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October 26, 2018

Mr. Jeff S. Jordan
Federal Election Commission
Office of Complaints Examination and Legal Administration
Attention: Christal Dennis, Paralegal
1050 First Street, NW
Washington, D.C. 20463

Re: Matter Under Review 7443 (Twitter, Inc.)

Dear Mr. Jordan:

On August 7, 2018, the Federal Election Commission (“FEC” or “Commission”) notified our client, Twitter, Inc. (“Twitter”), of a complaint filed by Friends of Matt Gaetz, the campaign committee of a Republican congressional candidate in Florida.

The complaint’s central allegation is that Twitter violated the Federal Election Campaign Act of 1971, as amended (“FECA”) by so-called “shadow-bann[ing]” conservative and Republican viewpoints from its free, “interactive-news coverage website.”¹ That claim is belied by the facts and directly contradicted by Twitter’s CEO, who recently testified to Congress that Twitter does not “consider political viewpoints, perspectives, or party affiliation in any of [its] policies or enforcement decisions, period.”² The complaint is also legally flawed, and fatally so.

The Gaetz campaign complains of so-called “shadowbanning” that in reality was no ban at all. Congressman Gaetz was never banned from Twitter, and his Tweets were never hidden from his followers or the public. Instead, the complaint arises from Twitter’s predictive typing function: before users hit enter to initiate a search, Twitter auto-suggests certain accounts as they type in the search box. Properly understood, the campaign’s complaint is that, although Congressman Gaetz’s account was always one of the results returned when users hit “enter” after typing search text, there was a brief time this summer when his account did not appear as an auto-suggested predictive result as users were in the middle of typing their queries. This was a technical and nonpartisan issue with Twitter’s predictive typing function that was swiftly

¹ Compl. ¶ 2.

² *Twitter: Transparency and Accountability*, 115th Cong. (Sept. 5, 2018), Transcript of Proceedings before the U.S. House Comm. on Energy and Commerce, at <https://docs.house.gov/meetings/IF/IF00/20180905/108642/HHRG-115-IF00-Transcript-20180905.pdf> (“Hearing Transcript”).

Mr. Jeff S. Jordan
 October 26, 2018
 Page 2

corrected. It was limited in duration and scope and affected liberals, conservatives, and non-political actors alike.

This technical issue had no political purpose or basis – it was part of a larger, platform-wide Twitter effort to increase the quality of discourse it hosts. Under the FECA, activities undertaken for non-political business reasons are not “for the purpose of influencing an election” and, therefore, do not qualify as a regulated contribution or expenditure under the FECA. Moreover, and contrary to the Gaetz campaign’s allegations, ongoing Twitter conversations are not the type of single-event, face-to-face “debates” contemplated by the Commission’s debate regulations.

Given these facts, which are further detailed on the following pages, Twitter respectfully requests that the Commission find no reason to believe that Twitter violated the FECA and dismiss this matter.³

FACTUAL BACKGROUND

Twitter was incorporated in Delaware in April 2007.⁴ While its principal offices are in San Francisco, California, the company has over 3,000 full-time employees and 35 offices worldwide.⁵ Twitter also has 335 million active users and ranks as one of the largest social networks in the world.⁶ All 100 senators, 50 governors, and nearly every Member of the House of Representatives currently reach their constituents through Twitter accounts.⁷

At its core, Twitter “stands for freedom of expression,”⁸ and the principle that “every voice has the power to impact the world.”⁹ Twitter has been called a “powerful tool for democracy”¹⁰ and “has bolstered grassroots conversations, disrupted the top-down nature of political leadership and thought, and has given voice to groups long hidden on the political

³ At the outset, we note that much of the complaint consists of errant and irrelevant statements about Twitter and the services it provides to users. These statements appear to have no bearing on the three “Counts” at the end of the complaint. *See Compl. ¶¶ 64-89.* This response will address the legal claims in those three “Counts.” If the Commission believes any other portion of the complaint merits attention, we are available to supplement this response.

⁴ Twitter, *2018 Annual Report*, at <http://www.viewproxy.com/Twitter/2018/AnnualReport2017.pdf>.

⁵ *See id.*; Twitter, *Our Company*, at https://about.twitter.com/en_us/company.html.

⁶ *See Twitter: Transparency and Accountability*, 115th Cong. (Sept. 5, 2018), Testimony of Jack Dorsey, Twitter Chief Executive Officer, before the U.S. House Comm. on Energy and Commerce at 3, at <https://docs.house.gov/meetings/IF/IF00/20180905/108642/HHRG-115-IF00-Wstate-DorseyJ-20180905.pdf> (“Dorsey Testimony”).

⁷ *Id.* at 2.

⁸ Bridget Coyne, *Empowering Freedom of Expression for National Voter Registration Day* (Sept. 27, 2017), at https://blog.twitter.com/official/en_us/topics/events/2017/national-voter-reg-day-2017.html.

⁹ Twitter, *Our Values*, at https://about.twitter.com/en_us/values.html.

¹⁰ Doug Gross, *5 Ways Twitter Changed How We Communicate*, CNN (Mar. 21, 2011), at <http://www.cnn.com/2011/TECH/social.media/03/21/twitter.birthday.communication/index.html>.

Mr. Jeff S. Jordan
 October 26, 2018
 Page 3

periphery [like] the Tea Party movement.”¹¹ Twitter regularly works to “live-stream congressional hearings and political events, providing the public access to important developments in our democracy.”¹² The company also partners with entities like The Pew Charitable Trust to promote voter registration and to help voters identify their polling locations.¹³

Conservatives, in particular, “have a strong presence on Twitter.”¹⁴ In 2017, for example, there were 59.5 million Tweets about Make America Great Again, or MAGA,¹⁵ and conservative commentators like Bill O'Reilly, Michelle Malkin, and Laura Ingraham each have over two million followers.¹⁶ Twitter's sales team also works with hundreds of conservative advertisers.¹⁷

Twitter is continuously working to improve the health of the conversations it hosts.¹⁸ “[A]buse, malicious automation, and manipulation” are concerns,¹⁹ with “harassment, troll armies, manipulation through bots and human-coordination, misinformation campaigns, and increasingly divisive echo chambers” receiving particular attention.²⁰ Historically, Twitter focused most of its efforts on removing content that violated Twitter's rules.²¹ But earlier this year, Twitter announced that it was broadening its work toward “building a systemic framework to help encourage more healthy debate, conversations, and critical thinking.”²² In particular, Twitter began employing “technology to be more aggressive in detecting and minimizing the visibility of certain types of abusive and manipulative behaviors.”²³ These automated methods rely upon thousands of different behavioral signals – none of them partisan or political – to preemptively detect abuse and reduce the reach of abusive behavior on the platform. Examples of such signals include: accounts that do not have a confirmed email address associated with them, simultaneous registration from multiple accounts, accounts that repeatedly Tweet about

¹¹ Van Newkirk, *The American Idea in 140 Characters*, The Atlantic (Mar. 24, 2016), at <https://www.theatlantic.com/politics/archive/2016/03/twitter-politics-last-decade/475131/>.

¹² Dorsey Testimony at 2.

¹³ See Bridget Coyne, *Staying Connected to #ElectionDay with Twitter* (Nov. 7, 2017), at https://blog.twitter.com/official/en_us/topics/events/2017/electionday2017.html; Bridget Coyne, *Empowering Freedom of Expression for National Voter Registration Day*.

¹⁴ Dorsey Testimony at 6.

¹⁵ See *id.*

¹⁶ See <https://twitter.com/BillOReilly>; <https://twitter.com/michellemalkin>; <https://twitter.com/IngrahamAngle>.

¹⁷ See Dorsey Testimony at 6.

¹⁸ See Del Harvey, *Serving Healthy Conversation* (May 15, 2018), at https://blog.twitter.com/official/en_us/topics/product/2018/Serving_Healthy_Conversation.html.

¹⁹ Dorsey Testimony at 1.

²⁰ <https://twitter.com/jack/status/969234279321419776>.

²¹ See Dorsey Testimony at 2.

²² Tweet of Jack Dorsey (@jack) at 7:33 A.M. on Mar. 1, 2018, at <https://twitter.com/jack/status/969234281653460992>. See also Dorsey Testimony at 3. Indeed, “[i]ndependent researchers and some investors long have criticized the company for not acting more aggressively to address what many considered a rampant problem with bots, trolls and other accounts used to amplify disinformation.” Craig Timberg and Elizabeth Dwoskin, *Twitter Is Sweeping Out Fake Accounts Like Never Before, Putting User Growth at Risk*, Wash. Post (July 6, 2018).

²³ Dorsey Testimony at 3.

Mr. Jeff S. Jordan
 October 26, 2018
 Page 4

accounts that do not follow them, and the amount of blocking or muting that occurs in connection with a particular account.²⁴

Twitter's use of these signals has led to positive results, increasing the overall quality of conversations on the platform. One such measure of success is the number of abuse reports, which fall when conversational health improves. Upon the implementation of these health-focused algorithms, abuse reports fell by the highest amount in Twitter's history.²⁵ Notwithstanding these successes, the rollout was not perfect. Interpreting and processing behavioral signals is "an extremely complex challenge facing everyone applying artificial intelligence,"²⁶ and "algorithmic fairness and fair machine learning [remain] active and substantial research topics in the machine learning community."²⁷

In July 2018, Twitter publicly acknowledged that one undesired consequence of the platform-wide rollout of its abuse detection technology was that some accounts were "not being auto-suggested even where people were searching for their specific name" in the Twitter search box, even though those accounts would appear in search results.²⁸ This was, in large part, not a function of what the account holders themselves were doing; rather, it was because the algorithms would not auto-suggest accounts if they were *associated with* other accounts that already had high indicia of misuse or abuse. The then-operating assumption was that accounts associated with other abusive accounts are themselves more likely to be abusive. Here, Congressman Gaetz's Twitter account was one of many that disappeared from the auto-suggestion list upon rollout, not because of the content of his Tweets, but rather because of the behavior of other Twitter accounts that were interacting with the Congressman's account (e.g., when those other accounts had been repeatedly blocked, muted or exhibited any of the other above-described behavior signals employed by the algorithms). This was not an isolated or targeted event: the issue impacted 600,000 accounts across the globe – including accounts belonging to Republicans and Democrats, but in greatest number to non-partisan and non-political actors.²⁹

²⁴ *Id.* at 5-6; Vijaya Gadde and Kayvon Beykpour, *Setting the Record Straight on Shadow Banning* (July 26, 2018), at https://blog.twitter.com/official/en_us/topics/company/2018/Setting-the-record-straight-on-shadow-banning.html.

²⁵ Dorsey Testimony at 6.

²⁶ Hearing Transcript, lines 279-280.

²⁷ Dorsey Testimony at 6; *see also* Del Harvey, *Serving Healthy Conversation* (explaining that "[t]his technology and our team will learn over time and will make mistakes," that "[t]here will be false positives and things that we miss," and that Twitter's "goal is to learn fast and make our processes and tools smarter").

²⁸ Dorsey Testimony at 7. The complaint misleadingly refers to this issue as "shadow-banning," but there was in fact no ban. Congressman Gaetz could still post and transmit Tweets to his followers, his Tweets would still appear in search results, and new users could seek out his Tweets if they knew the Congressman's Twitter handle. *See* Vijaya Gadde and Kayvon Beykpour, *Setting the Record Straight on Shadow Banning* (explaining that Twitter does "not shadow ban" and that the algorithm at issue here "only impacted [Twitter's] search auto-suggestions. The accounts, their Tweets and surrounding conversation about those accounts were showing up in search results").

²⁹ Dorsey Testimony at 7.

Mr. Jeff S. Jordan
 October 26, 2018
 Page 5

The situation was quickly elevated within Twitter's leadership, which took prompt action, reasoning that it was unfair to not auto-suggest individual users' accounts because of the actions of *others* interacting with them.³⁰ Accordingly, and within 24 hours, Twitter's leadership resolved the issue by disabling the rollout with respect to search predictions, thereby restoring the original predictive typing functionality which did not screen out user accounts.³¹ This was just one of many adjustments Twitter has made over the years to ensure that its efforts to improve the quality of Twitter conversations are implemented fairly.³²

In sworn testimony before Congress concerning these developments, Twitter CEO Jack Dorsey confirmed not only that the behavioral signals "that Twitter utilizes do[] not consider in any way political views or ideology,"³³ but also that Twitter does not "consider political viewpoints, perspectives, or party affiliation in any of our policies or enforcement decisions, period."³⁴ Indeed, the very "purpose of Twitter is to serve the public conversation, and [the company] does not make value judgments based on personal beliefs."³⁵ In fact, "from a simple business perspective and to serve the public conversation, Twitter is incentivized to keep all voices on the platform."³⁶ In short, as a "foundational" matter, Mr. Dorsey unequivocally affirmed that Twitter does "not shadowban anyone based on political ideology."³⁷

THE LAW

As a general statutory matter, corporations are prohibited from making a "contribution" or "expenditure" in connection with a federal election.³⁸ The term "contribution" is defined as, among other things, "anything of value made by any person for the purpose of influencing any election for Federal office."³⁹ Similarly, the term "expenditure" includes "anything of value, made by any person for the purpose of influencing any election for Federal office."⁴⁰ Both terms contain a media exemption that exempts "news story, commentary, [and] editorial" content.⁴¹ Federal law also "provides that an expenditure made by any person 'in cooperation, consultation,

³⁰ Hearing Transcript, lines 271-273 (explaining that Twitter's "technology was using . . . decision-making criteria that considers the behavior of people following these accounts. We decided that wasn't fair and we corrected it."); Vijaya Gadde and Kayvon Beykpour, *Setting the Record Straight on Shadow Banning* (explaining that, in general, "the issue had more to do with how other people were interacting with these representatives' accounts than the accounts themselves").

³¹ Dorsey Testimony at 7.

³² *Id.* at 6-7; Vijaya Gadde and Kayvon Beykpour, *Setting the Record Straight on Shadow Banning*.

³³ Dorsey Testimony at 6.

³⁴ Hearing Transcript, lines 238-241.

³⁵ Dorsey Testimony at 11.

³⁶ *Id.* at 1.

³⁷ *Id.*

³⁸ 52 U.S.C. § 30118.

³⁹ *Id.* § 30101(8)(A).

⁴⁰ *Id.* § 30101(9)(A).

⁴¹ See *id.* § 30101(9)(B); 11 C.F.R. § 100.73.

Mr. Jeff S. Jordan
 October 26, 2018
 Page 6

or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents' constitutes an in-kind contribution.”⁴²

The FEC also regulates candidate debates. Should an organization wish to stage a “debate,” any staging-related activities will be exempt from the definitions of “contribution” and “expenditure” if the debate is conducted in accordance with certain regulatory criteria.⁴³

DISCUSSION

I. Twitter Did Not Make a Corporate Contribution or Expenditure.

Counts I and II of the complaint allege that Twitter made a prohibited corporate contribution and failed to report expenditures to the Commission when Congressman Gaetz’s Twitter account was not auto-suggested in the Twitter search box. However, an activity must be undertaken “for the purpose of influencing an election” for it to constitute a contribution or expenditure.⁴⁴ As both the courts and the Commission have made clear, activities undertaken for non-political reasons are not “for the purpose of influencing an election” and, therefore, do not qualify as regulated contributions or expenditures.⁴⁵

Here, as the sworn testimony of Twitter’s CEO confirms, the auto-suggestion issue affected Republican, Democratic, and non-partisan accounts alike, and was not an attempt to influence an election. Instead, it was the result of Twitter’s ongoing efforts to improve the overall quality of the discourse on its platform. The technical component of these efforts that affected auto-suggested search results was developed, and ultimately abandoned, for business reasons only, and the complaint offers no evidence to the contrary. Thus, as a matter of fact and law, Twitter’s actions did not constitute a regulated contribution or expenditure.

For that reason, the Commission need not examine Counts I and II any further and should dismiss them. But if the Commission is interested in any of the related claims made there, we now show why they are flawed too.

⁴² First General Counsel’s Report, Matters Under Review 7199, 7219, 7242 (Patrick Murphy), Nov. 2, 2017.

⁴³ See 11 C.F.R. § 110.13.

⁴⁴ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (explaining that “the FECA regulates activity that is ‘unambiguously related to the campaign of a particular federal candidate’”).

⁴⁵ See, e.g., *Orloski v. FEC*, 795 F.2d 156, 160 (D.C. Cir. 1986); FEC Adv. Op. 2012-31 (AT&T) (finding no in-kind contribution where business’s activity “reflects commercial considerations and does not reflect considerations outside of a business relationship”); FEC Adv. Op. 2012-22 (skimmerhat) (concluding that no contribution would result where company provided Internet services “on a commercial basis only” and where the company “has a vested commercial interest in seeking participation of users from all political parties and ideological backgrounds”); Factual & Legal Analysis in Matter Under Review 7163 (Citizens for Joe Miller) (“explaining that a thing of value given to a campaign is not a ‘contribution’ if it was not for the purpose of influencing an election”); Factual and Legal Analysis in MUR 6586 (World Wrestling Entertainment, Inc.) (finding no contribution where corporation’s intent was to protect its business reputation).

Mr. Jeff S. Jordan
 October 26, 2018
 Page 7

First, contrary to the complaint’s allegations, Twitter did not take away or shut down Congressman Gaetz’s Twitter account. Followers and those who knew Congressman Gaetz’s Twitter handle still viewed his account and the individual Tweets as normal; they could “retweet” them to their own followers if they liked. His Tweets continued to appear in search results, as did his account. The algorithm merely affected the appearance of his and certain other Twitter accounts as auto-populated predictive entries in a dropdown box, a mere convenience Twitter provides. Twitter was not, as the complaint alleges, “taking disfavored candidates [sic] accounts away,”⁴⁶ or even removing them from search results.

Second, the complaint claims that Twitter has made a prohibited corporate in-kind contribution to certain unspecified opponents of Republican candidates. But an in-kind contribution of the sort the Gaetz campaign alleges would require Twitter to implement the auto-suggest algorithm in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, [an opposing candidate’s] authorized political committee[] or [its] agents.”⁴⁷ The decision to implement this algorithm here, however, was not undertaken at the suggestion of, after substantial discussions with, or with the material involvement of his opponents, as required by the Commission’s regulations.⁴⁸ The complaint does not allege (nor could it) that any such conduct – much less actual “coordination” – occurred.

Third, Twitter qualifies for the so-called press exemption of federal campaign finance law, with even the complaint acknowledging that Twitter is “an interactive-news coverage website” and a “news website.”⁴⁹ While the complaint contends that suppressing Congressman Gaetz’s views “does not amount to a legitimate press function,”⁵⁰ media entities have no obligation to carry or facilitate his views. The media exemption excludes from regulation “any cost incurred in covering or carrying” news stories,⁵¹ and the Commission has – in no uncertain terms – made clear that reviewing the “competing claims of parties” and “choos[ing] which to feature, investigate or address in news, editorial and opinion coverage” is part of the “normal press function” exempt from regulation.⁵²

These and other arguments – including those grounded in the First Amendment and the Communications Decency Act that are addressed in Twitter’s response to Matter Under Review 7447 and incorporated here by reference – preclude a finding of a violation by Twitter. Accordingly, the complaint should be dismissed.

⁴⁶ Compl. ¶ 72.

⁴⁷ See *supra* at 5-6.

⁴⁸ See 11 C.F.R. 109.21(d).

⁴⁹ Compl. ¶¶ 11, 12.

⁵⁰ *Id.* ¶ 73.

⁵¹ 11 C.F.R. § 100.73.

⁵² Statement of Reasons of Commissioners Darryl R. Wold, Danny L. McDonald, David M. Mason, Karl J. Sandstrom, and Scott E. Thomas, Matters Under Review 4929, 5006, 5090, and 5117 (ABC, CBS, NBC, New York Times, Los Angeles Times, and Washington Post et al.) (Dec. 20, 2000).

Mr. Jeff S. Jordan
 October 26, 2018
 Page 8

II. Tweets Are Not FEC-Regulated “Debates.”

Lastly, the complainant argues in Count III that Twitter’s role as a “modern public square . . . where political candidates gather to debate their platforms” makes Twitter subject to the FEC’s debate regulation. But this argument fundamentally misapprehends the type of “debate” the FEC regulates.

When the Commission established the rules for “candidate debates,” it did so with the “historical, traditional concept of candidate debates in mind.”⁵³ The Commission has further underscored that an FEC-regulated debate is a single “event” rather than a months-long series of conversations,⁵⁴ with an “inherent characteristic” of such events being a “face-to-face confrontation.”⁵⁵ In other words, “a debate does not consist of a series of candidate appearances at separate times over the course of a longer event.”⁵⁶

A series of Tweets by candidates is far removed from an FEC-regulated “debate.” They are not a single designated event like those the Commission sought to regulate, and Tweets do not result in a “face-to-face confrontation.” Instead, candidates engage opponents on Twitter from their home, office, or on the road at times of their choosing through various forms of electronic and other media. Such ongoing discussions – where candidates respond potentially hours or days later and from miles away over the course of the entire campaign – are simply outside the regulation.⁵⁷ Finally, and importantly, the complainant’s ability to engage in any so-called debate was not impaired. His Tweets were not removed from Twitter and could be viewed, replied to, retweeted, and interacted with by all users at all times. Any problems with the search auto-suggest function have no bearing on any debate.

In any event, the FEC’s debate regulation is an exception that allows the debate organizer to act where it may otherwise be making a regulated contribution or expenditure. As explained in the previous section, Twitter’s actions constituted neither. Therefore, there is no need for the Commission to consider application of the debate regulation here; Twitter’s activities were permissible in the first instance.

⁵³ FEC Adv. Op. 1986-37 (Nat’l Conservative Foundation) (citing, *inter alia*, the Lincoln-Douglas debates and the 1960, 1976, 1980, and 1984 presidential debates); *see also* Proposed Regulations, 44 Fed. Reg. 59,162 (Oct. 12, 1979) (confirming that the regulation was created in response to “the issues presented by the League of Women Voters in the 1976 sponsorship of [three nationally-televised] presidential debates”).

⁵⁴ 60 Fed. Reg. 64,260, 64,261 (Dec. 14, 1995).

⁵⁵ FEC Adv. Op. 1986-37.

⁵⁶ 60 Fed. Reg. at 64,262.

⁵⁷ Similarly, and to borrow upon the complaint’s analogy, an interstate highway does become a candidate “debate” site merely because opposing campaigns post competing billboards two miles apart from each other. Should the Commission, nonetheless, conclude that Tweets constitute a “debate,” we are available to supplement this response to demonstrate that Twitter’s platform complies with the requisite criteria for staging a debate exempt from the definitions of contribution and expenditure.

Mr. Jeff S. Jordan
 October 26, 2018
 Page 9

CONCLUSION

Twitter is committed to maintaining a robust platform for all citizens – be they conservative, liberal or somewhere in between – to engage and debate public issues, including those involving political candidates and policies. At the same time, and in facilitation of that goal, Twitter continually works to improve the experience for its users in a non-partisan way.

Earlier this year, Twitter rolled out technical means that significantly enhanced the quality of conversations on the platform. When Twitter learned that one minor aspect of the changes rendered results inconsistent with the company's business model and philosophy, it immediately changed course to bring its practices in line with its values. Twitter's actions were motivated by the business imperative to continually improve the Twitter user experience and not for the purpose of influencing any election.

In another recent enforcement matter involving the regulation of Twitter content, commissioners warned against sweeping Twitter “into a cumbersome and often speech-prohibitive” scheme of regulation that would “hamper free communication through the thousands of new and developing social media platforms.”⁵⁸ Rather than stifle non-partisan technological innovation at Twitter and similar companies, the Commission should act consistent with these previously-articulated principles, find no reason to believe that a violation of the FECA occurred, and dismiss this matter.

Sincerely,



Caleb P. Burns
 Andrew G. Woodson

⁵⁸ Matter Under Review 6911 (Lois Frankel for Congress), Statement of Reasons of Chairman Matthew S. Petersen and Comm'r Lee E. Goodman and Caroline C. Hunter (Apr. 12, 2016).