ That should have been the end of the analysis.³⁰ Efforts to expand the scope of the soft money prohibition to reach intangible or in-kind goods and services founder on the plain text of the statute.

Second, even if the statutory and regulatory language were unclear, we would decline to stretch the Act to reach simple corporate images like the logo here. While *de minimis* in this case, business owners routinely build their campaign messaging around their business backgrounds and corporate expertise. The Act does not require, and prudence does not support, imposing a draconian rule that would treat a business owner’s use of corporate branding as a prohibited in-kind contribution. We cannot identify a governmental interest sufficient to justify the clear chill that rule would impose on candidates’ ability to effectively communicate their preferred message with the public.

²⁹ See *United States v. Murgio*, 209 F.Supp.3d 698, 707 (S.D.N.Y. 2016) (“The ordinary meaning of ‘funds,’ according to Webster’s Dictionary, is ‘available pecuniary resources.’ ‘Pecuniary’ is defined as ‘taking the form of or consisting of money.’ And ‘money’ in turn, is defined as ‘something generally accepted as a medium of exchange, a measure of value, or a means of payment’”) (quoting Webster’s Third Int’l Dictionary at 921, 1458, 1663 (2002)).

³⁰ Our regulations are not to the contrary, merely tracking the Act’s invocation of “funds,” and defining “[f]ederal funds” to “mean funds that comply with the limitations, prohibitions, and reporting requirements of the Act” and “[n]on-federal funds” to “mean funds that are not subject to the limitations and prohibitions of the Act.” 11 C.F.R. §§ 300.2(g) and (k); 300.60, 300.61.

CONCLUSION

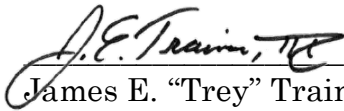
Accordingly, we determined that there was no reason to believe that the Respondents gave or received illegal in-kind corporate contributions or violated FECA's soft money rules.



Allen J. Dickerson
Commissioner

August 17, 2023

Date



James E. "Trey" Trainor, III
Commissioner

August 17, 2023

Date