

1 **FEDERAL ELECTION COMMISSION**  
2  
3 **FIRST GENERAL COUNSEL'S REPORT**

4  
5 **MUR 7742**

6 DATE COMPLAINT FILED: May 29, 2020

7 DATE OF NOTIFICATION: June 5, 2020

8 LAST RESPONSE RECEIVED: July 20, 2020

9 DATE ACTIVATED: August 14, 2020

10 EXPIRATION OF SOL: May 26, 2025

11 ELECTION CYCLE: 2020

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13 **COMPLAINANT:** Matt Gaetz

14  
15 **RESPONDENT:** Twitter, Inc.

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17 **RELEVANT STATUTES AND**  
18 **REGULATIONS:**

19 52 U.S.C. § 30101(8)(A), (9)(A)

20 52 U.S.C. § 30104(c)

21 52 U.S.C. § 30118

22 11 C.F.R. § 100.52(a)

23 11 C.F.R. § 100.73

24 11 C.F.R. § 100.111(a)

25 11 C.F.R. § 110.13

26 11 C.F.R. § 114.2(f)(1)

27 11 C.F.R. § 114.4(f)

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29 **INTERNAL REPORTS CHECKED:** None

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31 **FEDERAL AGENCIES CHECKED:** None

32 **I. INTRODUCTION**

33 The Complaint alleges that social media platform Twitter, Inc. (“Twitter”), violated the  
34 Federal Election Campaign Act of 1971, as amended (the “Act”), by making either prohibited  
35 corporate contributions or undisclosed independent expenditures. Specifically, the Complaint  
36 alleges that Twitter sought to influence the 2020 Presidential election by adding a “fact check”  
37 icon to two of President Donald J. Trump’s tweets as well as links to information regarding the

1 accuracy of the statements in Trump's tweets.<sup>1</sup> The Complaint also argues that Twitter, as a  
2 platform for political debate, falls within the scope of the Commission's debate regulations and  
3 that Twitter failed to use objective criteria for selecting participants as it was required to do.<sup>2</sup>  
4 Accordingly, the Complaint alleges that Twitter's costs in fact-checking Trump's tweets  
5 constitute prohibited in-kind contributions.<sup>3</sup> In the alternative, the Complaint alleges that Twitter  
6 "expressly advocat[ed]" against Trump's reelection through its "fact checks" and, in so doing,  
7 made unreported independent expenditures.<sup>4</sup>

8 Twitter filed a Response arguing that it added the "fact checks" for commercial reasons  
9 and not for the purpose of influencing a federal election.<sup>5</sup> In addition, Twitter argues that:  
10 (1) the "fact checks" qualify for the media exemption;<sup>6</sup> (2) the "fact checks" do not meet the  
11 definition of a contribution because Twitter offers its services for free and there are no  
12 allegations that Twitter engaged in coordination with any of Trump's opponents;<sup>7</sup> and (3) its  
13 course of conduct was generally protected by the First Amendment.<sup>8</sup>

14 As discussed below, the available information indicates that Twitter's costs to implement  
15 the "fact check" feature could not have resulted in an in-kind contribution because the "fact  
16 checks" at issue do not meet the definitions of electioneering communications or public

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<sup>1</sup> Compl. at 12-15 (May 29, 2020).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 12-14.

<sup>4</sup> *Id.* at 14-15.

<sup>5</sup> Resp. at 1-2, 10-12 (July 20, 2020).

<sup>6</sup> *Id.* at 12-13.

<sup>7</sup> *Id.* at 13-14.

<sup>8</sup> *Id.* at 14.

1 communications and because there is no indication that Twitter acted in coordination with any  
2 federal candidate or committee. Further, because Twitter's communications in connection with  
3 the "fact checks" do not expressly advocate the election or defeat of a federal candidate, its  
4 implementation costs were not independent expenditures either. Accordingly, we recommend  
5 that the Commission find no reason to believe that Twitter violated 52 U.S.C. § 30118(a) by  
6 making prohibited in-kind contributions or 52 U.S.C. § 30104(c) by failing to disclose  
7 independent expenditures.

## 8 **II. FACTUAL BACKGROUND**

9 Founded in 2007, Twitter is a large web-based social networking platform that allows  
10 users to publicly communicate for free in messages of up to 280 characters.<sup>9</sup> Twitter states that  
11 all 100 United States Senators, 50 state governors, and nearly every member of the U.S. House  
12 of Representatives have Twitter accounts.<sup>10</sup> In addition, Twitter states that it has "166 million  
13 monetizable daily active users" and had revenue of \$800 million in the first quarter of 2020.<sup>11</sup>

14 According to Twitter, one of its most important challenges in recent years has been "to  
15 combat the spread of misinformation on its platform," which has put Twitter in a position of  
16 "trying to strike a balance between free expression and preventing the spread of misleading  
17 information."<sup>12</sup> As a result, Twitter has taken steps to limit misinformation on its platform. For

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<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 4 (quoting Queenie Wong, *Political Ads Put Twitter, Facebook and Google in a Bind. Here's Why*, CNET (May 18, 2020), <https://www.cnet.com/features/political-ads-put-twitter-facebook-and-google-in-a-bind-heres-why>).

1 example, in late 2019, Twitter banned all political advertising from its service.<sup>13</sup> Furthermore, in  
2 response to misinformation about the COVID-19 pandemic, on May 11, 2020, Twitter  
3 announced that it was “introducing new labels and warning messages that will provide additional  
4 context and information on some Tweets containing disputed or misleading information related  
5 to COVID-19.”<sup>14</sup> Also in May 2020, Twitter expanded its existing “Election Integrity Policy”  
6 by making it a “Civic Integrity Policy,” both of which broadly forbid the use of Twitter’s  
7 services for the purpose of posting misleading information about voting.<sup>15</sup> The Civic Integrity  
8 Policy begins with a bold-faced warning:

9 **You may not use Twitter’s services for the purpose of manipulating or**  
10 **interfering in elections or other civic processes. This includes posting**  
11 **or sharing content that may suppress participation or mislead people**  
12 **about when, where, or how to participate in a civic process.**<sup>16</sup>

13 The policy goes on to describe the types of behavior Twitter intended to prohibit, including the  
14 posting of misleading information about how to participate in an election as well as posts  
15 attempting to increase voter suppression and intimidate voters.<sup>17</sup>

16 On May 26, 2020, Trump posted two tweets asserting that the use of mail-in ballots  
17 would lead to voter fraud, calling particular attention to the state of California.<sup>18</sup> In response,

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<sup>13</sup> *Id.* (citing Rachel Lerman and Barbara Ortuatay, *Twitter Bans Political Ads Ahead of 2020 Election*, ASSOCIATED PRESS (Oct. 30, 2019), <https://apnews.com/63057938a5b64d3592f800de19f443bc>).

<sup>14</sup> Twitter, “Updating our approach to misleading information.” (May 11, 2020), [https://blog.twitter.com/en\\_us/topics/product/2020/updating-our-approach-to-misleading-information.html](https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html).

<sup>15</sup> Resp. at 7, n.36.

<sup>16</sup> *Id.* at 5. The current version of Twitter’s Civic Integrity Policy also includes a warning that “we may label and reduce the visibility of Tweets containing false or misleading information about civic processes in order to provide additional context.” Twitter, “Civic Integrity Policy.” (Oct. 2020), <https://help.twitter.com/en/rules-and-policies/election-integrity-policy>.

<sup>17</sup> Resp. at 5-6.

<sup>18</sup> Twitter, @realDonaldTrump, May 26, 2020, 8:17am, <https://twitter.com/realDonaldTrump/status/1265255835124539392>.

- 1 Twitter appended an exclamation-point icon with text reading “Get the facts about mail-in  
 2 ballots” below both tweets. The tweets currently still appear with that icon, as seen below:



- 3  
 4 When users click through these “fact check” links, they are presented with a short article that  
 5 appears as follows:<sup>19</sup>

<sup>19</sup> Twitter, “Trump makes unsubstantiated claim that mail-in ballots will lead to voter fraud.” (May 26, 2020), <https://twitter.com/i/events/1265330601034256384>.

## Trump makes unsubstantiated claim that mail-in ballots will lead to voter fraud

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

On the day after adding these labels and additional content, Twitter used its own account to explain why it added the labels and information.

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.<sup>20</sup>

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.<sup>21</sup>

Following the 2020 general election, months after the Complaint was filed, Twitter again added "fact check" labels to certain of Trump's tweets.<sup>22</sup>

The Response primarily argues that Twitter undertook its labeling program and labeled Trump's tweet for a commercial, rather than electoral, purpose.<sup>23</sup> Twitter CEO Jack Dorsey told a Senate committee that the labeling program does not influence the

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<sup>20</sup> Twitter, @TwitterSafety, May 27, 2020, 10:54 p.m., <https://twitter.com/TwitterSafety/status/1265838823663075341>.

<sup>21</sup> Twitter, @TwitterSafety, May 27, 2020, 10:54 p.m., <https://twitter.com/TwitterSafety/status/1265838824451694597>.

<sup>22</sup> See, e.g., Twitter, @realDonaldTrump, Nov. 4, 12:49 a.m., <https://twitter.com/realDonaldTrump/status/1323864823680126977>; Twitter, @realDonaldTrump, Nov. 4, 4:56 p.m., <https://twitter.com/realDonaldTrump/status/1324108206801563650>.

<sup>23</sup> Resp. at 1-2, 10-12.

1 election, but rather is there to “protect the conversation and the integrity of the  
2 conversation around the elections.”<sup>24</sup>

### 3 **III. LEGAL ANALYSIS**

#### 4 **A. The Commission Should Find No Reason to Believe that Twitter Made a** 5 **Prohibited in-Kind Contribution**

6 The Act prohibits corporations from making contributions to federal candidates, and  
7 likewise bars political committees, other than independent expenditure-only political committees  
8 and committees with hybrid accounts, from knowingly accepting corporate contributions.<sup>25</sup> The  
9 term “contribution” includes “all in-kind contributions.”<sup>26</sup> As most relevant here, in-kind  
10 contributions include, *inter alia*, coordinated communications, subject to a three-part test  
11 codified at 11 C.F.R. § 109.21, and coordinated expenditures, defined at 11 C.F.R. § 109.20(a).  
12 Under the Commission’s coordinated communications regulation, the communication at issue  
13 must: (1) be paid for by a third party; (2) satisfy a “content” standard; and (3) satisfy a

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<sup>24</sup> Testimony of Jack Dorsey before the Senate Commerce Committee (Nov. 17, 2020); *see also* Resp. at 4 (“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.”).

<sup>25</sup> 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b), Note to Paragraph (b) (explaining that corporations and labor organizations may make contributions to nonconnected political committees that make only independent expenditures, or to separate accounts maintained by nonconnected political committees for making only independent expenditures).

<sup>26</sup> 11 C.F.R. § 100.52(d); *see also* 52 U.S.C. § 30101(8)(A) (defining contribution as including “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office”).

1 “conduct” standard.<sup>27</sup> All three prongs are required in order for the communication to be  
2 considered a coordinated communication and treated as an in-kind contribution.<sup>28</sup>

3 Although the available information suggests that Twitter may have met the first prong by  
4 expending corporate resources to add the “fact check” and accompanying article to Trump’s  
5 tweets, neither the “content” or the “conduct” prongs appear to be satisfied. The content  
6 standards in the regulation all require a communication to be either an “electioneering  
7 communication” or a “public communication,” neither of which appears to apply to Twitter’s  
8 activities or communications here.<sup>29</sup> An electioneering communication is “any broadcast, cable,  
9 or satellite communication” that refers to a “clearly identified candidate for Federal office,” is  
10 publicly distributed within a certain time before the election, depending on the office, and meets  
11 certain requirements regarding the audience, depending on the office.<sup>30</sup> Twitter’s “fact checks”  
12 of Trump’s tweets were published on the internet, not distributed on broadcast, cable, or satellite,  
13 and therefore do not legally qualify as electioneering communications. Alternatively, a public  
14 communication is “a communication by means of any broadcast, cable, or satellite  
15 communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone

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<sup>27</sup> 11 C.F.R. § 109.21. The content standards include: (1) a communication that is an electioneering communication; (2) a public communication that disseminates, distributes, or republishes campaign materials; (3) a public communication containing express advocacy; (4) a public communication that, in relevant part, refers to a clearly identified House or Senate candidate, and is publicly distributed or disseminated 90 days or fewer before a primary, general, or special election, and is directed to voters in the jurisdiction of the clearly identified candidate; and (5) a public communication that is the functional equivalent of express advocacy. *Id.* § 109.21(c).

The conduct standards include: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; and (5) former employee or independent contractor. *Id.* § 109.21(d)(1)-(5). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

<sup>28</sup> *Id.* § 109.21(a).

<sup>29</sup> *See id.* § 109.21(c) (content standards).

<sup>30</sup> 52 U.S.C. § 30104(f)(3) (definition of electioneering communication); 11 C.F.R. § 100.29 (same).



1 bank to the general public, or any other form of general public political advertising.”<sup>31</sup> The  
2 Commission’s implementing regulation provides that public communications “shall not include  
3 communications over the Internet, except for communications placed for a fee on another  
4 person’s Web site.”<sup>32</sup> While Twitter’s “fact check” labels and accompanying article are internet  
5 communications, the available information reveals that Twitter did not place them for a fee on  
6 another person’s website, it placed them on its own website. As such, these posts do not appear  
7 to be public communications.

8 It is likewise clear that the conduct prong is not satisfied. Each of the conduct standards  
9 requires some interaction with the candidate or campaign regarding the communication, such as  
10 a request or suggestion, substantial discussions, or use of a common vendor.<sup>33</sup> There is no  
11 indication, either in the Complaint or in any other information we have found, that Twitter added  
12 the “fact checks” in coordination with Trump’s opponents.<sup>34</sup> Instead, the “fact checks” appear to  
13 be part of an ongoing program, and Twitter cites to a different situation in which the labeling  
14 appeared to benefit Trump.<sup>35</sup>

15 The available information likewise does not indicate that Twitter’s costs in adding the  
16 “fact check” labels satisfy the definition of coordinated expenditure — the analysis here focuses

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<sup>31</sup> 52 U.S.C. § 30101(22) (definition of public communication); 11 C.F.R. § 100.26 (same).

<sup>32</sup> 11 C.F.R. § 100.26.

<sup>33</sup> *See id.* § 109.21(d) (content standards); *see also id.* 109.21(e) (stating that an agreement or formal collaboration “is not required for a communication to be a coordinated communication”).

<sup>34</sup> The Complaint does not specify which opponents. Trump’s Democratic opponent in the 2020 race, Joe Biden, was not officially nominated until August 2020, which was several months after the conduct at issue in this case.

<sup>35</sup> Resp. at 9 (asserting that Twitter added a “fact check” label to a tweet from a celebrity that used manipulated media to disparage Trump).

1 on any payments by Twitter that were “not made for communications.”<sup>36</sup> To the extent that the  
2 costs associated with the “fact checks” could be considered something other than  
3 communications, there is still nothing to suggest that Twitter made the payments “in cooperation,  
4 consultation or concert with, or at the request or suggestion of” any candidates.<sup>37</sup> Again, there  
5 are no facts from which to infer that Twitter had such contact with any of Trump’s opponents,  
6 and Twitter maintains that the “fact checks” at issue were made in accordance with its election-  
7 information policies.<sup>38</sup> Accordingly, there is no basis to infer that any payments by Twitter were  
8 coordinated expenditures.

9 As discussed above, Twitter’s Response also argues that its May 2020 Civic Engagement  
10 Policy, which specifically focuses on combatting misinformation in elections, advances Twitter’s  
11 commercial purpose, rather than an electoral purpose.<sup>39</sup> Twitter argues that, given its terms of  
12 use and in light of Commission precedent, it could have “remove[d] [Trump’s] Tweets entirely”  
13 but chose to take “a more calibrated approach to improve the health of the conversation it hosts  
14 while still making the platform available to an important political voice like that of President  
15 Trump.”<sup>40</sup> It further contends that “[t]hese decisions were made by applying a nonpartisan  
16 policy to further the company’s business objective of maintaining a healthy platform for  
17 discussion.”<sup>41</sup> Although the information in the record appears to be consistent with this

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<sup>36</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. at 425; *see* Advisory Op. 2011-14 at 4 (Utah Bankers Ass’n).

<sup>37</sup> 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20(a).

<sup>38</sup> Resp. at 11.

<sup>39</sup> *Id.* at 1-2, 10-12.

<sup>40</sup> *Id.* at 11.

<sup>41</sup> *Id.*

1 argument in light of Twitter's terms of use and policies,<sup>42</sup> as set forth above, Twitter's actions in  
2 labeling Trump's tweets did not meet the criteria for an in-kind contribution in the first place.

3 Finally, the Complaint alleges that Twitter qualifies as a debate platform but fails to  
4 comply with the Commission's debate regulations.<sup>44</sup> As an initial matter, although Twitter may  
5 be said to be providing a forum for debate and discussion, it is almost certainly not a "debate"  
6 within the meaning of Commission regulations.<sup>45</sup> More saliently, those regulations operate as an  
7 exception for activity that may otherwise be considered a contribution or expenditure. Because,  
8 as explained above, Twitter's alleged activities in connection with these matters are not  
9 contributions in the first place, determining whether the exception would apply is unnecessary.

10 For the foregoing reasons, we recommend that the Commission find no reason to believe  
11 that Twitter violated 52 U.S.C. § 30118(a) by making prohibited in-kind contributions.

12 **B. The Commission Should Find No Reason to Believe that Twitter Made an**  
13 **Unreported Independent Expenditure**

14 An "independent expenditure" is an expenditure "for a communication expressly  
15 advocating the election or defeat of a clearly identified candidate" that is not coordinated with  
16 the candidate or the candidate's committee.<sup>46</sup> The term "expressly advocating" means any

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<sup>42</sup>

First Gen. Counsel's  
Rpt., MURs 7443, 7447, 7550 (Twitter, Inc.) (recommending that the Commission find no reason to believe when  
Twitter temporarily changed the way search results were displayed, banned a candidate, and suspended an account  
for a commercial purpose)

<sup>44</sup> See Compl. at 2, 12.

<sup>45</sup> Accord First Gen. Counsel's Rpt. at 11, MUR 7443, 7447, & 7550 (Twitter, Inc.) (recommending same).

<sup>46</sup> 11 C.F.R. § 100.16(a) (definition of independent expenditure); see also 52 U.S.C. § 30101(17) (same).

1 communication that: (1) uses phrases or words such as “vote for,” “elect,” “defeat,” etc., “which  
2 in context can have no other reasonable meaning than to urge the election or defeat of one or  
3 more clearly identified candidate(s);” or (2) “[w]hen taken as a whole and with limited reference  
4 to external events, such as the proximity to the election, could only be interpreted by a  
5 reasonable person as containing advocacy of the election or defeat of one or more clearly  
6 identified candidate(s).”<sup>47</sup> Every person (other than a political committee) who makes  
7 independent expenditures in an aggregate amount or value in excess of \$250 during a calendar  
8 year shall file a statement with the Commission.<sup>48</sup>

9 In this case, Twitter’s “fact checks” contain no express advocacy opposing Trump or  
10 supporting his opponents. The Complaint argues that “by arbitrarily and capriciously ‘fact-  
11 checking’ Republican President Trump from its news-coverage website, Twitter has engaged in  
12 express advocacy against President Trump and in favor of his opponents.”<sup>49</sup> That argument is  
13 not borne out by the content of Twitter’s post, however, which does not reference his status as a  
14 candidate, the upcoming election, or exhort readers to vote in a certain way. Instead, it describes  
15 Trump’s tweets as “unsubstantiated” and references various news sources that cast doubt on his  
16 claims.<sup>50</sup> Although these statements are critical of Trump, they do not meet the Commission’s  
17 definition of “express advocacy.”

18 Because the activity at issue does not contain express advocacy, Twitter’s costs to engage  
19 in that activity does not qualify as an independent expenditure. We therefore recommend that

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<sup>47</sup> 11 C.F.R. § 100.22(a)-(b).

<sup>48</sup> 52 U.S.C. § 30104(c)(1); *see also* 11 C.F.R. § 114.10(b) (independent expenditure reporting requirements for corporations and labor organizations).

<sup>49</sup> Compl. at 14.

<sup>50</sup> *See supra* n.19 and accompanying photo.

1 the Commission find no reason to believe that Twitter violated 52 U.S.C. § 30104(c) by failing  
2 to disclose independent expenditures in connection with these “fact check” labels.

3 **IV. RECOMMENDATIONS**

- 4 1. Find no reason to believe that Twitter, Inc., violated 52 U.S.C. § 30118(a) by  
5 making prohibited in-kind corporate contributions;
- 6 2. Find no reason to believe that Twitter, Inc., violated 52 U.S.C. § 30104(c) by  
7 failing to disclose independent expenditures;
- 8 3. Approve the attached Factual and Legal Analysis;
- 9 4. Approve the appropriate letters; and
- 10 5. Close the file.

11  
12 Lisa J. Stevenson  
13 Acting General Counsel

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15  
16 December 11, 2020  
17 Date

18 *Charles Kitcher*  
19 \_\_\_\_\_  
20 Charles Kitcher  
21 Acting Associate General Counsel  
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