

WILMERHALE

December 11, 2020

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VIA ELECTRONIC MAIL

Mr. Jeff S. Jordan
Assistant General Counsel
Federal Election Commission
Office of Complaints Examination & Legal Administration
Attn: Christal Dennis, Paralegal
1050 First Street, NE
Washington, DC 20463

Re: MUR 7825 — Response of Facebook, Inc.

Dear Mr. Jordan:

This letter is submitted on behalf of our client, Facebook, Inc. (“Facebook”), in response to the complaint filed in the above-captioned matter under review.

The complaint alleges violations of the Federal Election Campaign Act (“FECA” or “the Act”) based on the operation of Facebook’s third-party fact-checking program—a highly publicized program that Facebook has operated for years as part of its broader effort to protect against all manner of misinformation on its platform (from simple internet hoaxes to public health and safety matters like COVID-19, as well as on topics in the political realm). Facebook has long made clear that “misinformation is bad for our community and bad for our business,” and it has taken various steps to reduce the presence and effect of misinformation on its platform, including by enabling independent third-party organizations like the Associated Press, Reuters, USA Today, and PolitiFact to fact-check material posted on Facebook.¹

The complaint in MUR 7825 alleges that Facebook’s labeling of a user post about Senator Kamala Harris and display of an October 13, 2020 article by PolitiFact constituted a prohibited contribution by Facebook to the Biden-Harris campaign in violation of 52 U.S.C. § 30118(a). More generally, it alleges that any corporate resources used to effectuate the third-party fact-checking program, as well as any efforts to reduce the placement of false stories in Facebook’s News Feed, are “prohibited expenditure[s] in connection with an election.” These theories are

¹ See *Hard Questions: How Is Facebook’s Fact-Checking Program Working?*, FACEBOOK NEWSROOM (June 14, 2018), <https://newsroom.fb.com/news/2018/06/hard-questions-fact-checking/>.

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fundamentally flawed for at least two reasons, each of which is sufficient to dispose of the complaint under FECA.²

First, Facebook’s display of the PolitiFact article and associated labeling are not “coordinated communications” under 11 C.F.R. § 109.21(a). The content posted on Facebook’s internet platform is, by definition, neither an “electioneering communication” nor a “public communication,” and the complainant fails to even allege that there was any coordination between Facebook and the Biden-Harris campaign.

Second, the complaint does not allege that Facebook displayed the PolitiFact article or labelled the underlying user post “for the purpose of influencing any election for Federal office,” 52 U.S.C. § 30101(8)(A)(i). To the contrary, the article and labels do not include any express advocacy or any solicitation of funds, and they are part of Facebook’s broader, well-publicized effort to combat misinformation on its platform for independent business reasons.

As explained in greater detail below, the complaint’s allegations are insufficient, lack substance, and fail to state any cognizable FECA violation as a matter of law. Accordingly, the Commission should find no reason to believe that Facebook violated the Act; in the alternative, the Commission should exercise its discretion to dismiss the complaint with no further action on the ground that it does not warrant further expenditure of Commission resources.

FACTUAL BACKGROUND³

The complaint concerns an internet article by PolitiFact that was displayed on Facebook’s internet platform. On October 12, 2020, the complainant linked to an article titled “Kamala Harris Tried to Put Pro-Lifers in Jail Who Exposed Planned Parenthood Selling Baby Parts” from the website LifeNews.com on its Facebook page.⁴ PolitiFact posted its own article in response, as part of Facebook’s third-party fact-checking program.⁵ As a result, Facebook labeled posts that included the LifeNews.com article to alert readers that third-party fact checkers had determined those posts contained false information, and made PolitiFact’s article available within those labels.

² In the interest of brevity, this response focuses on these two fundamental defects in the complaint’s theories of liability. Were the Commission to take any action beyond either finding no reason to believe or dismissing the complaint with no further action, Facebook expressly reserves any defenses available under 11 C.F.R. §§ 100.73 & 100.132, 47 U.S.C. § 230, and the First Amendment.

³ The factual background is drawn from the allegations in the complaint and the publicly available sources cited herein.

⁴ Liberty Counsel, *Kamala Harris Tried to Put Pro-Lifers in Jail Who Exposed Planned Parenthood Selling Baby Parts*, LIFENEWS.COM (Aug. 14, 2020), <https://www.lifenews.com/2020/08/14/kamala-harris-tried-to-put-pro-life-in-jail-who-exposed-planned-parenthood-selling-baby-parts/>.

⁵ Chris Nichols, *Social Media Posts Push False Claims About Kamala Harris And Planned Parenthood*, POLITICO (Oct. 13, 2020), <https://www.politifact.com/factchecks/2020/oct/13/facebook-posts/social-media-posts-push-false-claims-about-kamala-/>.

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Facebook launched its third-party fact-checking program in the United States in December 2016 and has since grown the program globally.⁶ Facebook has publicly explained how its third-party fact-checking program operates. The first step is to identify potentially false material posted on its platform. That step is generally automated and relies on computer programs that make predictions about whether content may be misinformation based on a range of signals—e.g., whether third-party comments on the post include phrases that indicate readers do not believe the content is true, whether Facebook users have flagged the content as being potentially false, and whether the post is being shared by a user or page that has spread false news before.⁷ If a post is identified as potentially false, Facebook may temporarily reduce its distribution pending third-party review and place it into a digital queue for potential review by third-party fact-checkers, who are independent of Facebook and certified through the non-partisan International Fact-Checking Network (IFCN).⁸ Independent fact-checkers may also identify content to review on their own.⁹ The fact-checkers select content to review, independently rate the content's accuracy, and independently write an article (or link to one of their prior articles) explaining how they arrived at their rating.¹⁰ If a fact-checker identifies a story as containing false content, Facebook reduces the story's distribution so fewer people see it.¹¹ Facebook also shows more context by surfacing fact-check articles to users across its platform and showing labels on top of false stories that indicate the story has been checked by independent fact-checkers and contains false information.¹²

Facebook posts queued for fact-checking review are not limited to political subjects; they encompass misinformation on a broad range of topics. For example, the following claims have recently been fact-checked (and rated as false) by third parties as part of this program: (i) that wearing a face mask to slow the spread of COVID-19 could cause Legionnaires' disease;¹³ (ii) that wildfires burning in California, Oregon, and Washington were the result of arson by political extremists;¹⁴ and (iii) that a list of celebrities, including Beyoncé and Chrissy Teigen, traveled on

⁶ See *supra* n. 1.

⁷ See *id.*

⁸ See *id.*; see also *Helping to Protect the 2020 US Elections*, FACEBOOK NEWSROOM (Oct. 21, 2019), <https://newsroom.fb.com/news/2019/10/update-on-election-integrity-efforts/>.

⁹ See *supra* n. 1.

¹⁰ See *id.*

¹¹ See *id.*

¹² See *Helping to Protect the 2020 US Elections*, FACEBOOK NEWSROOM (Oct. 21, 2019), <https://newsroom.fb.com/news/2019/10/update-on-election-integrity-efforts/>.

¹³ Saranac Hale Spencer, *Face Masks Don't Cause Legionnaires' Disease*, FACTCHECK.ORG (Aug. 12, 2020), <https://www.factcheck.org/2020/08/face-masks-dont-cause-legionnaires-disease/>.

¹⁴ Camille Caldera, *Fact Check: Oregon, Washington Fires Were Not Set By Anti-Fascist Activists*, USA TODAY (Sept. 11, 2020), <https://www.usatoday.com/story/news/factcheck/2020/09/11/fact-check-oregon-fires-were-not-set-antifa-any-other-activists/3460386001/>.

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Jeffrey Epstein’s “Lolita Express” plane to his Caribbean island.¹⁵ And to the extent posts from the political realm are selected for third-party fact-checking, they span the political spectrum. For example, the following claims about Republican political figures have recently been deemed false by third-party fact-checkers as part of this program: (i) that President Trump’s remarks about a payroll tax deferment indicated that he will “take away your Social Security”;¹⁶ and (ii) that Senator Mitch McConnell is the richest senator while Kentucky is the poorest state.¹⁷

LEGAL STANDARD

The Act requires that the Commission find “reason to believe that a person has committed, or is about to commit,” a FECA violation before it may initiate an investigation.¹⁸ And, as the Commission has explained: “The Commission may find ‘reason to believe’ only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA.”¹⁹ The Commission finds “no reason to believe” if “the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law.”²⁰ A “no reason to believe” finding is appropriate where the allegation “is so vague that an investigation would be effectively impossible” or where the complaint “fails to describe a violation of the Act.”²¹

The Commission has further clarified that “[u]nwarranted legal conclusions from asserted facts, … or mere speculation, … will not be accepted as true.”²² More specifically, “[c]omplaints not based upon personal knowledge must identify a source of information that reasonably gives

¹⁵ Alexis Tereszuk, *Fact Check: 'Leaked' Jeffrey Epstein Flight Log Is Fake - 40 Celebrities Including Beyonce, Chrissy Teigen & Barack Obama Were Never On 'Lolita Express,'* LEADSTORIES (Aug. 15, 2020), <https://leadstories.com/hoax-alert/2020/08/fact-check-leaked-jeffrey-epstein-flight-log-is-fake-40-celebrities-including-beyonce-chrissy-teigen-barack-obama-were-never-on-lolita-express.html>.

¹⁶ Hallie Golden, *Fact Check: Trump's Payroll Tax Cut Remarks Do NOT Mean He 'Will Take Away Your Social Security'*, LEADSTORIES (Oct. 30, 2020), <https://leadstories.com/hoax-alert/2020/10/fact-check-trump-payroll-tax-cut-remarks-do-not-mean-he-will-take-away-your-social-security.html>.

¹⁷ Camille Caldera, *Fact Check: Claims Are False About Mitch McConnell's Wealth, Kentucky's Lack of It*, USA TODAY (Oct. 20, 2020), <https://www.usatoday.com/story/news/factcheck/2020/10/20/fact-check-mitch-mcconnell-isnt-senates-richest-ky-isnt-poorest/3677447001/>.

¹⁸ 52 U.S.C. § 30109(a)(2).

¹⁹ MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, *et al.*), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas, at 1-2 (emphasis added); *see also* MUR 5467 (Michael Moore), First General Counsel’s Report, at 5 (citing MUR 4960) (“Purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find a reason to believe that a violation of the FECA has occurred.”).

²⁰ *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545 (Mar. 16, 2007), https://www.fec.gov/resources/cms-content/documents/notice_2007-6.pdf (emphasis added).

²¹ *Id.*

²² MUR 4960 at 2.

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rise to a belief in the truth of the allegations presented.”²³ The Commission does not find reason to believe FECA violations have occurred absent evidence thereof and has repeatedly found “no reason to believe” to dispose of complaints that do not allege specific facts sufficient to establish a violation.²⁴

Even if the allegations do not fail as a matter of law, as they do here, the Commission also has discretion to dismiss complaints that do not warrant further expenditure of Commission resources.²⁵

ARGUMENT

I. Facebook’s Display Of The PolitiFact Article And Associated Labels Are Not Coordinated Communications Under 11 C.F.R. § 109.21(a)

Commission regulations establish a three-prong test to determine whether a communication qualifies as a “coordinated communication” that constitutes an in-kind contribution.²⁶ First, the communication must be paid for by someone other than a candidate, a candidate’s authorized committee, a political party committee, or their authorized agents (the “payment prong”).²⁷ Second, the communication must satisfy one of the content standards in the Commission regulations (the “content prong”).²⁸ Third, the communication must satisfy one of the conduct standards in the Commission regulations (the “conduct prong”).²⁹ A communication

²³ *Id.* at 1 (citing 11 C.F.R. § 111.4(d)(2)); MUR 4545 (Clinton/Gore ’96 Primary Comm./Amtrak); MUR 3534 (Bibleway Church of Atlas Road, Inc.).

²⁴ See, e.g., MUR 3534 (Bibleway Church of Atlas Road, Inc.), Statement of Reasons of Chairman Scott E. Thomas, Vice Chairman Trevor Potter, and Commissioners Joan D. Aikens, Lee Ann Elliot, Danny Lee McDonald, and John Warren McGarry, at 2 (unanimously rejecting OGC recommendation and finding no reason to believe because the complaint was “vague” as to the content of communications at issue, and because “there was a lack of evidence” of facts suggesting a FECA violation); MUR 4869 (American Postal Workers Union), Statement of Reasons of Chairman Darryl R. Wold, Vice Chairman Danny L. McDonald, and Commissioners David M. Mason, Karl J. Sandstrom, and Scott E. Thomas, at 2 (unanimously finding no reason to believe because the complaint failed to allege conduct that would constitute a violation of FECA); MUR 7169 (Democratic Congressional Campaign Committee, *et al.*), Factual and Legal Analysis, at 11 (rejecting complaints alleging an excessive in-kind contribution where “the Complaints do not allege specific facts that are sufficient to provide reason to believe that the conduct prong has been satisfied.”); MUR 6821 (Shaheen for Senate, *et al.*), Factual and Legal Analysis, at 7-8 (finding no reason to believe there had been a “coordinated communication” where the complaint “fails to identify any communication” between the relevant parties); MUR 5754 (MoveOn.org Voter Fund), Factual and Legal Analysis, at 3 (finding “the complaint does not contain sufficient information on which to base an investigation” into whether the conduct standard was met where it does not “even specifically identify which ‘conduct’ standard would apply to the activity complained of” and “does not connect any such discussions” to any alleged coordinated communications).

²⁵ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

²⁶ 11 C.F.R. § 109.21(b)(1).

²⁷ 11 C.F.R. § 109.21(a)(1).

²⁸ 11 C.F.R. §§ 109.21(a)(2), (c).

²⁹ 11 C.F.R. §§ 109.21(a)(3), (d).

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qualifies as a “coordinated communication” only if *all three* prongs are satisfied. Here, even if one assumes the payment prong is met, the internet communications at issue cannot, by definition, satisfy the content prong, and the complainant has failed to allege any evidence that would satisfy the conduct prong. Accordingly, there is no basis for concluding that any “coordinated communications” have occurred.³⁰

A. Displaying The PolitiFact Article And Associated Labels Cannot Satisfy The “Content Prong” Because They Are Neither “Electioneering Communications” Nor “Public Communications”

Facebook’s display of the PolitiFact article and labeling of false stories do not satisfy the “content prong” of the “coordinated communication” regulation because they are neither “electioneering communications” nor “public communications.”³¹ And because the communications cannot satisfy the content prong as a matter of law, they cannot qualify as “coordinated communications.”

1. The PolitiFact Article And Associated Labels Are Not “Electioneering Communications”

An electioneering communication is “any broadcast, cable, or satellite communication” that refers to a clearly identified candidate for federal office and is publicly distributed within certain timeframes.³² Facebook’s display of the PolitiFact article and any labeling associated with it are not subject to the Commission’s rules on “electioneering communications” because those regulations apply only to activity on traditional broadcast media and do not extend to internet communications. Indeed, the Commission reinforced this position in an advisory opinion earlier this year, concluding that certain online advertisements do not constitute electioneering communications because they are “conducted exclusively on the internet.”³³

2. The PolitiFact Article And Associated Labels Are Not “Public Communications”

While certain forms of “public communication” can also satisfy the content prong, Commission regulations expressly exclude from the definition of “public communication” all internet communications except for “general public political advertising” that is “placed for a fee

³⁰ See MUR 6522 (Lisa Wilson-Foley et al.), Factual & Legal Analysis at 6 (finding no reason to believe that advertisements on Facebook and other social media platforms constituted a contribution; reasoning that internet communications not placed for a fee on another person’s website were neither electioneering nor public communications, and there was no evidence giving rise to a reasonable inference of coordination).

³¹ 11 C.F.R. § 109.21(c).

³² 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29(a)(3).

³³ AO 2019-18 (“Because IDF’s advertising is conducted exclusively on the internet, and does not include any ‘broadcast, cable, or satellite communications,’ the ads do not constitute electioneering communications, regardless of when they run in relation to any election.”).

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on another person’s Web site.”³⁴ Here, there is no “public communication” because the complaint concerns internet content and does not allege that any organization paid Facebook to post it.

B. The Complaint Also Fails Under The “Conduct Prong” Because It Does Not Allege Coordination Between Facebook And Any Campaign

Even if a communication meets the “content prong”—and the PolitiFact article and associated labels posted on Facebook do not and cannot, as a matter of law—a communication cannot be a “coordinated communication” under Commission regulations unless it satisfies at least one of several standards under the “conduct prong.”³⁵ Specifically, the communication must be made “at the request or suggestion” of a candidate, involve the “material involvement” of a candidate, be made “after one or more substantial discussions about the communication” with the candidate, be paid for by someone sharing a “common vendor” with the candidate, or be paid for by a “former employee or independent contractor” of the candidate.³⁶

The complaint fails even to allege that Facebook coordinated its activities with federal political candidates. Absent any factual allegations regarding coordination between Facebook and a campaign about the content, displaying the PolitiFact article cannot satisfy the “conduct prong.”³⁷ This provides an additional, independent reason why there has been no “coordinated communication” under Commission regulations.

II. The Complaint Fails To Allege That Facebook Displayed The PolitiFact Article Or Labeled The Underlying Post “For The Purpose Of Influencing Any Election For Federal Office”

To constitute an in-kind contribution under FECA, an activity must be undertaken “for the purpose of influencing [an] election for Federal office.”³⁸ The complaint neither alleges nor provides any basis to conclude that Facebook carried the PolitiFact article or labeled the underlying post for such a purpose, and thus fails to establish a FECA violation for this independent reason.

³⁴ 11 C.F.R. § 100.26.

³⁵ 11 C.F.R. § 109.21(d).

³⁶ *Id.*

³⁷ MUR 5754 (MoveOn.org Voter Fund), Factual and Legal Analysis, at 3 (finding “the complaint does not contain sufficient information on which to base an investigation” into whether the conduct standard was met where it does not “even specifically identify which ‘conduct’ standard would apply to the activity complained of” and “does not connect any such discussions” to any alleged coordinated communications).

³⁸ 52 U.S.C. § 30101(8)(A)(i); *see also*, e.g., AO 1982-56 (“[A]lthough media or other public appearances by candidates may benefit their election campaigns, the person defraying the costs of such an appearance will not be deemed to have made a contribution in-kind to the candidate absent an indication that such payments are made to influence the candidate’s election to Federal office.”).

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A. Facebook Did Not Undertake Any Activity Involving Express Advocacy Or Solicitation Of Funds Intended To Influence An Election

To determine the “purpose” of an alleged contribution, the Commission first applies a two-part test for distinguishing between political and nonpolitical intent. An activity is not a “contribution” under this test “if (1) there is an absence of any communication expressly advocating the nomination or election of the [candidate] appearing or the defeat of any other candidate, and (2) there is no solicitation, making, or acceptance of a campaign contribution for the [candidate] in connection with the event.”³⁹ Neither part of the test is satisfied here: The PolitiFact article and associated labels do not expressly advocate for Vice President Biden or Senator Harris’s election or for the defeat of any candidate, nor do they solicit a campaign contribution. These facts alone are sufficient to establish that Facebook has not made a “contribution” under 52 U.S.C. § 30101(8)(A)(i).⁴⁰

B. The Totality Of The Circumstances Does Not Compel A Different Result, As The Third-Party Fact-Checking Program Has A “Significant Non-Election” Related Aspect

In the absence of express advocacy or a solicitation, the Commission may consider the totality of the circumstances to assess whether an activity would be objectively perceived as an intentional attempt to influence an election.⁴¹ Under this objective test, the Commission considers whether the “activity in question ... appear[s] to have any specific and significant non-election related aspects that might distinguish it from election influencing activity.”⁴² It does not make this assessment based solely on the effects of the activity.⁴³

Facebook has independent business reasons for seeking to minimize misinformation on its platform. It has publicly explained that misinformation on the platform “is bad for our community and bad for our business.”⁴⁴ The explicit goal of Facebook’s third-party fact-checking program is to prevent the spread of viral misinformation and help users better understand what they see

³⁹ *Orloski v. FEC*, 795 F.2d 156, 160 (D.C. Cir. 1986); *see also* AO 1996-11; AO 1994-15; AO 1992-06; AO 1992-05; AO 1988-27, AO 1977-42.

⁴⁰ The complaint suggests that alleged payments by Facebook to PolitiFact and Facebook’s linking to the third-party fact-checking article amounts to an independent expenditure. To qualify as an independent expenditure, a communication must “expressly advocat[e] the election or defeat of a clearly identified candidate.” 52 U.S.C. § 30101(17). As the PolitiFact article did not expressly advocate for the election or defeat of any candidate, it cannot be an independent expenditure either.

⁴¹ *See, e.g.*, AO 1990-05; AO 1983-12 (“The purpose and functions of an organizational entity are material and relevant to the Commission’s characterization of the underlying purpose of a specific activity or program of that entity.”).

⁴² AO 1983-12.

⁴³ MUR 7024 (Van Hollen for Senate, *et al.*), Factual and Legal Analysis, at 5 (“Although the outcome of these actions could potentially have had an effect on candidates in future elections, the effect on any particular candidate’s election would be too indirect and attenuated to constitute a contribution.”).

⁴⁴ *See supra* n. 1.

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online.⁴⁵ The program extends far beyond politics, with third-party fact-checkers responding to posts dealing with internet hoaxes and misinformation regarding, for example, matters of public health and safety.⁴⁶ Even for those posts that arise in the political arena, Facebook operates the third-party fact-checking program on a non-partisan basis. And to be eligible to participate as fact-checkers in Facebook's program, organizations are required to be evaluated and certified through the non-partisan International Fact-Checking Network.⁴⁷ These independent third-party fact-checkers select from a digital queue of eligible content which content to evaluate, and they can also identify content to review on their own.⁴⁸ And while the post at issue here corrected misinformation about a Democratic politician, another complainant could have just as easily identified posts correcting misinformation about Republican political figures, as noted above.⁴⁹

For all of these reasons, the complaint provides no basis to conclude that the fact-checking article from PolitiFact and associated labels are an attempt to influence an election.

CONCLUSION

The Commission should find no reason to believe that Facebook violated FECA—or, in the alternative, exercise its discretion to dismiss the complaint without further expenditure of Commission resources—and should dismiss this matter with no further action.

Respectfully submitted,

/s/ Christopher E. Babbitt

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⁴⁵ See *supra* n. 12.

⁴⁶ See *supra* n. 13-15.

⁴⁷ See *supra* n. 1.

⁴⁸ See *id.*

⁴⁹ See *supra* n. 16-17.

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