



FEDERAL ELECTION COMMISSION
Washington, DC 20463

BY ELECTRONIC MAIL ONLY
cburns@wiley.law

August 18, 2021

Caleb P. Burns, Esq.
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006

RE: MURs 7443, 7447 & 7550
Twitter, Inc.

Dear Mr. Burns:

On July 27, 2018, July 31, 2018, and October 31, 2018, the Federal Election Commission notified your client, Twitter, Inc., of complaints alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On August 10, 2021, the Commission found, on the basis of the information in the complaints, and information provided by your client, that there is no reason to believe your client violated 52 U.S.C. §§ 30104(c) or 30118 by making prohibited in-kind corporate contributions or failing to disclose independent expenditures. Accordingly, the Commission closed its files in these matters.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Nick Mueller, the attorney assigned to this matter, at (202) 694-1650 or nmueller@fec.gov.

Sincerely,

Mark Allen

Mark Allen
Assistant General Counsel

Enclosure

Factual and Legal Analysis

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Twitter, Inc. **MURs:** 7443, 7447, & 7550

I. INTRODUCTION

These matters involve allegations that the social media platform Twitter, Inc. (“Twitter”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by denying the Complainants the ordinary full use of the platform. The Complainants in MURs 7443 and 7447, who were federal candidates at the time of the alleged violations, argue that the limitations placed on their accounts served as prohibited in-kind corporate contributions to, or closed independent expenditures supporting, their political opponents.¹ The Complainant in MUR 7550, who was not a federal candidate, argues that the limits on his account benefited his political opponents of the candidates he supports.² The MUR 7443 and 7447 Complainants also argue that Twitter, as a platform for political debate, falls within the scope of the Commission’s debate regulations and that Twitter’s alleged failure to use objective criteria for selecting participants resulted in a prohibited corporate contribution.³

Twitter disputes both the factual and legal basis of these allegations, stating that it did not make contributions or expenditures because its actions were undertaken for legitimate commercial reasons and not for the purpose of influencing a federal election. As discussed below, Twitter has credibly explained that it had a commercial motivation for each of the actions

¹ MUR 7443 Compl. (July 27, 2018); MUR 7447 Compl. (July 31, 2018).

² MUR 7550 Compl. (Nov. 19, 2018).

³ MUR 7443 Compl. at 16-17; MUR 7447 Compl. at 19-20.

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1 at issue in these complaints, rather than an electoral purpose. Therefore, it appears that no
 2 contribution or expenditure was made. Further, while Twitter may be providing a forum for
 3 debate and discussion, it is not a “debate” within the meaning of Commission’s regulations.
 4 Accordingly, the Commission finds no reason to believe that Twitter violated 52 U.S.C.
 5 §§ 30104(c) or 30118 of the Act by failing to disclose independent expenditures or making
 6 prohibited in-kind corporate contributions.

7 **II. FACTS**

8 The complaint in MUR 7443, filed by the authorized committee of Congressman Matt
 9 Gaetz, alleges that Twitter “shadow banned” Gaetz, thereby making a prohibited, in-kind,
 10 corporate contribution to, or an undisclosed independent expenditure supporting, Gaetz’s
 11 opponents.⁴ At the time of the alleged shadow banning, Gaetz was a candidate in the 2018
 12 Republican primary in Florida’s First District. Gaetz bases his allegation on a news report in
 13 *Vice* in which journalists reported that they typed Gaetz’s name into Twitter’s search bar, but that
 14 it did not appear in the auto-populated drop-down of options.⁵ Not having his name appear in
 15 this search, which makes it more difficult to find his profile, is what Gaetz refers to as shadow
 16 banning.⁶ Gaetz alleges that “similarly situated Republicans” were also excluded from the

⁴ The term “shadow ban” generally refers to the situation in which a user is not notified that they have been removed from a social media platform and may continue to interact with the platform, but other users cannot view the content the banned user publishes. The term is also used in instances in which a social media platform has made it more difficult to locate a particular user’s published content or account, or in which that user’s content is otherwise less likely to appear on another user’s social media feed. See G.F., *What is “Shadowbanning”?*, THE ECONOMIST (Aug. 1, 2018), <https://www.economist.com/the-economist-explains/2018/08/01/what-is-shadowbanning>.

⁵ MUR 7443 Compl. at 10 (citing Alex Thompson, *Twitter is “Shadow Banning” Prominent Republicans Like the RNC Chair and Trump Jr.’s Spokesman*, VICE NEWS (July 25, 2018), https://news.vice.com/en_us/article/43paqq/twitter-is-shadow-banning-prominent-republicans-like-the-rnc-chair-and-trump-jrs-spokesman (“Thompson, *Twitter is ‘Shadow Banning’ Prominent Republicans*”). The article was updated on July 26, 2018 with a revised headline: “Twitter appears to have fixed ‘shadow ban’ of prominent Republicans like the RNC chair and Trump Jr.’s spokesman.”)

⁶ MUR 7443 Compl. at 1, 10.

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1 Twitter search drop-down list, but that no Democratic candidates were subject to such
 2 exclusion.⁷ Because of the routine use of Twitter in political campaigns, Gaetz alleges that this
 3 decreased visibility on the platform relative to his Democratic opponents constitutes a thing of
 4 value, and thus an in-kind contribution to his opponent or an independent expenditure on his
 5 opponent's behalf.⁸

6 The complaint in MUR 7447, filed by Paul Nehlen, a candidate in the 2018 Republican
 7 primary election for Congress in Wisconsin's First District, alleges that Twitter violated the Act
 8 by banning him altogether from the social media platform. Nehlen alleges that his Twitter
 9 account was suspended in January 2018 for seven days because he violated Twitter's Rules and
 10 Terms of Service and was required to delete certain tweets before his account was reinstated.⁹
 11 After Nehlen's account was reinstated, he tweeted a link to a page containing a screenshot of the
 12 tweets he was originally required to delete.¹⁰ Nehlen states that, on February 11, 2018, Twitter
 13 reversed its reinstatement decision and permanently banned him.¹¹ He further states that he
 14 appealed that decision, and that the appeal was denied.¹² Twitter allegedly disabled the account
 15 of his campaign spokesman and permanently banned the spokesman from using the platform.¹³
 16 When that spokesman sought to continue tweeting from someone else's account, that account
 17 was disabled as well.¹⁴

⁷ *Id.* at 8, 10-11 (citing Thompson, *Twitter is "Shadow Banning" Prominent Republicans* and Complainant's own "good faith search").

⁸ *Id.* at 9-11.

⁹ MUR 7447 Compl. at 10.

¹⁰ *Id.* at 12

¹¹ *Id.* at 13.

¹² *Id.*

¹³ *Id.* at 11.

¹⁴ *Id.*

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1 Nehlen acknowledges that many of his tweets prompted other users to complain to
2 Twitter that the tweets were offensive and violated Twitter's rules.¹⁵ He states that he received
3 multiple email notices from Twitter regarding these complaints as well as determinations by
4 Twitter that these tweets did not violate Twitter's rules.¹⁶ Nehlen alleges that only Republican
5 candidates have been banned from Twitter and that Twitter acts in a partisan fashion, "favoring
6 liberal speech on its platform over conservative speech."¹⁷

7 The complaint in MUR 7550 was filed by a non-candidate who states that he used
8 Twitter to share messages reflecting his support for certain Democratic candidates. He alleges
9 that in February 2018, his account was suspended because of what Twitter told him was
10 "suspicious activity."¹⁸ Complainant states that Twitter tried to verify his account by sending a
11 verification code to his phone but that he was unable to respond because he had a new phone
12 number.¹⁹ Thus, the Complainant alleges that this suspension constituted an in-kind contribution
13 to the opponents of the Democratic candidates he supported.

14 Twitter generally responds to each complaint by asserting that it did not make a
15 contribution or expenditure because its activities were not undertaken for the purpose of
16 influencing an election. It explains that each of the activities complained of were the result of
17 actions taken to further Twitter's business interests. Specifically, Twitter states that advertisers,
18 the main source of Twitter's revenue, have expressed concern about "divisive content" that has
19 appeared on Twitter, threatening to take their advertising dollars elsewhere if Twitter did not

¹⁵ *Id.*

¹⁶ *Id.* at 10-13.

¹⁷ *Id.* at 6, 14.

¹⁸ MUR 7550 Compl.

¹⁹ *Id.*; see MUR 7550 Resp. at 1 (Jan. 28, 2019).

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1 take steps to address “a toxic online environment” where their ads could appear alongside “hate
 2 speech” or “content that promoted racism.”²⁰ In addition, Twitter states that criticism of its
 3 “hands-off approach to digital abuse and harassment on its service” may have affected the value
 4 of its stock and made potential buyers of the company wary.²¹ In response to these threats to
 5 Twitter’s brand and revenue streams, Twitter asserts that it “began employing ‘technology to be
 6 more aggressive in detecting and minimizing the visibility of certain types of abusive and
 7 manipulative behaviors.’”²² Through “automated methods,” Twitter attempted to “preemptively
 8 detect abuse and reduce the reach of abusive behavior on the platform” and remove “content that
 9 violates Twitter’s Rules and Terms of Service.”²³ Twitter reports that these measures have led to
 10 positive results, such as a reduction in the number of abuse reports from users.²⁴

²⁰ MUR 7447 Resp. at 3-4 (Oct. 26, 2018).

²¹ *Id.* at 4-5.

²² MUR 7443 Resp. at 3 (Oct. 26, 2018) (citing *Twitter: Transparency and Accountability*, 115th Cong. (Sept. 5, 2018), Testimony of Jack Dorsey, Twitter CEO, before the House Comm. on Energy and Commerce at 3, <https://docs.house.gov/meetings/IF/IF00/20180905/108642/HHRG-115-IF00-Wstate-DorseyJ-20180905.pdf> (“Dorsey Testimony”)).

²³ *Id.* at 3, 5-7. Twitter’s Terms of Service “reserve the right to remove content that violates the User Agreement” as well as to “suspend or terminate” accounts “if we reasonably believe . . . you have violated the these Terms or the Twitter Rules.” *Id* at 5 (citing Twitter, *Twitter Terms of Service*, <https://twitter.com/en/tos#update>; Twitter, *Twitter Rules*, <https://help.twitter.com/en/rules-and-policies/twitter-rules>). Twitter provides further descriptions of the kinds of content that may be considered abusive or hateful as well as the consequences for posting such content. See Twitter, *Twitter Rules*; Twitter, *Hateful Content Policy*, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>.

²⁴ *Id.* at 4. Twitter also asserts that its activities fall within the scope of the press exemption contained in 11 C.F.R. § 100.73 and thus it states that its activities are not contributions or expenditures. *Id.* at 7. Foreseeing this potential defense, MURs 7443 and 7447 Complainants assert that Twitter’s actions are not exempted from being contributions or expenditures by virtue of the press exemption because their actions were not for any legitimate press function. MUR 7443 Compl. at 11-12, 15; MUR 7447 Compl. at 14-15, 18.

Finally, Twitter asserts that it is immune from civil liability for its actions pursuant to the Communications Decency Act. MUR 7447 Resp. 14-15, 17-18; *see* 47 U.S.C. § 230(c) (providing that “no provider . . . of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, filthy, excessively violent, harassing, or otherwise objectionable”).

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1 With respect to the specific complaints, Twitter acknowledges that Gaetz, the
 2 Complainant in MUR 7443, along with 600,000 other accounts worldwide (including
 3 Republicans and Democrats) temporarily did not appear in the auto-populated drop-down of the
 4 search window.²⁵ Twitter states that Gaetz and other similarly situated users were not appearing
 5 in the auto-populated drop-down as a result of Twitter's larger efforts to "detect and minimize
 6 the visibility of certain types of abusive and manipulative behavior."²⁶ The reason that Gaetz
 7 and many others did not appear in this search function, even when users searched for their
 8 specific name, was that other accounts with whom they interacted had "high indicia of misuse or
 9 abuse."²⁷ Twitter states, however, that it decided it was unfair to remove accounts from this
 10 search function based on the actions of others, and reversed course within 24 hours of the issue
 11 being identified so that Gaetz and other affected accounts once again appeared in the search
 12 predictions.²⁸

13 With respect to Nehlen's account, at issue in MUR 7447, Twitter explains that Nehlen
 14 was banned for misusing Twitter's services by "facilitating intimidation," "employ[ing] violent
 15 imagery," and espousing "white supremacist and anti-Semitic views."²⁹ Twitter asserts that, in

²⁵ MUR 7443 Resp. at 4.

²⁶ *Id.* at 3.

²⁷ *Id.* at 4-5 ("Here, Congressman Gaetz's Twitter account was one of many that disappeared from the autosuggestion 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).").

²⁸ *Id.* at 5; *see also* Thompson, *Twitter is "Shadow Banning" Prominent Republicans*.

²⁹ MUR 7447 Resp. at 1, 8-10. Twitter describes in detail material from Nehlen's account including tweets depicting his primary election opponent "falling from a helicopter," "providing contact information of his critics" and "singling them out for harassing calls and messages," and a photoshopped image "of himself sitting at the desk in the Oval Office, surrounded by the spiked heads of Jewish men." *Id.* at 8-11 (quoting CV Vitolo-Haddad, *Paul Nehlen: Nazi Ideology on the Republican Ticket*; Bob Brigham, *Bannon-backed Candidate Advocates Murdering Paul Ryan with a Fascist 'Death Flight'*, RAWSTORY.COM (Dec. 20, 2017),

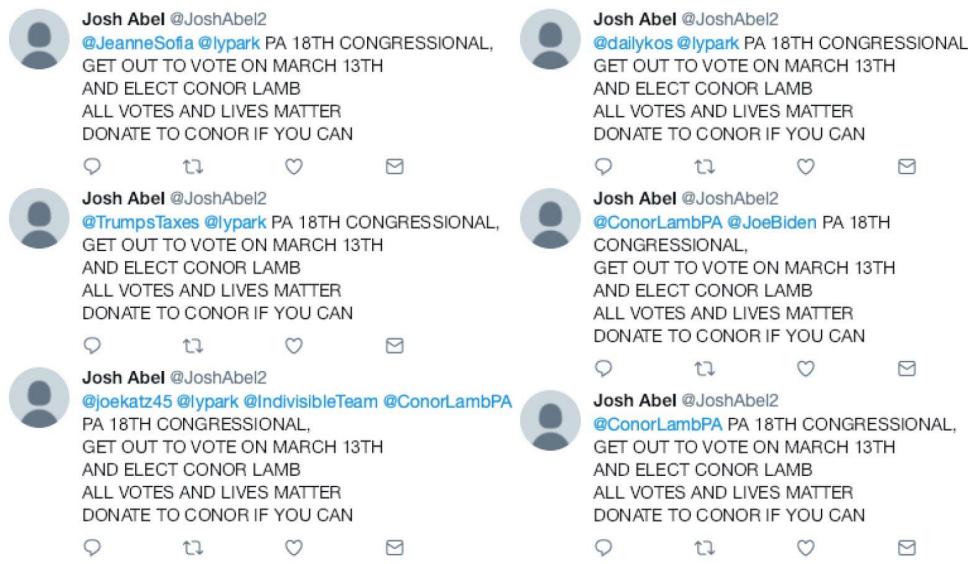
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1 light of the statements of potential advertisers' concerns with being "associated with violence,
 2 bigotry or hate," it acted on a commercial motivation to ban Nehlen from the platform rather
 3 than risk further damage to its brand and alienating advertisers.³⁰

4 Finally, with respect to the suspended account at issue in MUR 7550, Twitter explains
 5 that the activity of the account indicated it may have been a bot, or computer automated account,
 6 disseminating spam.³¹ In support, it provides the text of multiple tweets in all caps which were
 7 identical, save for the names of the individuals tagged in each tweet:³²



8
 9 Twitter sought to verify the authenticity of these posts via the phone number provided
 10 when the account was established, but the owner of the account was unable to respond because

³⁰ See *id.* at 4 (citing Barrett Brunsman, *P&G to YouTube: Don't Pair Our Ads with Terrorist Propaganda – or Cat Videos*, CIN. BUS. COURIER (Sept. 25, 2017), <https://www.bizjournals.com/cincinnati/news/2017/09/25/p-g-to-youtube-don-t-pair-our-ads-with-terrorist.html.>).

³¹ MUR 7550 Resp. at 5.

³² *Id.* at 5-6. Twitter states that Abel posted more than thirty of these similar posts on the same day and that his account history shows "numerous similar instances" of spam-like posts. *Id.* at 5 n.26.

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1 he was no longer in possession of that phone.³³ Twitter points to this undisputed attempt and
 2 failure to verify the account to support its claim that its actions did not have the purpose of
 3 influencing an election but were done for the purpose of preventing spam on its platform and
 4 thereby protecting its brand.³⁴

5 **III. LEGAL ANALYSIS**

6 The Act and Commission regulations prohibit any corporation from making contributions
 7 to a candidate's principal campaign committee.³⁵ Entities that are not political committees
 8 within the meaning of the Act must file disclosure reports with the Commission when they make
 9 independent expenditures that aggregate in excess of \$250 during a calendar year with respect to
 10 a given election.³⁶ "Contribution" and "expenditure" are defined to include any gift of money or
 11 "anything of value" for the purpose of influencing a federal election.³⁷ The Commission has
 12 previously concluded that a commercial vendor providing services to political committees will
 13 not make a contribution for the purpose of influencing an election when its business activity
 14 "reflects commercial considerations and does not reflect considerations outside the business
 15 relationship."³⁸ A commercial vendor need not make its services available to committees
 16 representing all political ideologies, but rather may establish objective business criteria to protect

³³ *Id.* at 6; MUR 7550 Compl.

³⁴ Twitter notes that "[t]his type of automated re-verification process occurs *nearly ten million times a week* on Twitter." MUR 7550 Resp. at 1 (emphasis in original).

³⁵ 52 U.S.C. § 30118(a).

³⁶ 52 U.S.C. § 30104(c)(1). An independent expenditure is an expenditure that expressly advocates the election or defeat of a clearly identified federal candidate and that is not made in concert or cooperation with, or at the request or suggestion of, the candidate or his or her committee or agent, or a political party committee or its agent. *Id.* § 30101(17).

³⁷ 52 U.S.C. § 30101(8)(A), (9)(A); 11 C.F.R. §§ 100.52(a), 100.111(a).

³⁸ Advisory Op. 2012-31 (AT&T) at 4.

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1 commercial viability of its business without making contributions to the committees that meet
 2 those criteria.³⁹

3 Though each of the three MURs presents a different set of factual circumstances, in each
 4 instance, Twitter's action that Complainants allege was a contribution or independent
 5 expenditure was part of an effort to "preemptively detect and reduce the reach of" content that
 6 Twitter believes negatively affects its brand and ability to attract advertisers.⁴⁰ Thus, the actions
 7 taken by Twitter appear to reflect commercial considerations, rather than an effort to influence a
 8 federal election.

9 With respect to MUR 7443, Twitter asserts that it temporarily changed its search function
 10 as part of its efforts to "increase the quality of the discourse it hosts" and it appears to have had
 11 no partisan basis or intent to influence an election, as the change affected more than 600,000
 12 accounts treating "liberals, conservatives, and non-political actors alike."⁴¹ Twitter explained its
 13 original decision, noting that "[t]he then-operating assumption was that accounts associated with
 14 other abusive accounts are themselves more likely to be abusive."⁴² As to MUR 7447, Twitter's
 15 decision to ban Nehlen was made in response to posts "facilitating intimidation," "employ[ing]
 16 violent imagery," and espousing "white supremacist and anti-Semitic views," which it states

³⁹ Advisory Op. 2017-06 (Stein and Gotlieb) at 6; *see also* Advisory Op. 2012-28 (CTIA — The Wireless Association) at 3, 8-9 (no contribution to committee where "wireless service providers may decide, due to commercial considerations, to accept proposals from some political committees and not others"); Advisory Op. 2012-26 (Cooper for Congress, *et al.*) at 10 (no contribution to committee where its participation was subject to "objective and commercially reasonable" criteria); Advisory Op. 2004-06 (Meetup) at 1 (explaining that a corporation may provide goods and services to political committees without being considered to have made an in-kind contribution so long as it does so "on the same terms and conditions available to all similarly situated persons in the general public").

⁴⁰ MUR 7443 Resp. at 3.

⁴¹ *Id.* at 2, 4; *see also* Dorsey Testimony at 1 ("Twitter does not use political ideology to make any decisions, whether related to ranking content on our service or how we enforce our rules. . . . We do not shadowban anyone based on political ideology.").

⁴² MUR 7443 Resp. at 4.

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1 were the kinds of posts about which major advertisers had expressed concern.⁴³ Finally,
 2 regarding MUR 7550, Twitter states that it suspended the user's account after a failed attempt to
 3 verify that the account was not, as it appeared to be, a bot disseminating spam. With respect to
 4 each of these matters, Twitter has credibly explained its commercial motivations behind its
 5 decisions as part of a larger effort to protect its brand and attract advertisers. In light of this
 6 commercial, rather than electoral, purpose, the Commission finds no reason to believe that
 7 Twitter's actions were either contributions or expenditures.⁴⁴

8 With respect to the allegations in the MURs 7443 and 7447 complaints that Twitter failed
 9 to disclose independent expenditures, neither complaint identifies any specific communication
 10 made by Twitter that allegedly contains express advocacy.⁴⁵ Therefore, the Commission finds
 11 no reason to believe that Twitter failed to disclose independent expenditures.

12 The allegation in the MUR 7443 and 7447 complaints—that Twitter violated the
 13 Commission's debate regulations by failing to follow objective criteria to pick participants in a
 14 debate by banning the Complainants—also misses the mark.⁴⁶ That multiple candidates may
 15 choose to express their opinions via their Twitter accounts does not make Twitter the host of a
 16 “debate” under our regulations. The Commission has interpreted a debate to necessarily involve
 17 “face-to-face appearances or confrontations,” noting that this has been “an inherent characteristic
 18 of candidate debates since the prototypical Lincoln-Douglas Debates in 1858.”⁴⁷ Twitter may be

⁴³ MUR 7447 Resp. at 1, 4, 8-10.

⁴⁴ Because our recommendations ultimately conclude that Twitter's actions are not contributions or expenditures under the Act, it is unnecessary to determine whether the press exemption or Communications Decency Act would apply under the circumstances.

⁴⁵ 11 C.F.R. §§ 100.16, 100.22.

⁴⁶ See MUR 7443 Compl. at 16-17; MUR 7447 Compl. at 19-20; see 11 C.F.R. §§ 110.13, 114.4(f).

⁴⁷ Advisory Op. 1986-37 (National Conservative Foundation) at 4 (determining that a forum that did not include face-to-face confrontations was not a debate for purposes of the Commission's regulations: “Although the

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1 said to be providing a forum for debate and discussion, but it is not a debate within the meaning
2 of the Commission's regulations.

3 Moreover, the Commission's debate regulations operate as an exception for activity that
4 may otherwise be considered a contribution or expenditure, and the regulations are not intended
5 to bring into regulation activity that is not for the purpose of influencing an election. The
6 purpose of the regulations is to "provide a specific exception so that certain nonprofit
7 organizations and the news media may stage debates, without being deemed to have made
8 prohibited corporate contributions to the candidates taking part in the debate."⁴⁸ Because, as
9 explained above, Twitter's alleged activities in connection with these matters do not have the
10 purpose of influencing an election and are thus not contributions or expenditures in the first
11 place, determining whether the exception would apply is unnecessary.

12 Accordingly, the Commission finds no reason to believe that Twitter violated 52 U.S.C.
13 §§ 30104(c) or 30118 of the Act by making prohibited contributions or failing to disclose
14 independent expenditures.

format and structure of these debates varied from one instance to another, the common element in all of them was a face-to-face confrontation. The Commission's nonpartisan candidate debate regulations were drafted with this historical, traditional concept of candidate debates in mind"). The Commission does not take a position on whether simultaneous face-to-face appearances or confrontations via videoconference or other technological means may also qualify as debates.

⁴⁸ See Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64260, 64261 (Dec. 14, 1995).