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Via Electronic Mail

December 1, 2020

Mr. Jeff S. Jordan
Federal Election Commission
Office of Complaints Examination
and Legal Administration
1050 1st Street NE
Washington, DC 20463

Re: Response of Biden for President - MUR 7812

Dear Mr. Jordan:

We write on behalf of our client, Biden for President (“the Committee”), in response to your letter dated October 14, 2020. Although the complaint makes allegations against “Kamala Harris for Vice President,” no such entity exists. Therefore, we are responding as counsel to Biden for President, the authorized committee for Kamala Harris’s candidacy for vice president.

This complaint should be dismissed with no further action because it fails to allege any violation of the Federal Election Campaign Act of 1971, as amended (“the Act”). As detailed in this response, the complaint’s conclusory allegations of coordination between the Committee and Facebook and AFP Fact Check (“Respondents”), do not proffer any facts on which the Commission could find reason to believe that the Committee violated the Act. Therefore, the Commission should find no reason to believe that Biden for President violated the Act, and dismiss the complaint.

I. Factual Background

On October 6, 2020, John Crump, on behalf of himself and Gun Owners of America, Inc. (“Complainants”), filed a complaint against Facebook, AFP Fact Check, and “Kamala Harris for Vice President.” The complaint includes several unsubstantiated allegations, including that Facebook and AFP Fact Check made unlawful corporate contributions to the Committee by engaging in third-party fact checking of Facebook posts that contained misleading information concerning the policy positions of Harris, then a candidate for vice president.

With respect to the Committee, the complaint contains only one allegation: that Facebook and AFP Fact Check “have coordinated their activities with federal political candidates,” including the Committee. The only factual assertion the complaint makes in support of this alleged violation does not even involve the Committee. Instead, it states that the Presidential Transition’s hiring of a former Facebook employee as its general counsel, is “cover for coordination” between the Committee and Facebook.

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II. Analysis

The complaint should be dismissed because it fails to allege any violation of the Act by the Committee. The complaint's theory, unsupported by facts or a clear understanding of the law, appears to be that Facebook's fact-checking of Complainants' social media posts constitute one or more "expenditures" within the meaning of the Act, and that Facebook and AFP Fact Check coordinated those expenditures with the Committee in some as of yet unascertained way, resulting in an impermissible in-kind contribution to the Committee. This theory fails because the complaint contains no sworn facts to suggest any coordination between Facebook and the Committee in fact occurred, or that the Committee violated the Act in any other way.

The complaint neither recites nor analyzes the factors established by the Commission for determining whether a communication is coordinated. A "coordinated communication" is a communication that (1) is paid for by a person other than a candidate or political committee, (2) meets at least one of the "content standards" set forth in the coordinated communications regulations, and (3) meets at least one of the "conduct standards" set forth in those regulations. *Id.* § 109.21(a). Payment for a communication that is coordinated with a candidate under these rules is not an independent expenditure, and generally must be reported as an in-kind contribution by the candidate with whom it was coordinated. 11 C.F.R. § 109.21(b)(3).

The Commission could dismiss this complaint as to the Committee by reaching any one of the following conclusions: that Facebook's fact-checking of false or misleading social media posts does not constitute a "contribution" or an "expenditure" by Facebook or AFP Fact Check, that the 109.21 content standards are not met, or that the 109.21 conduct standards are not met. While we strongly believe that the Commission can dismiss this complaint on all three grounds, we focus on the coordination elements as those allegations most directly implicate the Committee.¹

A. The Communications Do Not Meet the Content Standards of the Coordinated Communication Regulations.

A communication meets the content standards for coordination if it is either (1) an electioneering communication, or (2) a "public communication" that meets certain additional criteria set forth in FEC regulations. *Id.* § 109.21(c). The allegations here satisfy neither requirement.

Commission regulations exempt "any communication that . . . [i]s publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station" from the definition of "electioneering communication." *Id.* § 109.29(c)(1). Specifically, "communications over the Internet," such as the fact-checked social media posts here, are not electioneering communications. *Id.*

¹ We note that the complaint's suggestion that a social media provider's labeling or deleting of false commentary about a candidate constitutes a "contribution" or "expenditure" to that candidate is unsupported by any authority.

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Moreover, fact-checked social media posts are not “public communications” under Commission regulations. A “public communication” is “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” *Id.* § 109.26. Once again, “communications over the Internet,” are exempt, except if they are “communications placed for a fee on another person’s Web site,” which these are not. *Id.*; *see also* “Facebook’s Third-Party Fact-Checking Program,” available at <https://www.facebook.com/journalismproject/programs/third-party-fact-checking>.

While not entirely clear from the complaint, the communications alleged to be “coordinated” in this matter involve a notation affixed to an online social media post indicating that “independent fact-checkers” have identified the post as containing “false information.” The fact-checking notations are not paid advertisements and the notations are visible only to viewers of the post over the Internet. This online activity qualifies for the exemption from both the definition of “electioneering communication” and “public communication.” Accordingly, the content prong of the coordinated communication rules cannot be met.

B. The Complaint Does Not Allege Any Facts That Meet the Conduct Standards of the Coordinated Communication Regulations.

Complainants concede that they “know of no direct evidence . . . that Respondents have coordinated their activities with federal political candidates.” This statement, on its own, is sufficient to justify dismissal of this complaint as to the Committee. Despite this fundamental deficiency in the pleading, based on little more than innuendo, the complaint asks the Commission to find reason to believe that the Biden *Transition*’s hiring of a former Facebook attorney Jessica Hertz as its general counsel demonstrates that the Biden *Campaign* violated the Act. However, this fact does not give rise to reason to believe there was a coordinated communication with Facebook, or that any other violation occurred.

First, Ms. Hertz was hired by the Biden *Transition*, and not by the Biden *Campaign*. *See* A. Thompson and T. Meyer, “Biden Transition Elevates Former Facebook Exec As Ethics Arbiter,” *Politico*, Sept. 30, 2020, <https://www.politico.com/news/2020/09/30/biden-transition-facebook-ethics-424000> (stating that “Joe Biden’s transition team named Jessica Hertz . . . as its general counsel on Wednesday.”). Ms. Hertz is not now, and was not at the time of her hiring, an employee of the Committee. *See* 11 C.F.R. § 109.21(d) (providing, *inter alia*, that a communication is coordinated if it is made at the “request or suggestion of,” with the “material involvement” of, or after “substantial discussion with” a “*candidate, authorized committee, or political party committee.*” (emphasis added)).

Second, the complaint contains no facts, much less sworn facts, alleging that Ms. Hertz ever took any actions, in any capacity, to coordinate any Committee expenditures with the other Respondents. No activity is alleged that would meet the conduct standards of the coordinated communication regulations. Instead, lacking any good-faith basis to allege coordination, and confessing that its sole alleged “evidence” is “circumstantial,” the complaint asks the Commission to “undertake an investigation to identify illegal coordination.” Compl. at 21.

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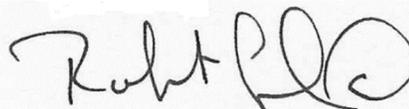
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Such an investigation is unwarranted and in conflict with prior agency practice.² Instead the compliant should be dismissed for failure to allege any activity that amounts to coordination or any other violation of the Act.

III. Conclusion

The complaint in this matter is totally devoid of any sworn allegations that, even if true, would suggest that the Committee has coordinated any expenditures with other Respondents, or committed any other violation of the Act. Therefore, the Commission should find no reason to believe that Biden for President has violated the Act and dismiss the complaint.

Respectfully submitted,



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² The FEC has long treated speculation as an insufficient basis to find “reason to believe” a violation has occurred. *See, e.g.*, FEC MUR 4960, Statement of Reasons of Commissioner David Mason, Karl Sandstrom, Bradley Smith and Scott Thomas, at 3.