

1 **FEDERAL ELECTION COMMISSION**

2 **FIRST GENERAL COUNSEL'S REPORT**

3 **MUR 7807**

4 DATE COMPLAINT FILED: 09/29/2020

5 DATE OF NOTIFICATION: 10/02/2020

6 LAST RESPONSE RECEIVED: 11/16/2020

7 DATE ACTIVATED: 12/14/2020

8 EXPIRATION OF SOL: 06/01/2025

9 (earliest)

10 ELECTION CYCLE: 2020

11 **COMPLAINANT:** Donald J. Trump for President, Inc.<sup>1</sup>

12 **RESPONDENT:** Snap Inc.

13 **RELEVANT STATUTES** 52 U.S.C. § 30118(a)

14 **AND REGULATIONS:** 11 C.F.R. § 100.52(d)(1)

15 11 C.F.R. § 109.21

16 11 C.F.R. § 114.2(b)

17 **INTERNAL REPORTS CHECKED:** Disclosure Reports

18 **FEDERAL AGENCIES CHECKED:**

19 **I. INTRODUCTION**

20 The Complaint in this matter alleges that Snap Inc. (“Snap”) violated the Federal Election  
 21 Campaign Act of 1971, as amended (the “Act”), by making a prohibited corporate contribution  
 22 to Joe Biden and Biden for President during the 2020 election. According to the Complaint, in  
 23 early June 2020, Snap stopped promoting Donald Trump on Snapchat’s “Discover” platform but  
 24 continued to promote Biden. The Complaint alleges that Snap’s decision was motivated by the

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25 <sup>1</sup> After the Complaint and Responses were filed, Donald J. Trump for President, Inc. changed its name to  
 26 Make America Great Again PAC. See Make America Great Again PAC, Statement of Organization, FEC Form 1  
 27 (Feb. 27, 2021).

1 “partisan ideology” of Snap CEO Evan Spiegel and that Snap’s continued promotion of Joe  
2 Biden on Discover amounted to millions of dollars in “free advertising,” which constituted a  
3 corporate in-kind contribution.<sup>2</sup>

4 Snap acknowledges that it stopped including Trump’s account on Discover but denies it  
5 did so for the purpose of influencing a federal election. Thus, Snap contends it did not make a  
6 prohibited in-kind contribution.<sup>3</sup>

7 The available information indicates that Snap’s decision to stop promoting the Trump  
8 campaign account on Snap was done for *bona fide* commercial reasons and not for the purpose of  
9 influencing the 2020 presidential election. Further, Snap’s continued inclusion of Joe Biden on  
10 Snapchat’s Discover platform was neither an advertising service nor a coordinated  
11 communication. Accordingly, we recommend that the Commission find no reason to believe  
12 that Snap made a corporate in-kind contribution to Biden and Biden for President in violation of  
13 52 U.S.C. § 30118(a). We also recommend that the Commission find no reason to believe that  
14 Evan Spiegel consented to a corporate contribution in violation of 52 U.S.C. § 30118(a).

## 15 **II. BACKGROUND**

### 16 **A. The Snapchat Application**

17 Snap is a publicly traded company. It was incorporated in Delaware as Snapchat, Inc., in  
18  
19 Snap is a publicly traded company. It was incorporated in Delaware as Snapchat, Inc., in  
20 2012 and changed its name to Snap Inc. in 2016.<sup>4</sup> Evan Spiegel is Snap’s Chief Executive

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<sup>2</sup> Complaint at 5 (Sept. 29, 2020).

<sup>3</sup> *See* Response at 1 (Nov. 16, 2020).

<sup>4</sup> *Id.*

1 Officer (CEO) and one of its co-founders.<sup>5</sup> Snap describes itself as a camera company.<sup>6</sup> Its  
2 flagship product, Snapchat, is a free camera application used primarily on mobile devices<sup>7</sup> and  
3 was “created to help people communicate through short videos and images called ‘Snaps.’”<sup>8</sup>  
4 According to its Form 10-Q filed in October 2020, there were 249 million daily active users of  
5 the Snapchat application in the third quarter of 2020.<sup>9</sup> Substantially all of Snap’s revenue is  
6 generated from third parties advertising on Snapchat.<sup>10</sup>

7 In 2015, Snap launched “Discover,” a free vertical video platform on the Snapchat  
8 application.<sup>11</sup> For a Snapchat user to access Discover, they swipe left from the camera (the  
9 Snapchat application opens to the camera) to open “Stories.”<sup>12</sup> From there, users can access the  
10 Discover section. The Response describes Discover as follows:

11 In the Discover section, users see thumbnails containing news  
12 headlines and associated photos. Users can then choose to click on  
13 a thumbnail to open and read the story. A user can choose to  
14 subscribe to a particular news source/channel, and can choose to  
15 receive updates on new posts from these channels. Users also will  
16 see other content that is popular or aligned with their interests even  
17 if they have not subscribed to it.<sup>13</sup>  
18

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<sup>5</sup> Resp. at 2.

<sup>6</sup> <https://www.snap.com/en-US> (“Snap is a camera company. We believe that reinventing the camera represents our greatest opportunity to improve the way people live and communicate.”); Snap Inc., Quarterly Report (Form 10-Q), at 10 (Oct. 21, 2020) (“Snap 10-Q”).

<sup>7</sup> Snap 10-Q at 10.

<sup>8</sup> Resp. at 2 (quoting Snap 10-Q at 10).

<sup>9</sup> Snap 10-Q at 24. “Daily Active User” is defined as a “registered Snapchat user who opens the Snapchat application at least once during a defined 24-hour period.” *Id.* at 25.

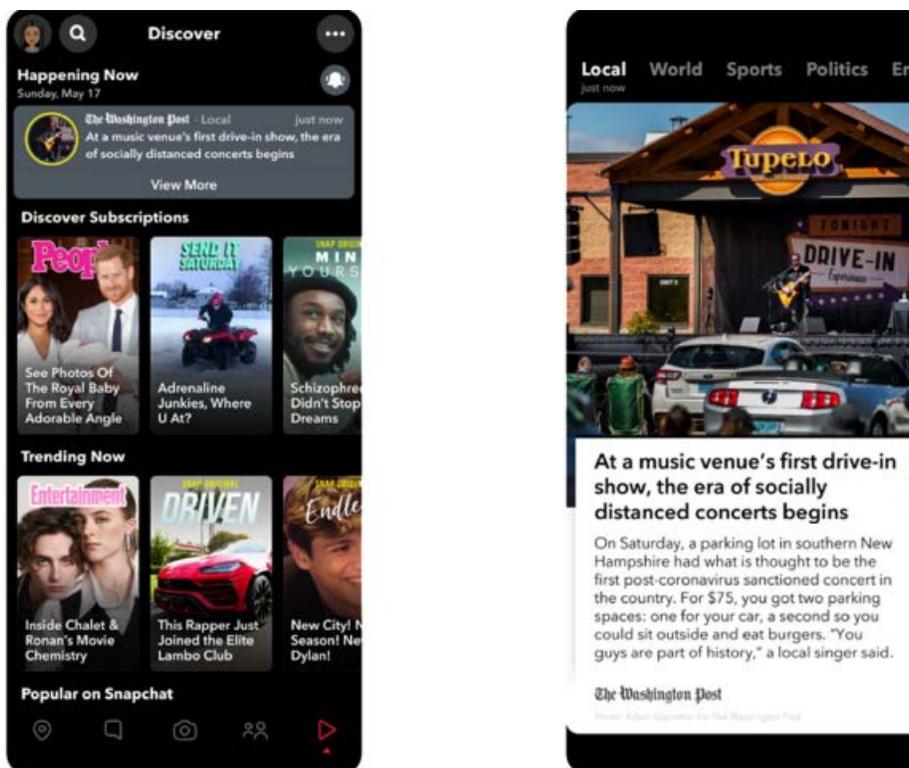
<sup>10</sup> *Id.* at 11, 42-43.

<sup>11</sup> Press Release, Introducing Discover, <https://newsroom.snap.com/introducing-discover>.

<sup>12</sup> Snapchat Support, How to Use Snapchat, <https://support.snapchat.com/en-US/a/how-to-use-snapchat>.

<sup>13</sup> Resp. at 4; *see also* Snapchat Support, Stories, <https://support.snapchat.com/en-US/a/discover> (“The Discover section has Stories from publishers, creators, Snap Stars, the community, Sponsored Stories, and more.”).

1 Discover includes “content from publishers and creators in the community” personalized  
 2 for each Snapchat user.<sup>14</sup> In other words, Discover consists of select third party content that  
 3 *Snap* chooses to promote on the Snapchat application.<sup>15</sup> A depiction of Discover provided by the  
 4 Response is below:



5 Snap states that it has “long promulgated and enforced” its Community Guidelines  
 6 through which it seeks to ensure the Snapchat application provides a “safe and positive  
 7 experience.”<sup>16</sup> Currently, the Community Guidelines apply to “all content on Snapchat — and to

<sup>14</sup> Snapchat, *The New Snapchat in 60 Seconds*, YouTube (Nov. 29, 2017), [https://www.youtube.com/watch?v=nx1R-eHskfM&feature=emb\\_title](https://www.youtube.com/watch?v=nx1R-eHskfM&feature=emb_title).

<sup>15</sup> Resp. at 6-7.

<sup>16</sup> Snap Community Guidelines, <https://snap.com/en-US/community-guidelines>; Resp. at 6. Although Snap did not provide a date as to when the Guidelines were first promulgated, publicly available information indicates that Snap had them in place for many years. See <https://www.childnet.com/blog/reporting-on-snapchat-answering-some-frequently-asked-questions> (stating that posts containing content, such as threats and violence, harassment and bullying, and terrorism could result in “breaking” Snap Community Guidelines) (posted March 15, 2018); Letter from Chris Handman, General Counsel, Snapchat, Inc., to The Honorable Charles E. Grassley, Chairman,

1 all Snapchatters, equally.”<sup>17</sup> However, at the time leading up to the events of this matter, the  
 2 Community Guidelines applied to “all content on Snapchat.”<sup>18</sup> In late May 2020, the guidelines  
 3 prohibited a variety of content in the following categories: (1) sexually explicit content;  
 4 (2) harassment and bullying, such as sharing another person’s private information or depicting  
 5 people in private spaces without their consent; (3) threats, violence, and harm, including  
 6 encouraging violence or dangerous behavior; (4) impersonation, deceptive practices, and false  
 7 information, such as pretending to be someone else or denying the existence of tragic events,  
 8 unsubstantiated medical claims, or undermining the integrity of civic processes; (5) illegal  
 9 content, such as using Snapchat to buy drugs; and (6) terrorism, hate groups, or hate speech,  
 10 including speech or content that demeans, defames, or promotes discrimination or violence on  
 11 the basis of various characteristics.<sup>19</sup> Snap’s guidelines also stated that the company would “try  
 12 to do what we think best reflects these values in each situation in our sole discretion.”<sup>20</sup>

### 13 **B. Snap’s Decision to Stop Promoting Trump on Discover**

14 Both the campaigns of Trump and Biden maintained accounts on Snapchat and were  
 15 featured on Discover through early 2020.<sup>21</sup> Then, on May 28 and May 30, 2020, using his

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Committee on the Judiciary, United States Senate (June 13, 2016), <https://www.judiciary.senate.gov/imo/media/doc/2016-06-23%20Snapchat%20to%20CEG%20-%20Elder%20Exploitation%20via%20Social%20Media.pdf> (describing Snapchat Community Guidelines as applied to elder abuse and invasions of privacy).

<sup>17</sup> Snap Community Guidelines, <https://snap.com/en-US/community-guidelines>.

<sup>18</sup> *Wayback Machine*, Internet Archive, (last visited Mar. 2, 2021), <https://archive.org/> (search for “<https://snap.com/en-US/community-guidelines>” to see Snap’s Community Guidelines at various times). Because the actions that form the basis for the Complaint’s allegations occurred in early June 2020, we utilized an internet archive to acquire a copy of Snap’s Community Guidelines in effect as of May 27, 2020, which was the closest date available.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Compl. at 1 (citing Camille Camdessus, *Trump, Biden Turn To New Presidential Campaign Field -- Snapchat*, BARRON’S (May 26, 2020), <https://www.barrons.com/news/trump-biden-turn-to-new-presidential-campaign-field-snapchat-01590543604>); *id.* at 5 (citing Garrett Sloane, *Snapchat Tosses Trump from Discover*,

1 Twitter and Facebook accounts, Trump responded to the ongoing nationwide protests over the  
 2 death of George Floyd. Trump stated:

3 “[t]hese THUGS are dishonoring the memory of George Floyd,  
 4 and I won’t let that happen. Just spoke to [Minnesota] Governor  
 5 Tim Walz and told him that the Military is with him all the way.  
 6 Any difficulty and we will assume control but, when the looting  
 7 starts, the shooting starts. Thank you!”<sup>22</sup>

8  
 9 “they [protestors outside the White House] would have been  
 10 greeted with the most vicious dogs, and most ominous weapons, I  
 11 have ever seen. That’s when people would have been really badly  
 12 hurt at least. Many Secret Service agents just waiting for action.  
 13 ‘We put the young ones on the front line, sir, they love it, and . . .  
 14 good practice.’”<sup>23</sup>

15  
 16 Twitter responded by placing a “public interest notice” on several of Trump’s Tweets for  
 17 glorifying violence.<sup>24</sup> Snap responded as well. On May 31, 2020, Snapchat CEO Evan Spiegel  
 18 sent a memo to all company employees, writing:

19 [Snapchat] simply cannot promote accounts in America that are  
 20 linked to people who incite racial violence, whether they do so on  
 21 or off our platform. Our Discover content platform is a curated  
 22 platform, where we decide what we promote. We have spoken  
 23 time and again about working hard to make a positive impact, and  
 24 we will walk the talk with the content we promote on Snapchat.  
 25 We may continue to allow divisive people to maintain an account

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ADAGE (June 3, 2020), <https://adage.com/article/digital/snapchat-tosses-trump-discover-drawing-advertiser-praise-and-presidential-rage/2260621>).

<sup>22</sup> <https://www.facebook.com/DonaldTrump/posts/i-cant-stand-back-watch-this-happen-to-a-great-american-city-minneapolis-a-total/10164767134275725/>; Donald J. Trump@realDonaldTrump, Twitter (May 28, 2020).

<sup>23</sup> Donald J. Trump@realDonaldTrump, Twitter (May 30, 2020).

<sup>24</sup> Resp. at 10; Twitter Comms (May, 29, 2020), <https://twitter.com/TwitterComms/status/1266267446979129345> (“This Tweet violates our policies regarding the glorification of violence based on the historical context of the last line, its connection to violence, and the risk it could inspire similar actions today.”). The effect of the notice resulted in the Tweets being hidden from Trump’s timeline (although still accessible if a user visited the Tweet directly) and users no longer being able to reply to the Tweets, retweet them directly, or like them. Newley Purnell & Andrew Restuccia, *Twitter Flags Trump’s Tweet About George Floyd Protests for ‘Glorifying Violence’*, WALL ST. JOURNAL (May 29, 2020),

1 on Snapchat, as long as the content that is published on Snapchat is  
2 consistent with our community guidelines, but we will not promote  
3 that account or content in any way. . . . This does not mean that we  
4 will remove content that people disagree with, or accounts that are  
5 insensitive to some people. . . . But there is simply no room for  
6 debate in our country about the value of human life and the  
7 importance of a constant struggle for freedom, equality, and  
8 justice. We are standing with all those who stand for peace, love,  
9 and justice and we will use our platform to promote good rather  
10 than evil.<sup>25</sup>

11  
12 A few days later, Snap stopped promoting the Trump campaign account on its Discover  
13 platform<sup>26</sup> and therefore stopped pushing the account affirmatively to users who did not seek it  
14 out.<sup>27</sup> In explaining Snap's decision, Mr. Spiegel stated that "the company was exercising its  
15 First Amendment right to free speech when it decided not to amplify President Donald Trump's  
16 content to a broader audience."<sup>28</sup> Snap states that it did not remove or hide Trump's account; it  
17 let the account remain accessible to those who followed it, searched for it, or wanted to view its  
18 content.<sup>29</sup>

19 Twitter and Snap were not the only companies to announce changes in the wake of  
20 Trump's May 28th and May 30th communications. For example, Twitch, the video streaming  
21 platform owned by Amazon, suspended President Trump's channel for "hateful conduct."<sup>30</sup>  
22 Reddit changed its content policy "to explicitly address hate," resulting in the termination of

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<sup>25</sup> See Resp. at 10-11; Evan Spiegel, *We Stand Together*, Snap.com (June 1, 2020),  
<https://newsroom.snap.com/we-stand-together>.

<sup>26</sup> Resp. at 11.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (quoting Sarah Frier, *Snap CEO Says Exercising Free Speech Rights by Limiting Trump*, BLOOMBERG  
(June 11, 2020), <https://www.bloomberg.com/news/articles/2020-06-11/snap-ceo-says-exercising-free-speech-rights-by-limiting-trump>).

<sup>29</sup> *Id.* at 11.

<sup>30</sup> Kellen Browning, *Twitch Suspends Trump's Channel for 'Hateful Conduct'*, N.Y. TIMES (June 29, 2020),  
<https://www.nytimes.com/2020/06/29/technology/twitch-trump.html>.

1 2,000 forums — known as subreddits — including the “r/The\_Donald forum,” which had over  
 2 790,000 subscribers.<sup>31</sup> Although Facebook took no immediate action, CEO Mark Zuckerberg  
 3 announced that the company would review its policies following public employee criticism and a  
 4 virtual walkout of hundreds of Facebook employees who disagreed with the company’s lack of  
 5 response.<sup>32</sup>

### 6 C. The Complaint and Response

7 The Complaint alleges that Snap’s decision to stop promoting Trump’s and his  
 8 Campaign’s content on Discover resulted in a corporate contribution to Joe Biden and his  
 9 campaign.<sup>33</sup> The Complaint argues that Snap “pretextually” claimed the communications  
 10 violated Snapchat community guidelines when “[i]n reality, Snapchat’s CEO [Evan Spiegel]  
 11 disagreed with President Trump and his Campaign’s messaging . . . and sought to silence the  
 12 President and his Campaign’s voice based on his own partisan ideology.”<sup>34</sup> The Complaint states

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<sup>31</sup> Cristiano Lima, *Twitch, Reddit crack down on Trump-linked content as industry faces reckoning*, POLITICO (June 29, 2020), <https://www.politico.com/news/2020/06/29/reddit-bans-pro-trump-forum-in-crackdown-on-hate-speech-344698>; *see also* Reddit, *Upcoming changes to our content policy, our board, and where we’re going from here* (June 5, 2020), [https://www.reddit.com/r/announcements/comments/gxas21/upcoming\\_changes\\_to\\_our\\_content\\_policy\\_our\\_board/](https://www.reddit.com/r/announcements/comments/gxas21/upcoming_changes_to_our_content_policy_our_board/); Reddit, *Update to Our Content Policy* (June 29, 2020), [https://www.reddit.com/r/announcements/comments/hi3oht/update\\_to\\_our\\_content\\_policy/](https://www.reddit.com/r/announcements/comments/hi3oht/update_to_our_content_policy/).

<sup>32</sup> *See* Resp. at 11 n.62 (citing Editorial Board, *Zuckerberg’s Credibility Test*, WALL ST. JOURNAL (June 4, 2020), <https://www.wsj.com/articles/zuckerbergs-credibility-test-11591313900>); *see also* Deepa Seetharaman, *Handling of Trump Posts Prompt Facebook Employees to Stage Virtual Walkout*, WALL ST. JOURNAL (June 1, 2020), <https://www.wsj.com/articles/facebook-employees-stage-virtual-walkout-over-trump-posts-11591034647>. On June 26, 2020, Facebook CEO Mark Zuckerberg announced, among other things, that the company was “prohibiting a wider category of hateful content in ads” and “expanding [Facebook’s] ads policy to prohibit claims that people from a specific race, ethnicity, national origin, religious affiliation, caste, sexual orientation, gender identity or immigration status are a threat to the physical safety, health or survival of others. At the same time, however, Zuckerberg said content would not be removed “if the public interest value outweighs the risk of harm,” and that seeing speech from politicians is in the public interest. Unless such public interest content incited violence or suppresses voting, Facebook would not remove it, but would instead label the content as violating Facebook’s policies. <https://www.facebook.com/zuck/posts/10112048980882521> (June 26, 2020) (noting that Zuckerberg committed “three weeks ago” to reviewing Facebook’s policies).

<sup>33</sup> Compl. at 4.

<sup>34</sup> *Id.*

1 that the loss of access to Snapchat's Discover platform increased the cost to the Trump campaign  
2 of getting its videos viewed by Snapchat users.<sup>35</sup> By the same token, the Complaint argues that  
3 Snap's continued promotion of Joe Biden on Discover amounted to millions of dollars in "free  
4 advertising services."<sup>36</sup>

5 The Complaint also argues that Snap's continued inclusion of Joe Biden on Discover "is  
6 not an exempt activity under [the Act's] 'press' or 'media exemption'" because Snap is not a  
7 press entity as traditionally determined by the Commission and because Snap's complained of  
8 actions are not within a press entity's legitimate press function.<sup>37</sup>

9 Snap acknowledges that it stopped including Trump's account on Discover but denies  
10 Snap's actions resulted in a prohibited in-kind contribution to Biden. Snap argues that its  
11 conduct did not violate the Act because: (1) Snap's decision to stop promoting the Trump  
12 campaign's account was an "electorally-neutral business decision" and not for the purpose of  
13 influencing an election<sup>38</sup> and (2) Snap's decision is protected under the First Amendment.<sup>39</sup>

14 Spiegel responded that he should be dismissed from this matter "at the threshold"  
15 because the Complaint did not specifically name him as a respondent and did not provide a basis

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<sup>35</sup> *Id.* at 5 ("Using the Discover feature, the Trump campaign on average, can generate approximately 1.5 million views of a single video posted on Snapchat. Without access to Discover, the average number of views drops to approximately 215,000 users. The average cost per view on Snapchat is 9 cents — meaning that in order to make up the difference in lost viewership, the Trump Campaign would have to pay approximately \$115,000 per video to reach the same scope of audience.").

<sup>36</sup> *Id.* at 5-6. The Complaint cites the Commission's debate regulations requiring staging organizations to not promote or advance a particular candidate to "prove the point" that the alleged "advertising services" provided to Joe Biden amounts to a prohibited corporate contribution unless also provided to Trump. *See id.* at 7 (citing Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates, 60 Fed. Reg. 64260, 64261 (Dec. 14, 1995)).

<sup>37</sup> *Id.* at 7-9 (citing 11 C.F.R. § 100.73).

<sup>38</sup> Resp. at 1, 14-16.

<sup>39</sup> *Id.* at 16 (citing *Citizens United v. FEC*, 558 U.S. 310 (2010) for proposition that "[t]he First Amendment specifically protects the right of corporations to publicly express their opinions on important issues of policy.").

1 for including him personally as a respondent.<sup>40</sup> Spiegel also stated that the five substantive  
 2 defenses articulated by Snap apply to him too.<sup>41</sup>

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

#### 4 **A. Snap Does Not Appear to Have Made a Prohibited In-Kind Contribution to** 5 **the Biden Campaign**

6  
 7 The Act prohibits corporations from making contributions to federal candidates and bars  
 8 candidates and political committees, other than independent expenditure-only political  
 9 committees and committees with hybrid accounts, from knowingly accepting or receiving  
 10 corporate contributions.<sup>42</sup> The Act also prohibits corporate officers and directors from  
 11 consenting to such contributions.<sup>43</sup> The term “contribution” includes “any gift, subscription,  
 12 loan, advance, or deposit of money or anything of value made by any person for the purpose of  
 13 influencing any election to Federal office.”<sup>44</sup>

#### 14 1. Snap’s Decision To Stop Promoting Trump on Discover Appears to Have 15 Been For *Bona Fide* Commercial Reasons

16  
 17 The Commission has long considered activity engaged in for *bona fide* commercial  
 18 reasons not to be “for the purpose of influencing an election,” and thus, not a contribution or

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<sup>40</sup> *Id.* at 13-14.

<sup>41</sup> *Id.* at 14.

<sup>42</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>43</sup> 52 U.S.C. § 30118(a).

<sup>44</sup> 52 U.S.C. § 30101(8)(A). For the purposes of section 30118, the term “contribution” includes the definition provided at 52 U.S.C. § 30101(8)(A) and also includes “any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section . . . .” 52 U.S.C. § 30118(b); 11 C.F.R. § 114.1(a).

1 expenditure under section 30118(a).<sup>45</sup> This is true even if a candidate benefitted from the  
 2 commercial activity.<sup>46</sup>

3 Here, Snap's removal of Trump from the Snapchat Discover platform appears to be a  
 4 decision made for *bona fide* commercial reasons and not for the purpose of influencing an  
 5 election. Snap reasonably contends that the success of its flagship product Snapchat turns on its  
 6 ability to retain, grow, and engage Snapchat's daily active users.<sup>47</sup> Snap states that "it has  
 7 become commercially successful because it has conscientiously developed a user base of

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<sup>45</sup> See, e.g., Factual & Legal Analysis at 4, MUR 6586 (World Wrestling Entertainment, Inc.) (WWE acted with the "sole intent to defend its business reputation" and not for the purpose of influencing the election when WWE's Senior VP sent a letter to a newspaper seeking a retraction of a negative article about Senate candidate Linda McMahon, the founder and owner of WWE); First Gen. Counsel's Rpt. at 13, MUR 5474 (Dog Eat Dog Films, *et al.*) (determining distributors and marketers of Fahrenheit 9/11 film did so "in connection with bona fide commercial activity and not for the purpose of influencing an election"); Certification, MUR 5474 (June 8, 2005) (Commission voted 6-0 to adopt recommendations); First Gen. Counsel's Rpt. at 2, MUR 1051 (Les Aspin) (advertisement portraying candidate in glowing terms was made for purpose of promoting Scientific American magazine); Certification, MUR 1051 (Nov. 16, 1979) (Commission voted 6-0 to find no reason to believe); First Gen. Counsel's Rpt. at 1-2, MUR 296 (Penthouse Magazine) (no reason to believe where corporate communication was an effort to promote a commercial venture — the selling of a magazine with a controversial article about Jimmy Carter); Certification, MUR 296 (Dec. 22, 1976) (Commission voted 5-0 to approve recommendation); Advisory Opinion 2021-04 (Pray.com) (online platform's posting of candidate statements on matters of faith serves company's commercial interests and is not a corporate in-kind contribution); Advisory Opinion 2012-11 (Microsoft Corporation) (commercially reasonable efforts "to protect [Microsoft] brand reputation" not an in-kind contribution when the company provided election-sensitive customers with free account security services); *cf. FEC v. Orloski v. FEC*, 795 F.2d 156, 160 (D.C. Cir. 1986) ("Corporate donations made for non-political purposes are therefore permissible.").

First Gen. Counsel's Rpt. at 10, MURs 7443, 7447, & 7550 (Twitter, Inc.) (Corporation acting to "preemptively detect and reduce the reach of" content. . . [corporation] believes negatively affects its brand and ability to attract advertisers" reflects commercial considerations, rather than an effort to influence a federal election) (

<sup>46</sup> See First Gen. Counsel's Rpt. at 16, MUR 3622 (The Clinton/Gore '92 Committee) ("the fact that any of these candidates — Clinton/Gore, Bush, or Perot — may have received an indirect benefit (dissemination of their political positions) as a result of the sale of these tapes does not convert commercial activity into a corporate contribution."); Certification, MUR 3622 (June 7, 1994) (no reason to believe recommendation approved 6-0); *cf.* Factual & Legal Analysis at 6, MUR 7024 (Van Hollen for Senate, *et al.*) ("[The] question under the Act is whether the legal services were provided for the purpose of influencing a federal election, not whether they provided a benefit to Van Hollen's campaign."); *id.* (no contribution given "absence of any objective or subjective indication" respondents acted for the purpose of influencing the election).

<sup>47</sup> Snap 10-Q at 40-41 ("Falling user retention, growth, or engagement could make Snapchat less attractive to advertisers and partners, which may seriously harm our business.").

1 'informed, tolerant, active and diverse young' people . . . not interested in hearing divisive  
2 rhetoric."<sup>48</sup> To promote a "safe and positive experience" for its user base, Snap states that it has  
3 long promulgated and enforced a set of Community Guidelines.<sup>49</sup> Snap had also warned users  
4 that the company would attempt to ensure Snapchat remained safe for users by doing what it  
5 thought "best reflects [Snap's] values in each situation in [Snap's] sole discretion."<sup>50</sup>

6 According to Snap, Trump's Snapchat account repeatedly violated the Community  
7 Guidelines.<sup>51</sup> Shortly before Snap stopped including his content on Discover, Trump's Snapchat  
8 account reposted Tweets questioning the legitimacy of mail-in ballots.<sup>52</sup> Snap determined these  
9 Tweets violated its Community Guidelines with respect to "spreading false information that causes  
10 harm or is malicious, such as . . . undermining the integrity of civic processes."<sup>53</sup> The Response  
11 indicates that the Trump campaign continued to repost the offending content despite being  
12 repeatedly informed that it violated Snap's content policy.<sup>54</sup> Then, on May 28th and May 30th  
13 Trump Tweeted and posted on Facebook that "when the looting starts, the shooting starts" and  
14 that protestors would be "greeted with the most vicious dogs, and most ominous weapons, I have  
15 ever seen."<sup>55</sup> Snap viewed these communications as threatening violence and decided it had

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<sup>48</sup> Resp. at 15 (citing Imogen Watson, *Snapchat Debuts First Brand-facing Campaign As It Looks to Reclaim Lost Ad Spend*, The Drum (Aug. 3, 2020), <https://www.thedrum.com/news/2020/08/03/snapchat-debuts-first-brand-facing-campaign-it-looks-reclaim-lost-ad-spend>) (quoting Snap Chief Marketing Officer).

<sup>49</sup> *Id.* at 6.

<sup>50</sup> *Wayback Machine*, Internet Archive, (last visited Mar. 2, 2021), <https://archive.org/> (search for "<https://snap.com/en-US/community-guidelines>" and select "May 27, 2020" to view Snap Community Guidelines).

<sup>51</sup> Resp. at 15.

<sup>52</sup> *See id.* at 9.

<sup>53</sup> *See id.* at 9-10.

<sup>54</sup> *Id.* at 9-10 ("Snap informed the Trump campaign that its post violated the Guidelines and removed it. . . . [T]he Trump campaign reposted the same Tweet seven more times over the next three days. Each time, Snap removed the post and informed the Trump campaign of its repeated violations . . .").

<sup>55</sup> *See supra* pp. 5-6.

1 reached a “tipping point” with respect to Trump’s Snapchat account and determined to cease  
2 promoting Trump’s content on Discover.<sup>56</sup>

3 A reasonable assessment of Trump’s May 28th and May 30th Twitter and Facebook  
4 communications supports Snap’s position that they can be viewed as “threaten[ing] violence  
5 against protesters.”<sup>57</sup> And in light of Snap’s recent experience involving Trump’s mail-in ballot  
6 posts on Snapchat, as just discussed, it appears reasonable for Snap to believe that operators of  
7 Trump’s Snapchat account might attempt to repost his May 28th or May 30th Tweets and have  
8 them shared on Discover. In short, Snap determined that, in its business judgment, Trump’s  
9 Tweets violated the Community Guidelines and continued promotion of Trump on Discover would  
10 have a detrimental effect on its brand and values-based business model.<sup>58</sup>

11 The available information indicates Snap’s business concerns were well-founded.  
12 According to news reports, advertisers boycotted one of Snap’s competitors when it did *not*  
13 respond to Trump’s Twitter and Facebook communications.<sup>59</sup> Snap, on the other hand, appears  
14 to have benefitted financially from its decision, drawing new advertisers who would not  
15 ordinarily spend money to advertise on Snapchat, including some advertisers who moved away  
16 from Facebook.<sup>60</sup> The available information thus supports Snap’s position that not protecting its

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<sup>56</sup> Resp. at 15.

<sup>57</sup> *Id.*

<sup>58</sup> *See id.* at 14-16.

<sup>59</sup> *See id.* at 9; Tom Dotan, Ad Boycott of Facebook Proved to Be Boon to Snap and Pinterest, Data Shows, THE INFORMATION (Oct. 15, 2020), <https://www.theinformation.com/articles/ad-boycott-of-facebook-proved-to-be-boon-to-snap-and-pinterest-data-shows> (“Nearly 1,000 companies pledged to suspend advertising on Facebook during the month of July”); Steven Overly, Advertisers struggle for power over Facebook as boycotts surge, POLITICO (June 26, 2020), <https://www.politico.com/news/2020/06/26/advertisers-struggle-for-power-over-facebook-as-boycotts-surge-341943> (“Facebook’s share price dropped 8 percent after Unilever announced its boycott, which it said will last the rest of the year. Others, ranging from Verizon to Ben & Jerry’s and Eddie Bauer, are pausing ads for July.”).

<sup>60</sup> “Advertiser ‘spending on the Snapchat app more than doubled from July to September compared to the same period last year.’ This included “advertisers that paused their Facebook spending during the boycott shift[ing]

1 “values-driven business model” — which the Community Guidelines were designed to promote —  
2 risked erosion of Snapchat’s ad revenue.

3 Finally, the Complaint does not provide factual support for its allegation that Snap’s  
4 decision stemmed from a desire by its CEO Evan Spiegel “to silence the President and his  
5 Campaign’s voice based on his own partisan ideology” and that Snap’s claimed justification was  
6 pretext.<sup>61</sup> In addition to the *bona fide* business justifications described above, the Complaint’s  
7 claim of pretext is further undermined when Snap’s actions are considered in the business  
8 environment in which it was made. In an environment where social media companies — Snap’s  
9 competition — were facing significant pressure to respond to Trump’s online activities,<sup>62</sup> Snap’s  
10 response appears to have been comparable, and in some cases *less* severe, than the responses of  
11 its social media competitors.<sup>63</sup>

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their entire monthly budget to Snapchat.” *See id.* at 9 (quoting Tom Dotan, Ad Boycott of Facebook Proved to Be Boon to Snap and Pinterest, Data Shows, THE INFORMATION (Oct. 15, 2020), <https://www.theinformation.com/articles/ad-boycott-of-facebook-proved-to-be-boon-to-snap-and-pinterest-data-shows>). .

<sup>61</sup> Compl. at 4.

<sup>62</sup> *See, e.g.*, Deepa Seetharaman, *Handling of Trump Posts Prompt Facebook Employees to Stage Virtual Walkout*, WALL ST. JOURNAL (June 1, 2020), <https://www.wsj.com/articles/facebook-employees-stage-virtual-walkout-over-trump-posts-11591034647>; Twitch, *Reddit crack down on Trump-linked content as industry faces reckoning*, POLITICO (June 29, 2020), <https://www.politico.com/news/2020/06/29/reddit-bans-pro-trump-forum-in-crackdown-on-hate-speech-344698>; Nancy Scola, *Zuckerberg announces new civil-rights protection as Facebook stares down boycott*, POLITICO (June 26, 2020), <https://www.politico.com/news/2020/06/26/zuckerberg-facebook-civil-rights-ad-boycott-341734> (describing that the complaints against Facebook “reached a fever pitch . . . in late May”).

<sup>63</sup> Snap did not remove or hide Trump’s account, and continued to permit Trump campaign advertising on Snapchat. *See supra* p. 7. That Snap took more severe action *after* the presidential election — terminating Trump’s Snapchat account in a similar environment when public pressure was directed at social media platforms for enabling speech inciting violence — further evidences that Snap’s actions in this matter were not for the purpose of influencing the election. *See* Sarah E. Needleman, *Twitter Bans President Trump’s Personal Account Permanently*, WALL ST. JOURNAL (Jan. 8, 2021), <https://www.wsj.com/articles/twitter-says-it-is-permanently-suspending-account-of-president-trump-11610148903> (“Other social-media companies placed indefinite bans on Mr. Trump this week, including Snapchat parent Snap Inc.”).

1           In sum, when viewed in the specific context of Snap's well-documented business model  
2 and the market in which it competes, the available information indicates that Snap's decision to  
3 no longer promote Trump on Discover was motivated by *bona fide* commercial reasons and not  
4 for the purpose of influencing the election.

5                   2.       Snap's Continued Inclusion of Joe Biden on Discover Does not Appear to  
6                            be a Service within the meaning of 11 C.F.R. § 100.52(d)  
7

8           The term "anything of value" includes "all in-kind contributions."<sup>64</sup> "In-kind  
9 contributions," include "the provision of any goods or services without charge or at a charge that  
10 is less than the usual and normal charge for such goods or services is a contribution."<sup>65</sup> The  
11 difference between the usual and normal charge for the goods or services at the time of the  
12 contribution and the amount actually charged is treated as an in-kind contribution.<sup>66</sup> The "usual  
13 and normal charge" for goods means the price of those goods in the market from which they  
14 ordinarily would have been purchased at the time of the contribution; and usual and normal  
15 charge for any services means "the hourly or piecework charge for the services at a  
16 commercially reasonable rate prevailing at the time the services were rendered."<sup>67</sup>

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<sup>64</sup> 11 C.F.R. § 100.52(d)(1).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* ("Examples of such goods or services include, but are not limited to: Securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists."). For the purposes of section 30118, the term "contribution" also includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, political party or committee, organization, or any other person in connection with any election to any of the offices referred to in 11 CFR 114.2 (a) or (b) as applicable." 11 C.F.R. § 114.1(a)(1).

1 Snap indicates that individuals are not charged a fee to be promoted on Discover.<sup>68</sup>  
 2 Instead, Snap charges advertisers to place ads directly on Discover<sup>69</sup> and shares ad revenue with  
 3 companies that are Discover “publishing partners.”<sup>70</sup> Because the record suggests that Snap  
 4 treated candidates much like other individuals, who are not charged to be included on Discover,  
 5 Snap did not provide a good or service below the usual and normal charge to the Biden campaign  
 6 and thus did not make a prohibited in-kind contribution.

7 3. Snap’s Inclusion of Joe Biden on Discover Does Not Appear to be a  
 8 Coordinated Contribution  
 9

10 An in-kind contribution can also result from a coordinated expenditure. The Act treats  
 11 expenditures made “in cooperation, consultation, or concert, with or at the request or suggestion  
 12 of, a candidate, his [or her] authorized political committees, or their agents” as in-kind  
 13 contributions to that candidate and must be reported as expenditures made by the candidate’s  
 14 authorized committee.<sup>71</sup> Commission regulations set forth a three-prong test for when a  
 15 communication is “coordinated” with a candidate, an authorized committee, a political party

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<sup>68</sup> Resp. at 12 (“[A]dvertising and advertising rates are completely separate from, and have nothing to do with, the free organic user accounts that are actually at issue here.”); *see also* Compl. at 3 (quoting Sarah Frier, *Trump Embraces Snapchat as Battle for 2020 Youth Vote Heats Up*, BLOOMBERG (May 13, 2020), <https://www.bloomberg.com/news/articles/2020-05-13/trump-embraces-snapchat-as-battle-for-2020-youth-vote-heats-up>) (indicating a Snapchat user’s inclusion on Discover is based on frequency of Snapchat posts, not payment).

<sup>69</sup> Snapchat Business Help Center, Create Story Ads, [https://businesshelp.snapchat.com/s/article/story-ads-product?language=en\\_US](https://businesshelp.snapchat.com/s/article/story-ads-product?language=en_US) (“Story Ads allow advertisers to reach consumers by placing a branded tile in Snapchat’s Discover section that opens into a collection of 3 - 20 images or videos”).

<sup>70</sup> *See* Kevin Tran, *Snapchat axes licensing deals with publishers amid redesign turmoil*, BUSINESS INSIDER (May 7, 2018), <https://www.businessinsider.com/snap-stops-paying-publishing-partners-upfront-licensing-fees-2018-5> (“Snap usually evenly splits ad revenue from Discover editions with publishers. Previously, Snap typically paid Discover publishers an upfront licensing fee and, in return, kept all ad revenue generated from their channels.”).

<sup>71</sup> 52 U.S.C. § 30116(a)(7)(B). Authorized committees are required to report the identification of each person who contributes an aggregate amount of \$200 or more per election cycle, along with the date and amount of the contribution, including in-kind contributions. 52 U.S.C. § 30104(b)(3); 11 C.F.R. § 100.52(d)(1) (term “anything of value” in the Act’s definition of contribution includes all in-kind contributions; 11 C.F.R. §§ 109.20, 109.21 (coordinated expenditures and coordinated communications treated as in-kind contributions and must also be reported as an expenditures).

1 committee, or agent thereof, and treated as an in-kind contribution: (1) the communication is  
2 paid for, partly or entirely, by a person other than the candidate, authorized committee, political  
3 party committee, or agent thereof; (2) the communication satisfies at least one of the “content  
4 standards” at 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the  
5 “conduct standards” at 11 C.F.R. § 109.21(d).<sup>72</sup> All three prongs must be satisfied for a  
6 communication to be considered coordinated under the regulations.

7 Here, Snap’s communications promoting Joe Biden on Discover do not satisfy the  
8 content prong, and we have no information suggesting the conduct prong was met. For a  
9 communication to satisfy the content prong it must, among other things, be either an  
10 “electioneering communication” or a “public communication.”<sup>73</sup> The term “broadcast, cable, or  
11 satellite communication” means a communication that is “publicly distributed by a television  
12 station, radio station, cable television system, or satellite system.”<sup>74</sup> The term “public  
13 communication” excludes communications over the Internet, except for communications placed  
14 for a fee on another person’s Website.<sup>75</sup> Here, Snap’s communications on its own platform are  
15 neither broadcast, cable, or satellite communications nor public communications.<sup>76</sup> Accordingly,

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<sup>72</sup> The six types of conduct that satisfy the conduct prong are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) use of a common vendor; (5) use of a former employee or independent contractor; and (6) republication of campaign material. 11 C.F.R. § 109.21(d)(1)-(6).

<sup>73</sup> See 11 C.F.R. § 109.21(c). The term “electioneering communication” excludes communications over the Internet. *Id.* § 100.29(c)(1). The term “public communication” also excludes communications over the Internet, except for communications placed for a fee on another person’s Website. *Id.* § 100.26.

<sup>74</sup> *Id.* § 100.29(b).

<sup>75</sup> *Id.* § 100.26.

<sup>76</sup> *Id.*

1 Snap's communications promoting Joe Biden on Discover do not satisfy the content prong and  
 2 do not appear to be coordinated communications under 11 C.F.R. § 109.21.<sup>77</sup>

3 \* \* \*

4 Because Snap appears to have stopped promoting Trump on its Discover platform for  
 5 *bona fide* commercial reasons and Snap's continued inclusion of Joe Biden on Snapchat's  
 6 Discover platform does not appear to be either an advertising service or a coordinated  
 7 communication, we recommend that the Commission find no reason to believe that Snap made a  
 8 corporate in-kind contribution to the Biden campaign in violation of 52 U.S.C. § 30118(a).<sup>78</sup> We  
 9 also recommend that the Commission find no reason to believe that Evan Spiegel consented to a  
 10 corporate contribution in violation of 52 U.S.C. § 30118(a).

#### 11 **IV. RECOMMENDATIONS**

- 12 1. Find no reason to believe that Snap Inc. made an in-kind corporate contribution in  
 13 violation of 52 U.S.C. § 30118(a);
- 14 2. Find no reason to believe that Evan Spiegel consented to a corporate contribution in  
 15 violation of 52 U.S.C. § 30118(a);
- 16 3. Approve the Factual and Legal Analysis;
- 17 4. Approve the appropriate letters; and
- 18 5. Close the File.

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 25 Lisa J. Stevenson  
 26 Acting General Counsel

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<sup>77</sup> This conclusion is consistent with the Commission's recent decision in Advisory Opinion 2021-04 (Pray.com), where the Commission determined online posting of candidate statements on the requestor's free online platform would not be coordinated communications because posts would not be electioneering communications or public communications. *See* Advisory Opinion 2021-04 (Pray.com).

<sup>78</sup> Because Snap's activities do not constitute a contribution for the reasons described in this report, the Commission need not analyze the merits of Snap's First Amendment, media exemption, and Communications Decency Act arguments.

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April 14, 2021  
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