



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 24, 2021

VIA EMAIL: cburns@wiley.law

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

RE: MUR 7742
Twitter, Inc.

Dear Mr. Burns:

On June 5, 2020, the Federal Election Commission notified your client, Twitter, Inc., of a complaint 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 complaint and information provided by you, that there is no reason to believe your client violated 52 U.S.C. §§ 30118(a) or 30104(b). Accordingly, the Commission closed its file in this matter.

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 Amanda Andrade, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Jim Lee".

Jim Lee
Acting Assistant General Counsel

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7 RESPONDENT: Twitter, Inc.

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9 **I. INTRODUCTION**

10 The Complaint alleges that social media platform Twitter, Inc. (“Twitter”) violated the
11 Federal Election Campaign Act of 1971, as amended (the “Act”), by making either prohibited
12 corporate contributions or undisclosed independent expenditures. Specifically, the Complaint
13 alleges that Twitter sought to influence the 2020 Presidential election by adding a “fact check”
14 icon to two of President Donald J. Trump’s tweets as well as links to information regarding the
15 accuracy of the statements in Trump’s tweets.¹ The Complaint also argues that Twitter, as a
16 platform for political debate, falls within the scope of the Commission’s debate regulations and
17 that Twitter failed to use objective criteria for selecting participants as it was required to do.²
18 Accordingly, the Complaint alleges that Twitter’s costs in fact-checking Trump’s tweets
19 constitute prohibited in-kind contributions.³ In the alternative, the Complaint alleges that Twitter
20 “expressly advocat[ed]” against Trump’s reelection through its “fact checks” and, in so doing,
21 made unreported independent expenditures.⁴

22 Twitter filed a Response arguing that it added the “fact checks” for commercial reasons
23 and not for the purpose of influencing a federal election.⁵ In addition, Twitter argues that:

¹ Compl. at 12-15 (May 29, 2020).

² *Id.* at 2.

³ *Id.* at 12-14.

⁴ *Id.* at 14-15.

⁵ Resp. at 1-2, 10-12 (July 20, 2020).

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1 (1) the “fact checks” qualify for the media exemption;⁶ (2) the “fact checks” do not meet the
2 definition of a contribution because Twitter offers its services for free and there are no
3 allegations that Twitter engaged in coordination with any of Trump’s opponents;⁷ and (3) its
4 course of conduct was generally protected by the First Amendment.⁸

5 As discussed below, the available information indicates that Twitter’s costs to implement
6 the “fact check” feature could not have resulted in an in-kind contribution because the “fact
7 checks” at issue do not meet the definitions of electioneering communications or public
8 communications and because there is no indication that Twitter acted in coordination with any
9 federal candidate or committee. Further, because Twitter’s communications in connection with
10 the “fact checks” did not expressly advocate the election or defeat of a federal candidate, its
11 implementation costs were not independent expenditures. Accordingly, there is no reason to
12 believe that Twitter violated 52 U.S.C. § 30118(a) by making prohibited in-kind contributions or
13 52 U.S.C. § 30104(c) by failing to disclose independent expenditures.

14 **II. FACTUAL BACKGROUND**

15 Founded in 2007, Twitter is a large web-based social networking platform that allows
16 users to publicly communicate for free in messages of up to 280 characters.⁹ Twitter states that
17 all 100 United States Senators, 50 state governors, and nearly every member of the U.S. House

⁶ *Id.* at 12-13.

⁷ *Id.* at 13-14.

⁸ *Id.* at 14.

⁹ *Id.* at 2.

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1 of Representatives have Twitter accounts.¹⁰ In addition, Twitter states that it has “166 million
2 monetizable daily active users” and had revenue of \$800 million in the first quarter of 2020.¹¹

3 According to Twitter, one of its most important challenges in recent years has been “to
4 combat the spread of misinformation on its platform,” which has put Twitter in a position of
5 “trying to strike a balance between free expression and preventing the spread of misleading
6 information.”¹² As a result, Twitter has taken steps to limit misinformation on its platform. For
7 example, in late 2019, Twitter banned all political advertising from its service.¹³ Furthermore, in
8 response to misinformation about the COVID-19 pandemic, on May 11, 2020, Twitter
9 announced that it was “introducing new labels and warning messages that will provide additional
10 context and information on some Tweets containing disputed or misleading information related
11 to COVID-19.”¹⁴ Also in May 2020, Twitter expanded its existing “Election Integrity Policy”
12 by making it a “Civic Integrity Policy,” both of which broadly forbid the use of Twitter’s
13 services for the purpose of posting misleading information about voting.¹⁵ The Civic Integrity
14 Policy begins with a bold-faced warning:

15 **You may not use Twitter’s services for the purpose of manipulating or**
16 **interfering in elections or other civic processes. This includes posting**

¹⁰ *Id.*

¹¹ *Id.*

¹² *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>).

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

¹⁴ Twitter, “Updating our approach to misleading information.” (May 11, 2020), https://blog.twitter.com/en_us/topics/product/2020/updated-our-approach-to-misleading-information.html.

¹⁵ Resp. at 7, n.36.

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1 **or sharing content that may suppress participation or mislead people**
2 **about when, where, or how to participate in a civic process.**¹⁶

3 The policy goes on to describe the types of behavior Twitter intended to prohibit, including the
4 posting of misleading information about how to participate in an election as well as posts
5 attempting to increase voter suppression and intimidate voters.¹⁷

6 On May 26, 2020, Trump posted two tweets asserting that the use of mail-in ballots
7 would lead to voter fraud, calling particular attention to the state of California.¹⁸ In response,
8 Twitter appended an exclamation-point icon with text reading “Get the facts about mail-in
9 ballots” below both tweets. The tweets, which are no longer accessible,¹⁹ appeared as seen
10 below:

¹⁶ *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>.

¹⁷ Resp. at 5-6.

¹⁸ Twitter, @realDonaldTrump, May 26, 2020, 8:17am, <https://twitter.com/realDonaldTrump/status/1265255835124539392> (no longer available due to suspension of account; *see infra* n.19).

¹⁹ On January 8, 2021, Twitter permanently suspended Trump’s account. Kate Conger and Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES (Jan. 8, 2021), <https://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html>. Accordingly, the Commission refers to these tweets and accompanying text and graphics as they existed at the time of the Complaint.

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Donald J. Trump ✓
 @realDonaldTrump



There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed. The Governor of California is sending Ballots to millions of people, anyone.....



Get the facts about mail-in ballots

8:17 AM · May 26, 2020 · Twitter for iPhone



Donald J. Trump ✓ @realDonaldTrump · May 26
 Replying to @realDonaldTrump



....living in the state, no matter who they are or how they got there, will get one. That will be followed up with professionals telling all of these people, many of whom have never even thought of voting before, how, and for whom, to vote. This will be a Rigged Election. No way!



Get the facts about mail-in ballots

- 1
- 2 When users clicked through these “fact check” links, they were presented with a short article that
- 3 appeared as follows:²⁰

²⁰ Twitter, “Trump makes unsubstantiated claim that mail-in ballots will lead to voter fraud.” (May 26, 2020), <https://twitter.com/i/events/1265330601034256384>.

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

1 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.

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

4 We added a label to two @realDonaldTrump Tweets about California's vote-
5 by-mail plans as part of our efforts to enforce our civic integrity policy. We
6 believe those Tweets could confuse voters about what they need to do to
7 receive a ballot and participate in the election process.²¹

8 We also wanted to provide additional context and conversation with regard to
9 voter fraud and mail-in ballots. We have a range of remediations, and in some
10 cases we add labels that link to more context.²²

11 Following the 2020 general election, months after the Complaint was filed, Twitter again
12 added "fact check" labels to certain of Trump's tweets.²³

13 The Response primarily argues that Twitter undertook its labeling program and
14 labeled Trump's tweet for a commercial, rather than an electoral, purpose.²⁴ Twitter
15 CEO Jack Dorsey told a Senate committee that the labeling program does not influence

²¹ Twitter, @TwitterSafety, May 27, 2020, 10:54 p.m., <https://twitter.com/TwitterSafety/status/1265838823663075341>.

²² Twitter, @TwitterSafety, May 27, 2020, 10:54 p.m., <https://twitter.com/TwitterSafety/status/1265838824451694597>.

²³ 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>.

²⁴ Resp. at 1-2, 10-12.

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1 elections, but rather is there to “protect the conversation and the integrity of the
2 conversation around the elections.”²⁵

3 **III. LEGAL ANALYSIS**

4 **A. There is No Reason to Believe that Twitter Made a Prohibited in-Kind** 5 **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.²⁶ The
9 term “contribution” includes “all in-kind contributions.”²⁷ 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
14 “conduct” standard.²⁸ All three prongs are required in order for the communication to be

²⁵ 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.”).

²⁶ 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).

²⁷ 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”).

²⁸ 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).

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1 considered a coordinated communication and treated as an in-kind contribution under the
2 regulations.²⁹

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 require that a communication be either an “electioneering
7 communication” or a “public communication,” neither of which appears to apply to Twitter’s
8 activities or communications here.³⁰ 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.³¹ 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
16 bank to the general public, or any other form of general public political advertising.”³² The
17 Commission’s implementing regulation provides that public communications “shall not include

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).

²⁹ *Id.* § 109.21(a).

³⁰ *See id.* § 109.21(c) (content standards).

³¹ 52 U.S.C. § 30104(f)(3) (definition of electioneering communication); 11 C.F.R. § 100.29 (same).

³² 52 U.S.C. § 30101(22) (definition of public communication); 11 C.F.R. § 100.26 (same).

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1 communications over the Internet, except for communications placed for a fee on another
2 person’s Web site.”³³ While Twitter’s “fact check” labels and accompanying article were
3 internet communications, the available information reveals that Twitter did not place them for a
4 fee on another person’s website, it placed them on its own website. As such, these posts do not
5 appear to be public communications.

6 It is likewise clear that the conduct prong is not satisfied. Each of the conduct standards
7 requires some interaction with the candidate or campaign regarding the communication, such as
8 a request or suggestion, substantial discussions, or use of a common vendor.³⁴ There is no
9 indication, either in the Complaint or in any other information we have found, that Twitter added
10 the “fact checks” in coordination with Trump’s opponents.³⁵ Instead, the “fact checks” appear to
11 be part of an ongoing program, and Twitter cites to a different situation in which the labeling
12 appeared to benefit Trump.³⁶

13 The available information likewise does not indicate that Twitter’s costs in adding the
14 “fact check” labels satisfy the definition of coordinated expenditure — the analysis here focuses
15 on any payments by Twitter that were “not made for communications.”³⁷ To the extent that the
16 costs associated with the “fact checks” could be considered something other than

³³ 11 C.F.R. § 100.26.

³⁴ *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”).

³⁵ 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.

³⁶ Resp. at 9 (asserting that Twitter added a “fact check” label to a tweet from a celebrity that used manipulated media to disparage Trump).

³⁷ Coordinated and Independent Expenditures, 68 Fed. Reg. at 425; *see* Advisory Op. 2011-14 at 4 (Utah Bankers Ass’n).

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1 communications, there is still nothing to suggest that Twitter made the payments “in cooperation,
2 consultation or concert with, or at the request or suggestion of” any candidates.³⁸ Again, there
3 are no facts from which to infer that Twitter had such contact with any of Trump’s opponents,
4 and Twitter maintains that the “fact checks” at issue were made in accordance with its election-
5 information policies.³⁹ Accordingly, there is no basis to infer that any payments by Twitter were
6 coordinated expenditures.

7 Finally, the Complaint alleges that Twitter qualifies as a debate platform but fails to
8 comply with the Commission’s debate regulations.⁴⁰ That multiple candidates may choose to
9 express their opinions via their Twitter accounts does not make Twitter a host of a debate. The
10 Commission has interpreted a debate to necessarily involve “face-to-face appearances or
11 confrontations,” noting that this has been “an inherent characteristic of candidate debates since
12 the prototypical Lincoln-Douglas Debates in 1858.”⁴¹ Twitter may be said to be providing a
13 forum for debate and discussion, but it is not a “debate” within the meaning of Commission
14 regulations. More saliently, those regulations operate as an exception for activity that may
15 otherwise be considered a contribution or expenditure. The purpose of the regulations is to
16 “provide a specific exception so that certain nonprofit organizations and the news media may
17 stage debates, without being deemed to have made prohibited corporate contributions to the

³⁸ 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20(a).

³⁹ Resp. at 11.

⁴⁰ See Compl. at 2, 12.

⁴¹ 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 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”).

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1 candidates taking part in the debate.”⁴² Because, as explained above, Twitter’s alleged activities
2 in connection with these matters are not contributions in the first place, determining whether the
3 exception would apply is unnecessary.

4 For the foregoing reasons, there is no reason to believe that Twitter violated 52 U.S.C.
5 § 30118(a) by making prohibited in-kind contributions.

6 **B. There is No Reason to Believe that Twitter Made an Unreported**
7 **Independent Expenditure**

8 An “independent expenditure” is an expenditure “for a communication expressly
9 advocating the election or defeat of a clearly identified candidate” that is not coordinated with
10 the candidate or the candidate’s committee.⁴³ The term “expressly advocating” means any
11 communication that: (1) uses phrases or words such as “vote for,” “elect,” “defeat,” etc., “which
12 in context can have no other reasonable meaning than to urge the election or defeat of one or
13 more clearly identified candidate(s);” or (2) “[w]hen taken as a whole and with limited reference
14 to external events, such as the proximity to the election, could only be interpreted by a
15 reasonable person as containing advocacy of the election or defeat of one or more clearly
16 identified candidate(s).”⁴⁴ Every person (other than a political committee) who makes
17 independent expenditures in an aggregate amount or value in excess of \$250 during a calendar
18 year shall file a statement with the Commission.⁴⁵

⁴² See Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64260, 64261 (Dec. 14, 1995). 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.

⁴³ 11 C.F.R. § 100.16(a) (definition of independent expenditure); *see also* 52 U.S.C. § 30101(17) (same).

⁴⁴ 11 C.F.R. § 100.22(a)-(b).

⁴⁵ 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).

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1 In this case, Twitter’s “fact checks” contained no express advocacy opposing Trump or
2 supporting his opponents. The Complaint argues that “by arbitrarily and capriciously ‘fact-
3 checking’ Republican President Trump from its news-coverage website, Twitter has engaged in
4 express advocacy against President Trump and in favor of his opponents.”⁴⁶ That argument is
5 not borne out by the content of Twitter’s post, however, which did not reference his status as a
6 candidate, the upcoming election, or exhort readers to vote in a certain way. Instead, it described
7 Trump’s tweets as “unsubstantiated” and referenced various news sources that cast doubt on his
8 claims.⁴⁷ Although these statements were critical of Trump, they do not meet the Commission’s
9 definition of “express advocacy.”

10 Because the activity at issue did not contain express advocacy, Twitter’s costs to engage
11 in that activity do not qualify as an independent expenditure. There is therefore no reason to
12 believe that Twitter violated 52 U.S.C. § 30104(c) by failing to disclose independent
13 expenditures in connection with these “fact check” labels.

⁴⁶ Compl. at 14.

⁴⁷ See *supra* n.19 and accompanying photo.