

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL’S REPORT

MUR: 7832

DATE COMPLAINT FILED: Oct. 26, 2020

DATE OF NOTIFICATIONS: Oct. 28, 2020

LAST RESPONSE RECEIVED: Dec. 14, 2020

DATE ACTIVATED: May 11, 2021

EXPIRATION OF SOL: Feb. 7, 2025

ELECTION CYCLE: 2020

COMPLAINANT:

Anna Paulina Luna for Congress

RESPONDENT:

Twitter, Inc.

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30101(8)(A)

52 U.S.C. § 30118(a)

11 C.F.R. § 100.52(d)(1)

11 C.F.R. § 114.2(b)

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

Anna Paulina Luna was a 2020 congressional candidate who was denied “verification” of her Twitter account. Twitter, Inc. (“Twitter”), declined to verify Luna’s account, but verified the accounts of Luna’s primary and general election opponents. Twitter “verification” is a process that Twitter uses to evaluate the authenticity of notable accounts. The Complaint alleges that verification is a thing of value because, *inter alia*, verified accounts reach more users and have higher click-through rates for their fundraising links; that Twitter declined to verify Luna’s account for the purpose of influencing a federal election; and therefore by verifying her opponents’ Twitter accounts but not Luna’s, Twitter made prohibited in-kind corporate contributions to those candidates, in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”). Twitter states that its decision not to verify Luna’s account was predicated on Luna’s violations of its user agreement and terms of service before she became a candidate

1 and was therefore made for commercial reasons, *i.e.*, to avoid negatively impacting revenue by
2 giving its imprimatur to an individual with a history of posting abusive content and pattern of
3 controversial statements, and not for the purpose of influencing a federal election. Twitter
4 asserts that it followed its 2020 candidate verification policy and a more general verification
5 policy applicable to other users, which state, in part, that a candidate or user may be denied
6 verification if they have violated Twitter's conduct policies in the past.

7 As discussed below, the Complaint's assertions regarding Twitter's alleged electoral
8 purpose lack specific factual support and are refuted by the Response, which plausibly asserts
9 that Twitter acted to advance its commercial interests, and not for the purpose of influencing a
10 federal election.¹ As a general matter, Twitter credibly asserts that its verification policies are
11 designed to protect its business interests — specifically to increase profit through retention of
12 users and advertisers who may otherwise leave if they feel that Twitter does not adequately
13 combat controversial speech. Regarding its decision not to verify Luna, Twitter's Response
14 suggests a non-political explanation reflecting *bona fide* commercial interests, and the other
15 available information is insufficient to reasonably infer that Twitter acted contrary to those
16 interests or for the purpose of influencing an election.

17 Therefore, we recommend that the Commission dismiss the allegations that Twitter
18 violated 52 U.S.C. § 30118(a) by making prohibited in-kind contributions to Luna's primary and
19 general election opponents.

¹ Resp. at 11 (Dec. 14, 2020).

II. FACTUAL BACKGROUND

Anna Paulina Luna was a 2020 candidate in Florida's 13th Congressional District and Anna Paulina Luna for Congress is her authorized committee.² On August 18, 2020, Luna won the Republican primary and, on November 3, 2020, lost in the general election to Democratic candidate and incumbent Charlie Crist.³ Luna is currently a candidate for the 2022 election in the same district.⁴ Luna maintains a Twitter account under the username @realannapaulina that she created in September 2017 approximately two years prior to becoming a federal candidate.⁵ As detailed below, Luna's Twitter account is not "verified," despite her multiple attempts to seek verification from Twitter during the 2020 election.

Twitter is a web-based social media platform and public Delaware corporation that "allows users to publicly communicate in messages of up to 280 characters — regardless of substantive content."⁶ Twitter is a free service and derives the majority of its revenue from advertising.⁷ Twitter states that it has nearly 200 million daily active users.⁸

² Compl. at 1 (Oct. 26, 2020); Anna Paulina Luna, Statement of Candidacy (Sept. 4, 2019); Anna Paulina Luna for Congress, Statement of Org. (Sept. 4, 2019).

³ <https://www.nytimes.com/interactive/2020/11/03/us/elections/results-florida-house-district-13.html>.

⁴ Anna Paulina Luna, Statement of Candidacy (May 1, 2021).

⁵ Compl. at 3; *see id.* ("Prior to becoming a federal candidate, Luna was nationally known as a social media influencer."); <https://twitter.com/realannapaulina>.

⁶ Resp. at 2-3.

⁷ *See id.* at 6.

⁸ *Id.* at 2.

1 **A. Twitter Verification**

2 1. Twitter's Original Verification Policy

3 Since 2009, Twitter has employed a procedure to “verify” certain accounts.⁹ Twitter
 4 describes this as a process to “confirm the authenticity” of notable accounts.¹⁰ When an account
 5 is verified, a blue symbol with a white checkmark appears next to the username associated with
 6 the given account on its main page and on any tweets or responses to tweets. For example, the
 7 verified Twitter account of the Commission appears as follows:¹¹



⁹ *Id.* at 4.

¹⁰ *Id.* at 1.

¹¹ <https://twitter.com/FEC>. The blue symbol with a white checkmark (or verification badge) notifies users that it is authentic account of the FEC.

The verification badge “lets people know that an account of public interest is authentic.”¹² Twitter states that it initiated this process after concerns arose that false accounts were impersonating high-profile users on the platform.¹³ Twitter states that it wanted to prevent activities that “deceived its users and the general public.”¹⁴ According to Twitter, unverified accounts “can sow confusion and lead users to a less-satisfying experience on the platform.”¹⁵ Between 2009 and 2017, Twitter allowed any “notable and active” users to request verification if they met certain criteria.¹⁶

2. Changes to Verification Policy in 2017

Twitter states that verification is “perceived as an endorsement,” which led to problems with its initial verification procedures.¹⁷ According to Twitter, “concerns arose that Twitter was approvingly associating itself with accounts — such as those belonging to white supremacists — that were acting contrary to [the] platform’s rules.”¹⁸ In 2017, Twitter began to review already verified accounts and remove verification badges from accounts that violated its rules.¹⁹ Twitter also enacted its Post-2017 Verification Policy which states that users are ineligible for verified status if they were “associated with coordinated harmful activity, or hateful content as defined in

¹² Twitter Help Center: About Verified Accounts, Twitter.com, <https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts> (“Post-2017 Verification Policy”).

¹³ Resp. at 4.

¹⁴ *Id.*

¹⁵ *Id.* at 5.

¹⁶ *Id.* at 4 (“Twitter places particular emphasis on the verification of accounts belonging to government officials, news organizations, notable athletes, prominent companies/brands, etc.”).

¹⁷ *Id.* at 6 (quoting November 15, 2017, tweet by Twitter Customer Support announcing the upcoming 2017 Verification Policy, available at <https://twitter.com/TwitterSupport/status/930926124892168192>).

¹⁸ *Id.* at 5-6; see Alex Castro, *Twitter Pauses Verification Process After Controversy Over Charlottesville Organizer*, THE VERGE (Nov. 9, 2017), <https://www.theverge.com/2017/11/9/16628290/twitter-jason-kessler-charlottesville-verification>.

¹⁹ Resp. at 6.

Twitter's Ads Policies.”²⁰ Twitter's Post-2017 Verification Policy also states that Twitter would consider both users' online and offline conduct when making verification decisions.²¹ Referencing that change, the Policy stated that users may be ineligible for verification “even if their activity on Twitter doesn't violate the Twitter Rules.”²²

Twitter states that it implemented these changes to its verification policy because of “heightened outrage” from users over verifying certain controversial figures and pressure from advertisers to “minimize divisive content” or risk losing advertising revenue.²³ Twitter states that major advertisers insisted that Twitter and other tech companies do more to “minimize divisive content on their platforms,” and that hundreds of advertisers have pulled or temporarily paused ads that end up “running next to objectionable content that promoted racism or other controversial material.”²⁴ Twitter asserts that its verification and conduct policies are not “motivated by a desire to influence any election,” and cites to sworn congressional testimony from its Chief Executive Officer, Jack Dorsey, stating that Twitter does not “consider political viewpoints, perspectives, or party affiliation in any of our policies or enforcement decisions, period.”²⁵

²⁰ Post-2017 Verification Policy; *see* Resp. at 6.

²¹ Post-2017 Verification Policy.

²² *Id.*

²³ *Id.*

²⁴ *Id.* (internal quotation marks omitted).

²⁵ Resp. at 7 (citing *Twitter: Transparency and Accountability*, 115th Cong. (Sept. 5, 2018), Testimony of Jack Dorsey, Twitter CEO, before the House Comm. on Energy and Commerce at 3, <https://docs.house.gov/meetings/IF/IF00/20180905/108642/HHRG-115-IF00-Wstate-DorseyJ-20180905.pdf> (“Dorsey Testimony”))

3. Candidate Verification

Twitter states that while it was implementing and evaluating its Post-2017 Verification Policy, the company “froze nearly all new verifications while it worked on improving the verification process and solicited public comments on how it might improve the process,” but exempted political candidates and public health officials.²⁶ During the 2018 election cycle, Twitter implemented a partnership with Ballotpedia to verify congressional and gubernatorial general election candidates.²⁷

Twitter expanded its program of verifying political candidates in the 2020 election cycle, announcing on December 12, 2019, that in partnership with Ballotpedia it would proactively verify federal and gubernatorial candidates in the primary and general elections.²⁸ Twitter states that candidates were required to comply with the company’s policies — including compliance with Twitter’s Rules, Terms of Service, Coordinated Harmful Activity Policy, and Hateful Conduct Policy — in order to be verified.²⁹ A February 28, 2020, update to the 2020 Candidate Verification Policy stated that, in order to be verified, a candidate must:

1. Meet Ballotpedia’s threshold for an official candidate requiring that they register with a federal or state campaign finance agency before the candidate filing deadline and appear on official candidate lists released by government election agencies after the candidate filing deadline (this may require gathering petition signatures and paying a filing fee);

²⁶ Resp. at 7.

²⁷ Nancy Scola, *Twitter to verify Election Candidates in the Midterms*, POLITICO (May 23, 2018), <https://www.politico.com/story/2018/05/23/twitter-verify-candidates-midterms-2018-1282802>.

²⁸ Bridget Coyne, Public Policy Director, Twitter, *Helping Identify 2020 US Election Candidates on Twitter* (Dec. 12, 2019), https://blog.twitter.com/en_us/topics/company/2019/helping-identify-2020-us-election-candidates-on-twitter.html (“2020 Candidate Verification Policy”); *Ballotpedia Partners with Twitter to Identify 2020 Election Candidates*, BALLOTPEDIA (Dec. 12, 2019), https://ballotpedia.org/Ballotpedia_partners_with_Twitter_to_identify_2020_election_candidates (last visited May 28, 2021).

²⁹ Resp. at 7.

2. Meet certain account requirements before becoming verified, which include having a profile photo, header photo, bio, and website that clearly identify them as a candidate; and

3. Comply with our Twitter Rules and Terms of Service as we have stated on our Help Center page.³⁰

Further, Twitter's 2020 candidate verification policy states that: "If a Twitter account engages in, or has engaged in, activity that violates the Twitter Rules, it may be ineligible for verification or subject to enforcement action."³¹

4. Benefits of Verification for Federal Candidates

According to the Complaint, verification has "numerous and significant benefits," which "can lead to more followers and a higher social media profile."³² In addition to indicating to other Twitter users that an account is authentic and "in the public interest," the Complaint asserts that verified accounts will be displayed more prominently in search results and have significantly higher engagement rates, meaning that users are more likely to both see the accounts' tweets and to click on photos, hashtags, and links embedded in the accounts' tweets.³³ The Complaint alleges that improved search results and engagement rates significantly affect candidates' "attempt[s] to gain attention and raise money" by using Twitter.³⁴ The Complaint also argues

³⁰ 2020 Candidate Verification Policy.

³¹ *Id.*

³² Compl. at 5.

³³ *Id.*

³⁴ *Id.* We note that the Complaint inaccurately cites a 2014 Twitter blog post regarding data analysis of over two million tweets sent by thousands of verified users across different fields over the course of a month. Compl. at 5, note 43 (citing Simon Rogers, *What Fuels a Tweet's Engagement?*, TWITTER (Mar. 10, 2014)). The Complaint asserts that "verified accounts [] receive significant boosts in engagement, including a 38% increased engagement on photos, a 16% boost on tweets with hashtags, and a 28% boost on videos." *Id.* The Original Twitter blog post, however, does not say that; it says that in examining only tweets by verified users, it found that tweets containing those elements received the listed increases in user engagement as compared to tweets by verified users which did not contain those elements. In any event, Twitter's Response does not dispute that verified users generally reach a broader audience and realize increased engagement rates over non-verified users.

1 that fake and parody accounts are prevalent on Twitter, and that verification helps a *bona fide*
 2 candidate's account "stand out and provide confidence to voters that they are hearing directly
 3 from the individual behind the account and/or contributing to the candidates [sic] campaign as
 4 opposed to a sham group."³⁵ Twitter does not dispute these statements about the practical
 5 benefits of verification, and contemporaneous press reports discussing Twitter's efforts to verify
 6 candidates echo the Complaint's assertions about the benefits verification confers to
 7 candidates.³⁶

8 **B. Luna's Efforts to Obtain Verification**

9 The Complaint states that by early February 2020, Luna was the only Republican primary
 10 candidate in Florida's 13th Congressional District whose Twitter account was not verified.³⁷ On
 11 February 7, 2020, Luna emailed a Twitter official, Senior Manager of North America Policy
 12 Communications Katie Rosborough, stating that "everyone in my primary race has been verified
 13 on twitter except for me" and asking if "you could assist with this."³⁸

14 Twitter responded the same day from a more general "Twitter Government & Elections"
 15 email account with a boilerplate message directing Luna to contact Ballotpedia to "ensure [her]
 16 candidate profile is up to date" and stating that "[t]o treat all candidates fairly, [Twitter] will
 17 process these [verification] requests once we have received them from Ballotpedia."³⁹ Luna

³⁵ *Id.* at 5.

³⁶ *Id.* at 3, n.10, 20 (citing Emily Birnbaum and Chris Mills Rodrigo, *Twitter Falling Short on Pledge to Verify Primary Candidates*, THE HILL (Feb. 25, 2020), <https://thehill.com/policy/technology/484453-twitter-falling-short-on-pledge-to-verify-primary-candidates>; Allum Bokhari, *Twitter Verified a Fake Candidate, but Not Florida Congressional Candidate Anna Paulina Luna*, BREITBART (Mar. 6, 2020), <https://www.breitbart.com/tech/2020/03/06/twitter-verified-a-fake-candidate-but-not-florida-congressional-candidate-anna-paulina-luna>.)

³⁷ *Id.* at 3.

³⁸ *Id.* at 3, Attach. A at 2 (email from Luna to Katie Rosborough, Senior Manager of North America Policy Communications, Twitter (Feb. 7, 2020)).

³⁹ *Id.* at 3, Attach. A at 1-2 (email from Twitter Government & Politics to Luna (Feb. 7, 2020)).

1 responded that her “profile on Ballotpedia has been up to date for a while now with correct
 2 information and my profile has still not been verified,” and again stated that she was the only
 3 candidate in her primary who had not been verified.⁴⁰ Twitter responded: “Great! It should now
 4 be processed on a rolling basis.”⁴¹

5 Luna contacted the same Twitter Government & Elections account on March 3, 2020,
 6 nearly a month later, after seeing no change in her verification status.⁴² Luna asserted that she
 7 was “in compliance with Ballotpedia and twitters [sic] standards for verification” and repeated
 8 that she was the only primary candidate not yet verified.⁴³ Twitter responded with another
 9 boilerplate email, this time enumerating the three requirements for verification as stated in
 10 Twitter’s 2020 candidate verification policy.⁴⁴ Twitter’s email did not provide any specific
 11 information about the status of Luna’s request.

12 On June 11, 2020, Luna made a final attempt to contact Twitter about her verification
 13 status, adding that “I’ve had multiple people attempting to solicit money under false pretenses, of
 14 which I had to report pages to get them removed, people running scams pretending to use money
 15 for my campaign,” along with the same prior assertions that she was the only candidate in her
 16 primary that was not verified.⁴⁵ Twitter responded by sending the same boilerplate email sent in
 17 March, but this time appended with the sentence: “Thank you for flagging. We have escalated
 18 this with our Support Team for further review.”⁴⁶

⁴⁰ *Id.* at 3, Attach. A at 1 (email from Luna to Twitter Government & Politics (Feb. 7, 2020)).

⁴¹ *Id.* at 3, Attach. A at 1 (email from Twitter Government & Politics to Luna (Feb. 7, 2020)).

⁴² *Id.* at 3, Attach. B at 1-2 (email from Luna to Twitter Government & Politics (Mar. 3, 2020)).

⁴³ *Id.* at 3, Attach. B at 1 (email from Twitter Government & Politics to Luna (Mar. 6, 2020)).

⁴⁴ *Id.*; see 2020 Candidate Verification Policy.

⁴⁵ *Id.* at 4, Attach. C at 1-2 (email from Luna to Twitter Government & Politics (June 11, 2020)).

⁴⁶ *Id.* at 4, Attach. C at 1 (email from Twitter Government & Politics to Luna (June 11, 2020)).

On August 19, 2020, after Luna had won the primary election, Derek Utley, a Luna campaign consultant, emailed Twitter explaining that Luna had won the primary and requesting that her account be verified.⁴⁷ Twitter again responded by sending the same boilerplate email sent in March.⁴⁸ Utley replied, saying: “She has already won her primary. She’s already passed all of [B]allotpedia’s rules and she clearly identifies as a candidate. She in the nominee for the Republican party. Please proceed forward with verification.”⁴⁹

The Complaint states that there was no further correspondence between Luna and Twitter regarding verification of her account and that as of the date of the Complaint, Twitter has not provided Luna with any explanation as to why her account was not verified during the 2020 election or why it remains unverified.⁵⁰ The Complaint maintains that “Luna has satisfied all requirements to be verified on Twitter, and has not engaged in any conduct that would prohibit her from being verified on the platform.”⁵¹

C. Complaint’s Allegations that Twitter Denied Verification for the Purpose of Influencing Florida’s 13th Congressional District Election

The Complaint alleges that Twitter “deliberately refused” to verify Luna’s account, and that “by not verifying [Luna] . . . Twitter is providing something of value to Luna’s political opponents for the purpose of influencing the election in Florida’s 13th District.”⁵² In support of this allegation, the Complaint asserts that Twitter has demonstrated a pattern of “discriminatory

⁴⁷ *Id.* at 4, Attach. D at 2 (email from Derek Utley, Chairman, X Strategies LLC, to Twitter Government & Politics (Aug. 19, 2020)).

⁴⁸ *Id.* at 4, Attach. D at 1-2 (email from Twitter Government & Politics to Derek Utley, Chairman, X Strategies LLC (Aug. 19, 2020)).

⁴⁹ *Id.* at 4, Attach. D at 1 (email from Derek Utley, Chairman, X Strategies LLC, to Twitter Government & Politics (Aug. 19, 2020)).

⁵⁰ *Id.* at 4.

⁵¹ *Id.*

⁵² *Id.* at 1.

1 treatment of conservative voices.”⁵³ It cites a 2018 *Vice News* article related to so-called
 2 “shadow banning” of conservative political figures on Twitter, which limited their visibility in
 3 the auto-populated drop-down search box on the Twitter platform.⁵⁴ In the article, a Twitter
 4 spokesperson acknowledged the issue, which Twitter later claimed to have fixed, but stated that
 5 technology behind the issue was based on account behavior, not the content of their tweets.⁵⁵
 6 Further, the Complaint points to congressional hearings held in 2018-19 on alleged anti-
 7 conservative bias by tech and social media corporations.⁵⁶ According to the cited press reports,
 8 representatives from Facebook and Twitter appeared at the hearings to respond to allegations by
 9 Republican Members that their companies’ algorithms could be suppressing conservative views
 10 on the platforms and discriminating against Republicans.⁵⁷ Representatives from both Twitter
 11 and Facebook reportedly denied these allegations under oath.⁵⁸

12 The Complaint states that Luna “abided by all of Twitter’s qualifications to receive
 13 verification” and that, given Twitter’s alleged political bias, its denial of Luna’s verification must
 14 have been for the purpose of harming her election chances, to the benefit of her primary and
 15 general election opponents.⁵⁹

⁵³ *Id.* at 4-5. More generally, the Complaint asserts that “Twitter is a new public forum and when Twitter discriminates against conservative leaders like Anna Paulina Luna . . . by applying its universal regulations in an arbitrary and subjective manner, it is not only un-American and morally wrong, it is also illegal.” *Id.* at 1.

⁵⁴ *Id.* at 5 (citing Alex Thompson, *Twitter Appears to Have Fixed “Shadow Ban” of Prominent Republicans like the RNC Chair and Trump Jr.’s Spokesperson*, VICE NEWS (July 25, 2018), <https://www.vice.com/en/article/43paqq/twitter-is-shadow-banning-prominent-republicans-like-the-rnc-chair-and-trump-jrs-spokesman>).

⁵⁵ Thompson, *supra* note 54.

⁵⁶ Compl. at 4-5 (citing Cecilia Kang, Sheera Frenkel, Kate Conger, Matthew Rosenberg and Nicholas Fandos, *Twitter’s Dorsey Avoids Taking Sides in Partisan House Hearing*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/technology/facebook-twitter-congress.html>; Cecilia Kang and Sheera Frenkel, *Republicans Accuse Twitter of Bias Against Conservatives*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/technology/lawmakers-facebook-twitter-foreign-influence-hearing.html>).

⁵⁷ Kang, Frenkel, Conger, Rosenberg & Fandos, *supra* note 56

⁵⁸ Kang & Frenkel, *supra* note 56.

⁵⁹ Compl. at 4-6.

D. Twitter's Explanation for its Decision not to Verify Luna's Account

In its Response, Twitter states that it “denied [Luna’s] request by applying its politically neutral verification rules,” pointing to a prior instance pre-dating Luna’s candidacy when her account was suspended for “posting abusive content,” her “larger pattern of controversial social media posts,” and history of “provocative” statements.⁶⁰ Accordingly, Twitter contends that the official reason for denying Luna’s verification, was the fact that “she had previously violated Twitter’s User Agreement, including the Twitter Rules and incorporated policies.”⁶¹ Twitter points to its 2020 candidate verification policy and multiple emails to Luna, which stated that “if a Twitter account engaged in, *or has engaged in*, activity that violates the Twitter rules, it may be ineligible for verification.”⁶²

Twitter asserts that its “internal logs reflect that Ms. Luna was disciplined for posting abusive content on August 4, 2019,”⁶³ but does not provide those logs, does not explicitly identify the conduct that it claims violated its rules, and does not state what specific policy it determined Luna violated. Rather, the Response vaguely cites a contemporaneous press report wherein representatives from Luna’s campaign identified the following tweet from August 4, 2019, in the wake of a mass shooting at an El Paso, Texas Walmart by a man who authorities say targeted Latinos, that they told the reporter led to her account being suspended by Twitter for 13 hours until she removed the tweet:⁶⁴

⁶⁰ Resp. at 8-9, 11.

⁶¹ *Id.* at 1-2.

⁶² *Id.* at 9.

⁶³ *Id.*

⁶⁴ Compl. at 8 (citing Josh Solomon, *Republican Anna Paulina Luna Has a History of Clashing with Twitter*, TAMPA BAY TIMES (Sept. 20, 2020), <https://www.tampabay.com/florida-politics/elections/2020/09/18/republican-anna-paulina-luna-has-a-history-of-clashing-with-twitter/>).



According to the article, a campaign spokesperson said that Twitter told Luna the tweet violated the company's guidelines pertaining to posting material dangerous to the community.⁶⁵ In its Response, Twitter did not explain what portion of this tweet violated its rules or policies. Twitter's Response does not acknowledge the tweet specifically, referring only to the fact that "Twitter's internal logs reflect that Ms. Luna was disciplined."⁶⁶

The Response also cites press reports that reference statements from Luna prior to becoming a candidate that Twitter describes as demonstrating a "history of provocative statements," including, as the Response describes them, "comparing Hillary Clinton to herpes" during a Fox News interview, saying that then-Senator Kamala Harris believes that "child rape and slavery of Hispanic women and children is a joke," and "jokingly comparing Immigration and Customs Enforcement trucks to 'ice cream trucks.'"⁶⁷ The Response also states that social media site Instagram had also taken adverse action against Luna for postings made on that platform and claims that Luna has used her Twitter account to post inaccurate or misleading information.⁶⁸

⁶⁵ Solomon, *supra* note 64.

⁶⁶ Resp. at 9.

⁶⁷ *Id.* at 8.

⁶⁸ *Id.* at 9.

1 **III. LEGAL ANALYSIS**

2 **A. Relevant Law**

3 The Act prohibits corporations from making contributions to federal candidates, and
 4 likewise bars candidates, political committees (other than independent expenditure-only political
 5 committees and committees with hybrid accounts), and other persons, from knowingly accepting
 6 or receiving corporate contributions.⁶⁹ Under the Act, a “contribution” includes “any gift,
 7 subscription, loan, advance, or deposit of money or anything of value made by any person for the
 8 purpose of influencing any election for Federal office.”⁷⁰ The term “anything of value” includes
 9 “all in-kind contributions.”⁷¹ In-kind contributions include “provision of any goods or services
 10 without charge or at a charge that is less than the usual and normal charge for such goods or
 11 services.”⁷²

12 The Commission has concluded that a commercial vendor providing services to political
 13 committees will not make a contribution for the purpose of influencing an election when its
 14 business activity “reflects commercial considerations and does not reflect considerations outside
 15 of a business relationship.”⁷³ A commercial vendor need not make its services available to
 16 committees representing all political ideologies, but rather may establish objective business
 17 criteria to protect commercial viability of its business without making contributions to the
 18 committees that meet those criteria.⁷⁴

⁶⁹ 52 U.S.C. § 30118(a); *accord* 11 C.F.R. § 114.2(a), (d).

⁷⁰ 52 U.S.C. § 30101(8)(A); *accord* 11 C.F.R. § 100.52.

⁷¹ 11 C.F.R. § 100.52(d)(1).

⁷² *Id.* (listing examples of goods or services, such as securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists).

⁷³ Advisory Op. 2012-31 (AT&T) at 4.

⁷⁴ Advisory Op. 2004-06 (Meetup) at 1 (explaining that a corporation may provide goods and services to political committees without being considered to have made an in-kind contribution so long as it does so “on the same terms and conditions available to all similarly situated persons in the general public”); Advisory Op. 2012-26

1 The Commission has long considered activity engaged in for *bona fide* commercial
 2 reasons not to be “for the purpose of influencing an election,” and thus, not a contribution or
 3 expenditure under section 30118(a).⁷⁵ This is true even if a candidate benefitted from the
 4 commercial activity.⁷⁶ In Advisory Op. 2017-06 (Stein and Gottlieb), the Commission
 5 concluded that a for-profit corporation facilitating credit and debit card purchases to political
 6 committees, “need not make its services available to committees representing all political
 7 ideologies, but rather may establish objective business criteria to protect the commercial viability
 8 of its business without making contributions to the committees that meet those criteria.”⁷⁷ The
 9 corporation proposed to select only Democratic candidates and market its product to Democratic
 10 users, “based on its determination that this is the best way to attract users and promote the

(Cooper for Congress, *et al.*) at 10 (concluding that no contribution to committee resulted where its participation in a text message fundraising program was subject to “objective and commercially reasonable” criteria).

⁷⁵ See, e.g., Factual & Legal Analysis at 4, MUR 6586 (World Wrestling Entertainment, Inc.) (finding that the WWE acted with the “sole intent to defend its business reputation” and not for the purpose of influencing an election when the WWE’s senior vice president sent a letter to a newspaper seeking a retraction of a negative article about Senate candidate Linda McMahon, who owned and served as CEO of the WWE); First Gen. Counsel’s Rpt. at 13, MUR 5474 (Dog Eat Dog Films, *et al.*) (determining that distributors and marketers of *Fahrenheit 9/11* film acted “in connection with bona fide commercial activity and not for the purpose of influencing an election”) (Commission voted to approve no reason to believe recommendations); Advisory Op. 2012-11 (Microsoft Corp.) (concluding that commercially reasonable efforts “to protect [Microsoft’s] brand reputation” by providing election-sensitive customers with free account security services are not an in-kind contribution).

⁷⁶ See First Gen. Counsel’s Rpt. at 16, MUR 3622 (The Clinton/Gore ‘92 Committee) (“[T]he fact that any of these candidates . . . 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.”) (Commission voted to approve no reason to believe recommendation); Factual & Legal Analysis at 6, MUR 7024 (Van Hollen for Senate, *et al.*) (opining that 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,” and concluding there was no contribution given the “absence of any objective or subjective indication” respondents acted for the purpose of influencing the election).

⁷⁷ Advisory Op. 2017-06 (Stein & Gottlieb) at 6; see Advisory Op. 2012-28 (CTIA) at 8-9 (“A vendor may establish and apply eligibility criteria to political committees in order to protect the commercial viability of the vendor’s program.”); Advisory Op. 2012-26 (Cooper for Congress, *et al.*) at 10 (concluding that limiting political committees participation in a text message fundraising does not result in an in-kind contribution where the selection is “subjection to ‘objective and to commercially reasonable’ criteria”); Advisory Op. 2006-34 (Working Assets) at 2, 4 (concluding that a proposed affinity program between a wireless telephone services and select political committees did not result in a contribution to those political committees where selection into the program was based on “commercial viability determined by common commercial principles”).

[product's] commercial success in the current political environment.”⁷⁸ The corporation would “select candidates it believes will increase user participation and use of the [product], based on its own research and analysis and user feedback.”⁷⁹

B. The Commission Should Dismiss the Allegations that Twitter Made Prohibited In-Kind Contributions to Luna's Opponents

The Complaint alleges that Twitter made prohibited in-kind corporate contributions to Luna's primary and general election opponents when it declined to verify Luna's account while verifying her opponents' accounts.⁸⁰ The allegation is premised on the Complaint's assertions that Twitter verification is a thing of value provided to those candidates and not Luna and that Twitter's decision not to verify Luna's account was made for the purpose of influencing a federal election.⁸¹ As discussed below, even assuming *arguendo* that verification is a thing of value, the Complaint lacks any direct factual support for the allegation that Twitter acted for the purpose of influencing Luna's elections, whereas the Response plausibly states that Twitter's decision not to verify Luna was predicated on pre-candidacy violations of Twitter's rules and terms of service and made in accordance with corporate policies implemented to protect and maximize corporate profits. The available information, therefore, is insufficient to support an inference that Twitter acted for the purpose of influencing the election rather than for its claimed non-political purpose reflecting *bona fide* commercial interests.

Twitter has credibly asserted that its 2020 candidate verification policy and more general verification policy in effect at the time reflect *bona fide* commercial interests and were not

⁷⁸ Advisory Op. 2017-06 (Stein & Gottlieb) at 6.

⁷⁹ *Id.*

⁸⁰ Compl. at 1, 6.

⁸¹ *Id.* at 6-7.

1 designed for the purpose of influencing any federal election. Twitter states that it first
 2 implemented a verification program in 2009 to address concerns that unverified accounts “can
 3 sow confusion and lead users to a less-satisfying experience.”⁸² By 2017, Twitter states that new
 4 concerns arose that verification was “perceived as an endorsement,” leading to address negative
 5 reactions from users and advertisers when verification badges were associated with controversial
 6 material.⁸³ Twitter states that its revenue comes from advertisers and users who pay to promote
 7 tweets on the platform, and that changes were necessary to retain users and advertisers who
 8 might take their business elsewhere.⁸⁴ As such, Twitter states that it added new requirements for
 9 obtaining and maintaining verification, including that accounts may ineligible for verified status
 10 if they are “associated with coordinated harmful activity, or hateful content as defined in
 11 Twitter’s Ads Policies.”⁸⁵ Moreover, when announcing its 2020 candidate verification policy,
 12 Twitter specifically included a provision stating that: “If a Twitter account engages in, or has
 13 engaged in, activity that violates the Twitter Rules, it may be ineligible for verification or subject
 14 to enforcement action.”⁸⁶ Accordingly, both the implementation of a verification program in the
 15 first place and the subsequent revisions to the verification policy appear to reflect objective

⁸² Resp. at 5.

⁸³ *Supra*, notes 17-18.

⁸⁴ *Supra*, note 23. The Response also specifically addresses the factual support put forward in the Complaint. Regarding allegations that Twitter was “shadow banning” conservative accounts, Twitter incorporates its Response in MUR 7443 (Friends of Matt Gaetz), which alleged that the practice resulted in prohibited in-kind corporate contributions to, or undisclosed independent expenditures supporting, Gaetz’s political opponents. Resp. at 2, n.1. As in the Response here, Twitter’s Response in MUR 7443 denied that “shadow banning” had an electoral purpose, and laid out the company’s business case for limiting “certain types of abusive and manipulative behaviors” on the platform. MUR 7443 Resp. at 3 (Oct. 26, 2018) (citing Dorsey Testimony)

⁸⁵ *Supra*, note 20. Twitter’s updated verification policy stated that it would consider both users’ online and offline conduct when making verification decisions and that users may be ineligible for verification “even if their activity on Twitter doesn’t violate the Twitter Rules.” Post-2017 Verification Policy.

⁸⁶ 2020 Candidate Verification Policy.

1 business criteria tied back to Twitter's concerns that perceived endorsements of certain activity it
2 considers harmful or abusive may impact its profitability.

3 Regarding the more specific issue of Twitter's denial of Luna's verification request,
4 Twitter's Response suggests a non-political explanation, asserting that its decision was based on
5 its 2020 candidate verification policy and thus that its actions were undertaken for legitimate
6 commercial reasons and not for the purpose of influencing a federal election. As an initial
7 matter, whereas the Complaint asserts that "Luna has satisfied all requirements to be verified on
8 Twitter, and has not engaged in any conduct that would prohibit her from being verified on the
9 platform,"⁸⁷ Twitter states that it "has taken disciplinary action against Ms. Luna for her actions
10 on the platform" and that "internal logs reflect that Ms. Luna was disciplined for posting abusive
11 content on August 4, 2019."⁸⁸ Twitter also points to other activities by Luna outside of Twitter
12 that have contributed to what it characterizes as a "history of provocative statements" and "larger
13 pattern of controversial social media posts."⁸⁹ Although the Response lacks transparency about
14 these predicate Twitter Rules violations — Twitter cites "internal logs" yet neither provides them
15 nor any detailed summary of them and failed to provide specific explanations to Luna's inquiries
16 — given this information, including the suspension which pre-dated Luna's candidacy, Twitter
17 has made a plausible argument that its decision to deny Luna's verification was in accordance
18 with its 2020 candidate verification policy, which stated that accounts may be ineligible for
19 verification if they have engaged in activity that violates Twitter's rules.⁹⁰

⁸⁷ *Supra*, note 59.

⁸⁸ *Supra*, note 60.

⁸⁹ *Id.*

⁹⁰ Post-2017 Verification Policy.

1 There is no specific factual support in the Complaint or elsewhere to support the
2 Complaint's assertion that Twitter's decision to deny Luna's verification was for the purpose of
3 influencing Luna's elections. First, there is nothing to suggest that Twitter's refusal to verify
4 Luna differed in this case from similar decisions the company made as to other candidates and
5 non-candidates with prior Twitter rules violations. Second, nothing in the Complaint or
6 elsewhere refutes Twitter's assertion that the predicate rules violations occurred before she
7 became a candidate, and therefore could not have been based on her status as a federal
8 candidate.⁹¹ Third, the Complaint's broad assertion that Twitter engages in "discriminatory
9 treatment of conservative voices" lacks factual support, is directly refuted in the Response, and
10 does not reasonably suggest that it acted against Luna with an electoral motive.⁹² The
11 Complaint's main support is a 2018 news article about conservative names not appearing in the
12 auto-population feature of Twitter's search bar.⁹³ Twitter states it promptly corrected the issue
13 which was the result of a non-political technology mistake and notes that "conservatives, in
14 particular hav[e] 'a strong presence on Twitter.'"⁹⁴ It any event, this does not appear to have any
15 bearing on Twitter's action with respect to Luna's verification.

16 Twitter's Response is silent as to exactly when it decided not to verify Luna's account
17 and the available information indicates that Twitter never communicated to Luna any reason for
18 denying her repeated verification requests. Additionally, as noted, Twitter claims to have
19 "internal logs" that detail Luna's predicate violations of its rules which they have not provided to

⁹¹ *Supra*, notes 63-64.

⁹² *Supra*, note 53.

⁹³ Thompson, *supra* note 54.

⁹⁴ *Id.*; Resp. at 3 (quoting Dorsey Testimony).

1 the Commission. Twitter's lack of transparency, though conspicuous, does not itself show that it
2 acted for the purpose of influencing an election.

3 In conclusion, the available information does not show that Twitter's actions were
4 undertaken for the purpose of influencing a federal election. Twitter has supplied a credible
5 explanation for its verification program generally and its Response suggests a non-political
6 explanation for its specific decision to deny Luna verification in light of her prior violation of
7 Twitter's rules. Twitter plausibly asserts that it determined, in its business judgment, that Luna's
8 tweet and other activities violated its rules and that verification of her account and perceived
9 endorsement thereof would have a detrimental effect on its brand and ability to maintain and
10 attract advertisers. The Complaint does not provide and we are aware of no specific information
11 that might otherwise suggest that Twitter denied Luna's verification for the purpose of
12 influencing a federal election. Therefore, we recommend that the Commission dismiss the
13 allegations that Twitter violated 52 U.S.C. § 30118(a) by making prohibited in-kind corporate
14 contributions.

15 **IV. RECOMMENDATIONS**

- 16 1. Dismiss the allegations that Twitter violated 52 U.S.C. § 30118(a) by making
17 prohibited in-kind corporate contributions;
- 18 2. Approve the attached Factual and Legal Analysis;
- 19 3. Approve the appropriate letters; and
- 20 4. Close the file.

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Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Acting Associate General Counsel for Enforcement

June 16, 2021

Date

Peter G. Blumberg

Peter G. Blumberg
Acting Deputy Associate General Counsel for
Enforcement

Claudio J. Pavia

Claudio J. Pavia
Acting Assistant General Counsel

Ray Wolcott

Ray Wolcott
Attorney