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July 20, 2020

VIA E-MAIL (CELA@FEC.GOV)
CONFIDENTIAL

Mr. Jeff S. Jordan
Attn: Kathryn Ross, Paralegal
Office of Complaints Examination and Legal Administration
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: MUR 7742 (Twitter, Inc.)

Dear Mr. Jordan:

On June 5, 2020, the Federal Election Commission ("FEC" or "Commission") notified our client, Twitter, Inc. ("Twitter"), of a complaint filed by Congressman Matt Gaetz. This is the second complaint that Congressman Gaetz has filed against Twitter, and it is equally meritless.¹

The central allegation in this complaint is that Twitter violated the Federal Election Campaign Act of 1971, as amended ("FECA") by adding a "fact check" link to certain Tweets made by President Trump about California's voting procedures, thereby providing something of value to his opponents "for the purpose of influencing [an] election."² This claim is belied by the facts, law, and even Gaetz's own complaint. Under the FECA, activities undertaken for non-political business reasons – such as improving the health of the conversation on the platform by combating misinformation and responding to advertiser concerns – are not undertaken "for the

¹ See Matter Under Review 7443.

² 52 U.S.C. § 30101(8)(A), (9)(A).

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purpose of influencing an election.” This is particularly true here given that neither the President’s Tweets nor the information Twitter posted in response refer to President Trump’s candidacy at all, much less attempt to influence his election – a prerequisite for imposing liability under the legal theories espoused by the complaint.

In addition, there are numerous other reasons – such as application of the media exemption – why Twitter’s actions were exempt from regulation under the FECA. But regardless of which rationale the Commission ultimately adopts, it does not alter the conclusion that Twitter acted lawfully. Accordingly, Twitter respectfully requests that the Commission find no reason to believe that the company violated the FECA and dismiss this complaint.³

FACTUAL BACKGROUND

Twitter was incorporated in Delaware in April 2007.⁴ While its principal offices are in San Francisco, California, the company has approximately 4,900 full-time employees and 35 offices worldwide.⁵ Twitter also has 166 million monetizable daily active users and is a popular social media network around the world.⁶ The company is publicly traded and had quarterly revenues or more than \$800 million in Q1 of 2020.⁷ A listing of Twitter’s board members is available on the company’s website.⁸ None of the board members are candidates for federal office in the United States or represent federal political parties.

Twitter is a free service that allows users to publicly communicate in messages of up to 280 characters – regardless of the substantive content of the communication.⁹ All 100 senators, 50 governors, and nearly every Member of the House of Representatives reach their constituents through Twitter accounts,¹⁰ with conservatives, in particular having “a strong

³ The complaint also makes several passing allegations that Twitter is shadow banning Republican officials and is violating the rules for conducting an FEC-regulated debate. See, e.g., Compl. ¶¶ 4, 20-23, 30, 49-51. Such fleeting statements fail to meet the minimum standards for an actionable complaint. See 11 C.F.R. § 111.4(d)(3). In any event, Twitter has already addressed these claims in its response to Matter Under Review 7443 which Twitter incorporates here by reference. If the Commission believes this or any other portion of the complaint in this matter merits additional attention, we are available to supplement this response.

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

⁵ See Twitter, *2019 Annual Report*, at [https://s22.q4cdn.com/826641620/files/doc_financials/2019/FiscalYR2019_Twitter_Annual_Report-\(3\).pdf](https://s22.q4cdn.com/826641620/files/doc_financials/2019/FiscalYR2019_Twitter_Annual_Report-(3).pdf); Twitter, *Our Company*, at https://about.twitter.com/en_us/company.html.

⁶ Lauren Feiner, *Twitter Falls After Execs Fail to Show Signs of Coronavirus Recovery in Earnings Report*, CNBC.com (May 5, 2020), at <https://www.cnbc.com/2020/04/30/twitter-twtr-earnings-q1-2020.html>.

⁷ See *id.*

⁸ Twitter, *Board of Directors*, at <https://investor.twitterinc.com/corporate-governance/board-of-directors>.

⁹ Twitter, *Twitter Via SMS FAQs*, at <https://help.twitter.com/en/using-twitter/twitter-sms-faqs>; Selena Larson, *Welcome to a World with 280-Character Tweets*, CNN.com (Nov. 7, 2017), at <https://money.cnn.com/2017/11/07/technology/twitter-280-character-limit/>.

¹⁰ 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 2, at <https://docs.house.gov/meetings/IF/IF00/20180905/108642/HHRG-115-IF00-Wstate-DorseyJ-20180905.pdf> (“Dorsey Testimony”).

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presence on Twitter.”¹¹ Indeed, earlier this month a study by several academics concluded that that “Twitter broadly represents the entire spectrum of ideologies,” with “more conservative opinion leaders on the platform than liberal ones.”¹²

Twitter’s purpose is to serve the public conversation.¹³ At its core, Twitter “stands for freedom of expression”¹⁴ and the principle that “every voice has the power to impact the world.”¹⁵ Twitter has been called a “powerful tool for democracy,”¹⁶ 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 periphery [like] the Tea Party movement.”¹⁷

To further advance these ideals, Twitter “live-stream[s] congressional hearings and political events, providing the public access to important developments in our democracy.”¹⁸ Twitter also has emphasized news content and is using algorithmically and human-curated timelines to feature “tweets from news organizations and users that are not news professionals . . . to make it easier for everyone to find relevant news and the surrounding conversation so they can stay informed about what matters to them.”¹⁹

As part of its commitment to civic engagement, Twitter also works to advance voter registration and voting in a non-partisan fashion. For example, prior to the 2016 election, Twitter debuted a feature that enabled users to message the company’s @Gov_Twitter account and receive information about voter registration deadlines and a link to a voter registration application.²⁰ Twitter also partnered with The Pew Charitable Trust and Google to answer questions about polling place locations and to provide information about which races would

¹¹ *Id.* at 6.

¹² Subhayan Mukerjee *et al.*, *Our Study Found Little Evidence That Twitter Is Biased Against Conservative Opinion Leaders*, Wash. Post (July 9, 2020), at <https://www.washingtonpost.com/politics/2020/07/09/our-study-found-little-evidence-that-twitter-is-biased-against-conservative-opinion-leaders/>.

¹³ Twitter, *The Twitter Rules*, at <https://help.twitter.com/en/rules-and-policies/twitter-rules>.

¹⁴ 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.

¹⁵ Twitter, *Our Values*, at https://about.twitter.com/en_us/values.html.

¹⁶ 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>.

¹⁷ 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/>.

¹⁸ See Dorsey Testimony at 2.

¹⁹ Alex Kantrowitz, *Twitter Is Experimenting with a Way to Show You Even More Breaking News Tweets*, BuzzFeed.News (Mar. 15, 2018), at <https://www.buzzfeednews.com/article/alexkantrowitz/twitter-is-experimenting-with-a-way-to-show-you-even-more#.yqa44w9LKW>; see also Alex Eule, *Twitter’s Plan For Growth: Layoffs*, Barrons.com (Oct. 27, 2016), at <https://www.barrons.com/articles/twitters-plan-for-growth-layoffs-1477584370> (explaining that “much of the most relevant election news breaking [in 2016 is] on the [Twitter] service”).

²⁰ Sarah Perez, *Twitter Will Now Help You Register to Vote, Answer Voter Questions Via Direct Message*, Techcrunch.com (Sept. 27, 2016), at <https://techcrunch.com/2016/09/27/twitter-will-now-help-you-register-to-vote-answer-voter-questions-via-direct-message/>.

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appear on an individual's ballot.²¹ Prior to the 2018 election, Twitter also sent U.S.-based users a prompt with voter registration information and used the @TwitterGov account to disseminate information about the absentee ballot process.²² Such nonpartisan steps earned praise as the type of "tool to empower democratic participation [that] certainly manifests the best of what social media companies can do."²³

One of Twitter's most important challenges in recent years has been to combat the spread of misinformation on its platform, with tech companies like Twitter being put in "an uncomfortable place as they try to strike a balance between free expression and preventing the spread of misleading information."²⁴ Last year, "[r]eacting to growing concern about misinformation spread on social media, [Twitter banned] all political advertising from its service."²⁵ This decision allayed some concerns, but criticism continued for "failing to combat misinformation from politicians"²⁶ and for not taking additional action.²⁷

In response to this criticism and to further improve the health of the conversations on its platform, Twitter implemented new measures to prevent the dissemination of misinformation by political figures and about important social issues. For example, Twitter publicly announced that it would be combatting misinformation about the U.S. Census²⁸ and the spread of COVID-19.²⁹ Twitter noted that it cannot "take 'enforcement action on every tweet,'"³⁰ but, in the COVID-19 context, was "focused on content that has the highest potential of directly causing physical

²¹ Tom Tarantino, *Get Registered to Vote with @Gov*, (Sept. 27, 2016), at

https://blog.twitter.com/official/en_us/a/2016/get-registered-to-vote-with-gov.html.

²² Del Harvey and Yoel Roth, *An Update on Our Elections Integrity Work*, (Oct. 1, 2018), at

https://blog.twitter.com/en_us/topics/company/2018/an-update-on-our-elections-integrity-work.html.

²³ Rachel Kraus, *Twitter Is Launching a Voter Registration Campaign*, Mashable.com (Sept. 24, 2018), at <https://mashable.com/article/twitter-be-a-voter-registration-campaign/>.

²⁴ Queenie Wong, *Political Ads Put Twitter, Facebook and Google in a Bind. Here's Why*, Cnet.com (May 18, 2020), at <https://www.cnet.com/features/political-ads-put-twitter-facebook-and-google-in-a-bind-heres-why/>.

²⁵ Rachel Lerman and Barbara Ortuatay, *Twitter Bans Political Ads Ahead of 2020 Election*, Associated Press (Oct. 30, 2019), at <https://apnews.com/63057938a5b64d3592f800de19f443bc>.

²⁶ Queenie Wong, *Political Ads Put Twitter, Facebook and Google in a Bind. Here's Why*; see also *id.* (explaining that earlier this year Twitter "came under fire for refusing to pull down an edited video posted by Trump that some Democrats complained misled viewers").

²⁷ Fergal Gallagher, *Are Google, Twitter and Facebook Doing Enough to Protect the 2020 Election in the Age of 'Information Disorder'?*, ABCNews.com (Nov. 15, 2019), at <https://abcnews.go.com/US/google-twitter-facebook-protect-2020-election-age-information/story?id=66527631>.

²⁸ See, e.g., Eric Newcomer and Molly Schuetz, *Twitter Expands Efforts to Combat Misinformation on Census*, Bloomberg Law (Feb. 11, 2020), at <https://news.bloomberglaw.com/tech-and-telecom-law/twitter-follows-facebook-cracking-down-on-census-misinformation>.

²⁹ See, e.g., Vijaya Gadde and Matt Derella, *An update on our Continuity Strategy During COVID-19*, Twitter.com (Mar. 16, 2020), at https://blog.twitter.com/en_us/topics/company/2020/An-update-on-our-continuity-strategy-during-COVID-19.html; Yoel Roth and Nick Pickles, *Updating our Approach to Misleading Information*, Twitter.com (May 11, 2020), at https://blog.twitter.com/en_us/topics/product/2020/Updating-our-approach-to-misleading-information.html.

³⁰ Aimee Chanthadavong, *Twitter Removing Tweets with COVID-19 Misinformation That Could Cause Physical Harm*, ZDNet.com (Mar. 24, 2020), at <https://www.zdnet.com/article/twitter-removing-tweets-that-could-cause-physical-harm-to-curb-covid-19-misinformation/>.

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harm.”³¹ Upon identifying such content, Twitter explained that it will apply “new labels and warning messages [to] provide additional context and information on [the] Tweets containing disputed or misleading information.”³²

Twitter also considered “adding brightly colored labels directly beneath . . . misinformation posted by politicians and other public figures.”³³ Though Twitter ultimately decided not to implement this measure, the company did give “users the ability to flag tweets that they believe contain misleading information about how to vote in this year’s U.S. presidential election.”³⁴ Twitter had already implemented this feature in connection with the 2019 elections held in the United Kingdom, India, and elsewhere.³⁵

Twitter’s efforts in these areas are set forth in its May 2020 Civic Integrity policy, the relevant portions of which follow:

Civic integrity policy

Overview

You may not use Twitter’s services for the purpose of manipulating or interfering in elections or other civic processes. This includes posting or sharing content that may suppress participation or mislead people about when, where, or how to participate in a civic process.

The public conversation occurring on Twitter is never more important than during elections and other civic events. Any attempts to undermine the integrity of our service is antithetical to our fundamental rights and undermines the core tenets of freedom of expression, the value upon which our company is based.

We believe we have a responsibility to protect the integrity of those conversations from interference and manipulation. Therefore, we prohibit attempts to use our services to manipulate or disrupt civic processes, including through the distribution of false or misleading information about the procedures or circumstances around participation in a civic process.

What is a civic process?

³¹ *Id.*

³² Yoel Roth and Nick Pickles, *Updating our Approach to Misleading Information*; see also Twitter, *World Leaders on Twitter: Principles and Approach* (Oct. 15, 2019), at https://blog.twitter.com/en_us/topics/company/2019/worldleaders2019.html (explaining that “if a Tweet from a world leader does violate the Twitter Rules but there is a clear public interest value to keeping the Tweet on the service, we may place it behind a notice that provides context about the violation”).

³³ Ben Collins, *Twitter Is Testing New Ways to Fight Misinformation — Including a Community-Based Points System*, NBCNews.com (Feb. 13, 2020), at <https://www.nbcnews.com/tech/tech-news/twitter-testing-new-ways-fight-misinformation-including-community-based-points-n1139931>.

³⁴ Betsy Morris, *Twitter Adds Feature to Thwart Misinformation About U.S. Voting Process*, Wall Street Journal (Jan. 29, 2020), at <https://www.wsj.com/articles/twitter-adds-feature-to-thwart-misinformation-about-u-s-voting-process-11580357266?mod=searchresults&page=1&pos=2>.

³⁵ See *id.*

Twitter considers civic processes to be events or procedures mandated, organized, and conducted by the governing and/or electoral body of a country, state, region, district, or municipality to address a matter of common concern through public participation. Some examples of civic processes may include:

- Political elections
- Censuses
- Major referenda and ballot initiatives

What is in violation of this policy?

We prohibit 3 categories of manipulative behavior and content under this policy:

Misleading information about how to participate

You can't share false or misleading information about how to participate in an election or other civic process. This includes but is not limited to:

- misleading information about procedures to participate in a civic process (for example, that you can vote by Tweet, text message, email, or phone call in jurisdictions where these are not a possibility);
- misleading information about requirements for participation, including identification or citizenship requirements; and
- misleading statements or information about the official, announced date or time of a civic process.

Suppression and intimidation

You can't share false or misleading information intended to intimidate or dissuade people from participating in an election or other civic process. This includes but is not limited to:

- misleading claims that polling places are closed, that polling has ended, or other misleading information relating to votes not being counted;
- misleading claims about police or law enforcement activity related to voting in an election, polling places, or collecting census information;
- misleading claims about long lines, equipment problems, or other disruptions at voting locations during election periods;
- misleading claims about process procedures or techniques which could dissuade people from participating; and

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- threats regarding voting locations or other key places or events (note that our violent threats policy may also be relevant for threats not covered by this policy). . . .

What happens if you violate this policy?

The consequences for violating our civic integrity policy depends on the severity and type of the violation and the accounts' history of previous violations. . . .³⁶

By preventing the spread of misinformation regarding voting and other important civic matters, this policy advances Twitter's long-held business objective to continually improve the health of the conversations on its platform. Implementing the policy also addressed a "long-standing criticism that the company [was] too hands-off when it comes to policing misinformation and falsehoods from world leaders."³⁷ Indeed, other social media companies have followed Twitter and undertaken their own efforts to combat the spread of misinformation on their platforms.³⁸

The commercial reasons for the policy had also become apparent to Twitter. Advertisers have asked companies to do more in this area or risk losing advertising revenue.³⁹ Indeed, one major social media platform has recently seen "a growing boycott by advertisers unhappy with its handling of misinformation," with some of those same companies "also halting their advertising

³⁶ Twitter, *Civic Integrity Policy* (May 2020), at <https://help.twitter.com/en/rules-and-policies/election-integrity-policy>. Twitter incorporated this policy into its Rules governing access to its platform. See Twitter, *The Twitter Rules*, at <https://help.twitter.com/en/rules-and-policies/twitter-rules>. The new policy built upon an existing policy from April 2019, entitled the *Election Integrity Policy*, which addressed some of the same concerns. See Twitter, *Election Integrity Policy* (Apr. 2019), at <https://web.archive.org/web/20200307144712/https://help.twitter.com/en/rules-and-policies/election-integrity-policy> (explaining that users "may not use Twitter's services for the purpose of manipulating or interfering in elections. This includes posting or sharing content that may suppress voter turnout or mislead people about when, where, or how to vote").

³⁷ Elizabeth Dwoskin, *Twitter Labels Trump's Tweets with a Fact Check for the First Time*, Washington Post (May 27, 2020), at <https://www.washingtonpost.com/technology/2020/05/26/trump-twitter-label-fact-check/>; see also Betsy Morris, *Twitter Adds Feature to Thwart Misinformation About U.S. Voting Process* (explaining that "[s]ocial-media platforms were under particular scrutiny after a Senate committee report in October [2019] criticized U.S. tech companies for helping spread disinformation during the 2016 election"); Elizabeth Culliford and Katie Paul, *With Fact-checks, Twitter Takes on a New Kind of Task*, Reuters (May 30, 2020) (noting that "[s]ocial media platforms have been under fierce scrutiny over how they police rapidly spreading false information and other types of abusive content since Russia exploited the networks to interfere in the 2016 U.S. presidential election").

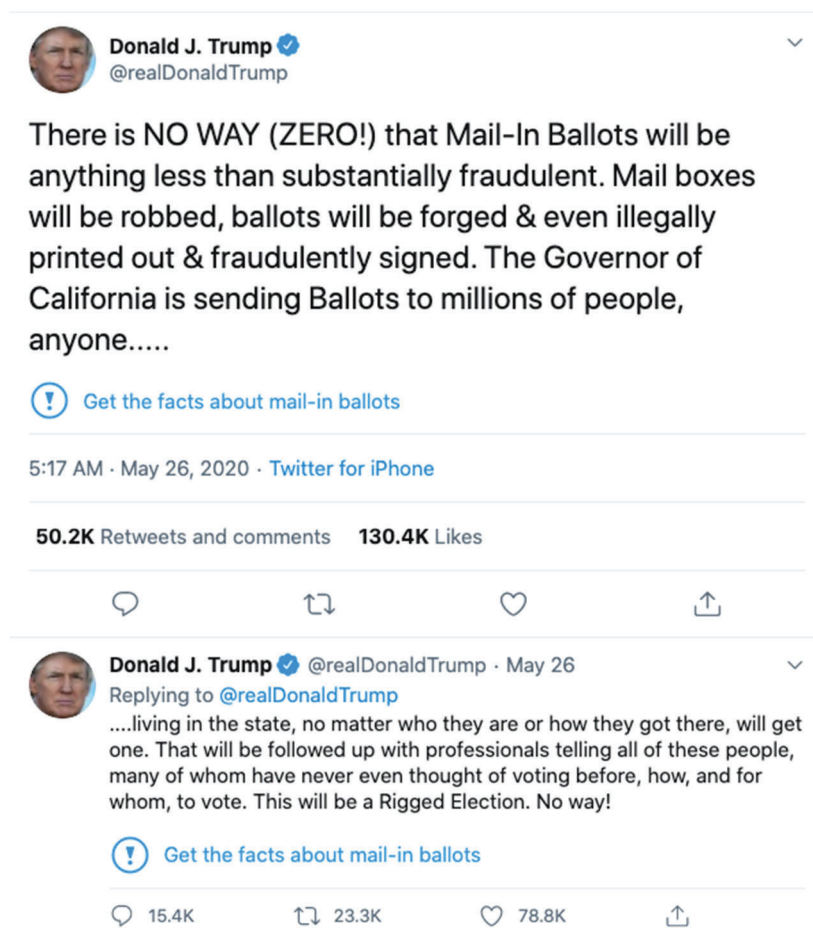
³⁸ Jonathan Shieber, *As Advertisers Revolt, Facebook Commits to Flagging 'Newsworthy' Political Speech That Violates Policy*, Techcrunch.com (June 26, 2020), at <https://techcrunch.com/2020/06/26/as-advertisers-revolt-facebook-commits-to-flagging-newsworthy-political-speech-that-violates-policy/> (explaining Facebook's position that "voter suppression [is] not allowed to be distributed on the platform whether or not [it is] deemed newsworthy, adding that 'there are no exceptions for politicians'").

³⁹ See, e.g., Jemima McEvoy, *Facebook Responds As LEGO, Dunkin Donuts Join Over 500 Companies In Growing Boycott*, Forbes.com (July 1, 2020), at <https://www.forbes.com/sites/jemimamcevoy/2020/07/01/lego-dunkin-donuts-join-over-500-companies-in-growing-facebook-boycott/#1fa5991820b8>; Tiffany Hsu and Cecilia Kang, *'Morally Impossible': Some Advertisers Take a Timeout From Facebook*, N.Y. Times (June 9, 2020), at <https://www.nytimes.com/2020/06/09/business/media/facebook-advertisers-trump-zuckerberg.html>.

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on Twitter.”⁴⁰ And just last month, Unilever cited misinformation and related concerns in support of its decision to halt advertising on Twitter and other platforms.⁴¹

On May 26, 2020, President Trump posted the following Tweets to his account @realDonaldTrump, at <https://twitter.com/realDonaldTrump/status/1265255835124539392>:



When a Twitter user clicked on the “Get the facts” link that Twitter had inserted pursuant to its new policy, the user was directed to a page that explained, *inter alia*:

On Tuesday, President Trump made a series of claims about potential voter fraud after California Governor Gavin Newsom announced an effort to expand

⁴⁰ Tiffany Hsu and Gillian Friedman, *CVS, Dunkin', Lego: The Brands Pulling Ads From Facebook Over Hate Speech*, N.Y. Times (July 7, 2020), at <https://www.nytimes.com/2020/06/26/business/media/Facebook-advertising-boycott.html>.

⁴¹ Kurt Wagner and Thomas Buckley, Facebook, Twitter Tumble on Unilever's Social-Media Pullback, Bloomberg (June 26, 2020), at <https://www.bloomberg.com/news/articles/2020-06-26/unilever-will-halt-u-s-ads-on-facebook-twitter-through-2020>.

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mail-in voting in California during the COVID-19 pandemic. These claims are unsubstantiated, according to CNN, Washington Post and others. Experts say mail-in ballots are very rarely linked to voter fraud. . . . Five states already vote entirely by mail and all states offer some form of mail-in absentee voting, according to NBC News.⁴²

Twitter explained its decision to include the additional context as follows:

We added a label to two @realDonaldTrump Tweets about California's vote-by-mail plans as part of our efforts to enforce our civic integrity policy. We believe those Tweets could confuse voters about what they need to do to receive a ballot and participate in the election process. . . . We also wanted to provide additional context and conversation with regard to voter fraud and mail-in ballots. We have a range of remediations, and in some cases we add labels that link to more context.⁴³

Twitter has applied its policy and labeled other Tweets, including one by actress Debra Messing that used manipulated media to compare President Trump to Adolf Hitler.⁴⁴

THE LAW

As a general statutory matter, corporations are prohibited from making a "contribution" and are otherwise regulated when making an "expenditure" in connection with a federal election.⁴⁵ In relevant part, the term "contribution" is defined as "anything of value made by any person *for the purpose of influencing any election* for Federal office."⁴⁶ Similarly, the term "expenditure" means "anything of value, made by any person *for the purpose of influencing any election* for Federal office."⁴⁷ Under well-established Commission precedent, in order for a communication to be "for the purpose of influencing any election," it must contain clear language "such as 'vote for the President,' 're-elect your Congressman,' . . . 'vote against Old Hickory,' 'defeat' accompanied by a picture of one or more candidate(s), 'reject the incumbent,' or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)."⁴⁸

Expenditures that are made without cooperation or consultation with a candidate are called "independent expenditures"⁴⁹ and must be reported to the FEC when they exceed certain

⁴² *Trump Makes Unsubstantiated Claim That Mail-in Ballots Will Lead to Voter Fraud* (May 26, 2020), at <https://twitter.com/i/events/1265330601034256384>.

⁴³ @TwitterSafety, at <https://twitter.com/TwitterSafety/status/1265838823663075341>.

⁴⁴ Matt Keeley, *Twitter Fact-Checks Debra Messing Trump-Hitler Tweet After Newsweek Query*, Newsweek (June 2, 2020), at <https://www.newsweek.com/twitter-fact-checks-debra-messing-trump-hitler-tweet-after-newsweek-query-1508253>.

⁴⁵ 52 U.S.C. § 30118.

⁴⁶ *Id.* § 30101(8)(A) (emphasis added).

⁴⁷ *Id.* § 30101(9)(A) (emphasis added).

⁴⁸ 11 C.F.R. § 100.22(a); *see also id.* § 100.22(b); Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen, MUR 6346 (discussing concerns with enforcing 11 C.F.R. § 100.22(b)).

⁴⁹ *See* 11 C.F.R. 100.16.

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monetary thresholds. A corporate “expenditure” that is coordinated with a candidate, by contrast, may also be regulated as a prohibited “contribution.” Specifically, federal law “provides that an expenditure made by any person ‘in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents’ constitutes an in-kind contribution” to that candidate.⁵⁰

The terms “contribution” and “expenditure” both contain an exemption for “any news story, commentary, [or] editorial.”⁵¹ In particular, this so-called media exemption applies when an entity engaging in an activity is: (a) a media entity; (b) not owned or controlled by a political party, political committee, or candidate; and (c) is acting as a media entity when conducting its activities.⁵²

DISCUSSION

Count I of the complaint alleges that Twitter made a prohibited corporate contribution to President Trump’s campaign opponents by fact-checking the President’s Tweet. Count II alleges, in the alternative, that Twitter failed to report its fact-checking as an independent expenditure. These claims are without merit for numerous reasons, most notably that in order to be a regulated contribution or expenditure, an activity must be undertaken “for the purpose of influencing an election.”⁵³

As both the courts and the Commission have made clear, however, 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.⁵⁴ For example, in Advisory Opinion 2012-28 (CTIA), the Commission held that a business “may decide, for commercial reasons, to [provide services to] some political committees and not others” based on “eligibility criteria [designed] to protect the commercial viability of the [business].”⁵⁵ The Commission recently applied these general principles to conclude that Microsoft’s commercially reasonable efforts “to protect its brand reputation” did not amount to a prohibited in-kind contribution when

⁵⁰ First General Counsel’s Report, Matters Under Review 7199, 7219, 7242 (Patrick Murphy), Nov. 2, 2017.

⁵¹ See 52 U.S.C. § 30101(9)(B); 11 C.F.R. § 100.73.

⁵² See FEC Adv. Op. 2016-01 (Ethiq); *Reader’s Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

⁵³ 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’”).

⁵⁴ 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).

⁵⁵ See also FEC Adv. Op. 1994-30 (Conservative Concepts, Inc.) (explaining that activity that is undertaken “for genuinely commercial purposes,” among other relevant considerations, would not be a contribution or expenditure).

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the company provided election-sensitive customers with free account security services (e.g., cyber security training, technical support in tracking breaches and remedying them, etc.).⁵⁶ The Commission cited Microsoft's concern that its brand reputation would be "at risk of experiencing severe and long-term damage" in the absence of the account security services.⁵⁷ In addition, the Commission has explained that a technology company "need not make its services available to [candidates] representing all political ideologies, but rather may establish objective business criteria to protect the commercial viability of its business without making contributions to the [candidates] that meet those criteria."⁵⁸

Commissioners and FEC staff have specifically recognized Twitter's authority to control content and access to its platform, stating that "Twitter controls the terms by which users may access the website," the company "maintains the right to restrict content on its website,"⁵⁹ and "Twitter maintains ownership interests in software . . . and retains the right to 'remove or refuse to distribute any content on its services, suspend or terminate users, and reclaim usernames.'"⁶⁰

Here, the decision to add context to President Trump's Tweets is wholly consistent with these authorities. If fact, Commission precedent would have permitted Twitter to go even further and remove the Tweets entirely. But Twitter did not do that. It took a more calibrated approach to improve the health of the conversation it hosts while still making the platform available to an important political voice like that of President Trump. These decisions were made by applying a nonpartisan policy to further the company's business objective of maintaining a healthy platform for discussion. That objective has become increasingly important as advertisers have pressured social media companies to do more to combat disinformation on their platforms.⁶¹ Indeed, the complaint acknowledges that past efforts to improve the health of the conversation on Twitter have been successful, leading to a decrease in user complaints and abuse reports.⁶² Thus, even the complaint recognizes the fundamental business reasons for these policies: by ensuring that more users are having a positive experience on Twitter, they and others will continue to use the platform and create an even more attractive market for advertisers.⁶³

Twitter's application of this policy to President Trump's Tweets is also consistent with its past business initiatives to encourage voter registration and voting as well as the company's efforts to combat misinformation in other areas (e.g., COVID-19).⁶⁴ And Twitter's identical

⁵⁶ FEC Adv. Op. 2018-11 (Microsoft).

⁵⁷ *Id.*

⁵⁸ FEC Adv. Op. 2017-06 (Stein and Gottlieb).

⁵⁹ Matter Under Review 6911 (Lois Frankel for Congress), Statement of Reasons of Chairman Matthew S. Petersen and Comm'rs Lee E. Goodman and Caroline C. Hunter (Apr. 12, 2016).

⁶⁰ FEC Adv. Op. 2017-05 (Great America PAC) (internal brackets omitted). Likewise, in the enforcement context, the Commission's Office of General Counsel has noted without disapproval that Twitter "maintains the right to restrict content on [its] website." First General Counsel's Report, MUR 6911 (Lois Frankel for Congress et al.), at 4 & n.14 (Sept. 3, 2015) (citing Twitter's Terms of Service). Similarly, OGC has referenced Twitter's reservation of its "right at all times . . . to remove or refuse to distribute any Content on the Services[and] to suspend or terminate users."

⁶¹ See *supra* at 7-8.

⁶² See Compl. ¶ 29.

⁶³ See also *id.*

⁶⁴ See *supra* at 4-5.

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enforcement action against Ms. Messing's Tweets critical of President Trump demonstrates Twitter's non-partisan application of its policies. Clearly, Twitter's decision to add context to President Trump's Tweets was well within the bounds of applicable Commission precedent as a politically neutral business decision that was not intended to influence an election.

But it is clear that Twitter's actions were not intended to influence an election for another reason: neither President Trump's Tweets nor Twitter's response to them contained any express candidate advocacy that would qualify the communications as regulated contributions or expenditures. FEC Commissioners have routinely held that communications lacking explicit words of advocacy about a candidate – such as “vote against” or “oppose” candidate X – cannot be regulated as expenditures.⁶⁵ And those same principles apply to the regulation of contributions, as the additional content Twitter posted on its own website had no relationship to any campaign.⁶⁶ Here, rather than advocate for Trump's re-election or defeat, the communications were generic statements about the voting process that did not mention Trump's candidacy or instruct viewers how to vote in the upcoming election. Indeed, these Tweets were made nearly six months in advance of an election. Without any express candidate advocacy, the communications are missing the legal prerequisite to be regulated as contributions or expenditures.

For both these reasons, Twitter's decision to add a link to additional information to President Trump's Tweets was not taken to influence an election and, therefore, did not result in a regulated contribution or expenditure. Therefore, the Commission need not examine Counts I or II any further and should dismiss the complaint. For the sake of completeness, however, we note that the Commission could also dismiss the complaint for several other equally compelling reasons.

First, Twitter qualifies for the so-called media exemption of federal campaign finance law. Grounded in First Amendment principles, the exemption excepts from regulation “any cost incurred in covering or carrying” news stories⁶⁷ and permits a media entity to choose between “competing claims of parties” and which content “to feature, investigate or address in news, editorial and opinion coverage.”⁶⁸

The Commission “has not limited the press exemption to traditional news outlets” and has applied it to “news stories, commentaries, and editorials *no matter in what medium they are published*,” [including] Internet Web sites and entities that distribute their content exclusively on

⁶⁵ See Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, Matter Under Review 6729, at 3 n.14 (Oct. 24, 2014), at <https://eqs.fec.gov/eqsdocsMUR/14044363864.pdf>; Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, MURs 5694 and 5910, at 7-15 (Apr. 27, 2009), at <https://www.fec.gov/files/legal/murs/5910/29044232838.pdf>.

⁶⁶ See generally 11 C.F.R. § 100.22 (explaining how certain coordinated communications can become contributions).

⁶⁷ 11 C.F.R. § 100.73.

⁶⁸ 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).

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the Internet,”⁶⁹ as well as websites that curate news content.⁷⁰ Given Twitter’s news-oriented nature,⁷¹ there is little question that Twitter qualifies as a media entity under federal campaign finance law. Indeed, the complaint readily admits this fact.⁷² And providing additional context – or what the complainant refers to as fact-checking – is a common role for modern media entities.⁷³ The FactCheck.org media outlet reviewed another voting-related Tweet by President Trump just days before Twitter acted.⁷⁴ There is no dispute that the media exemption would apply to FactCheck.org. Nor should there be when Twitter engages in precisely the same activity.

Second, because Twitter’s services are offered for free, and the definitions of contribution and expenditure are predicated on providing something of value, adding context to President Trump’s Tweet cannot result in Twitter making a regulated contribution or expenditure subject to regulation under federal campaign finance law.⁷⁵ Regardless, President Trump’s Tweets remain available on Twitter where all can see them for free.

Third, as a technical legal matter, Twitter’s decision to provide context to President Trump’s Tweets would be a prohibited corporate contribution to his political opponents only if coordinated with them or otherwise done “in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, [a candidate’s] authorized political committee[] or [its] agents.”⁷⁶ The complaint here is facially deficient because it fails to even allege that coordination occurred, much less provide any factual evidence to support its claim. Nor could it: the decision to add context was not undertaken at the suggestion of, after any, let alone

⁶⁹ FEC Adv. Op. 2008-14 (Melothe); *see also id.* (explaining that the Commission “has also recognized the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach”).

⁷⁰ FEC Adv. Op. 2016-01; *see also* FEC Adv. Op. 2005-16 (Fired Up) (finding that a website qualified as a media entity where it was “viewable by the general public and akin to a periodical or news program distributed to the general public”).

⁷¹ *See supra* at 3.

⁷² Compl. ¶¶ 13-14 (discussing, *inter alia*, Twitter’s “status as a news website”).

⁷³ *See, e.g.,* Laura Easton, *What We Fact Check and Why*, Associated Press (Feb. 1, 2017), at <https://blog.ap.org/behind-the-news/what-we-fact-check-and-why>; Jane Elizabeth *et al.*, *Fact-checking and Accountability Journalism: Popular, Effective — But Sometimes Misunderstood*, American Press Institute (Oct. 27, 2015), at <https://www.americanpressinstitute.org/publications/reports/survey-research/fact-checking-journalists-survey/> (explaining that the “fact-checking movement in journalism dates back more than 25 years”); Linda Qui, *Hey @jack, Here Are More Questionable Tweets From @realdonaldtrump*, N.Y. Times (June 10, 2020), at <https://www.nytimes.com/2020/06/03/us/politics/trump-twitter-fact-check.html>.

⁷⁴ *See* D’Angelo Gore, *Trump’s False Tweet About Michigan Absentee Ballot Applications*, FactCheck.org (May 20, 2020), at <https://www.factcheck.org/2020/05/trumps-false-tweet-about-michigan-absentee-ballot-applications/>.

⁷⁵ *Cf.* Matter Under Review 6911 (Lois Frankel for Congress), Statement of Reasons of Chairman Matthew S. Petersen and Comm’rs Lee E. Goodman and Caroline C. Hunter (Apr. 12, 2016) (noting that “Twitter is a free service that does not charge users to create accounts, display profiles, or send tweets”); *see also* First General Counsel’s Report, MUR 6911 (Lois Frankel for Congress *et al.*), at 3 (Sept. 3, 2015) (noting same).

⁷⁶ *See supra* at 10.

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substantial, discussions with, or with the material involvement of President Trump's campaign opponents, as required by the Commission's coordination regulations.⁷⁷

Fourth, Twitter has a constitutional right to speak on issues of importance to the company. The guarantee of free speech “necessarily compris[es] the decision of both what to say and what not to say,”⁷⁸ and the First Amendment safeguards the “choice of material . . . [that]—whether fair or unfair— constitute[s] the exercise of editorial control and judgment.”⁷⁹ Here, Twitter has chosen not to censor President Trump's comments, but is rather “responding to the speech with their own”⁸⁰ to offer context about the voting process. That is the essence of the First Amendment. While it is not necessary for the Commission to resolve this matter based on this constitutional defense, the Commission would be well served to construe its regulations and cabin its enforcement of the federal campaign finance laws to avoid infringing upon such fundamental freedoms.⁸¹

CONCLUSION

Twitter is committed to maintaining a robust platform for all users – be they conservative, liberal or somewhere in between – to engage and debate public issues. But when a speaker – even the President of the United States – goes too far and, in Twitter's business judgment, begins disseminating misinformation about an issue as critical as voting, the company has the legal freedom to protect its platform, its customers, and its revenue stream. Adding context to President Trump's Tweets – nearly six months before the November 2020 election – was a lawful action to protect the company's business interests rather than an attempt to influence any election. Accordingly, the Commission should find no reason to believe that Twitter violated the FECA and should dismiss this matter.

Sincerely,



Caleb P. Burns
Andrew G. Woodson

⁷⁷ See 11 C.F.R. § 109.21(d).

⁷⁸ *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796-797 (1988).

⁷⁹ *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557, 575 (1995).

⁸⁰ Eugene Volokh, *Twitter's Speech Isn't "Stifling Free Speech,"* The Volokh Conspiracy (May 27, 2020), at <https://reason.com/2020/05/27/twitters-speech-isnt-stifling-free-speech/>.

⁸¹ See *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) (noting the Commission's prior failure, under the doctrine of constitutional avoidance, to “tailor its [regulations] to avoid unnecessarily infringing upon First Amendment rights”); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress”).