

WILMERHALE

December 16, 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: Trace Keeys, Paralegal  
1050 First Street, NE  
Washington, DC 20463

**Re: MUR 7834 — 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 that Google, Facebook, and Twitter, as well as other unnamed “Silicon Valley corporations,” act in ways that create an “uneven playing field” for online discussion of a broad range of issues, including immigration, abortion, the judiciary, and what the complaint identifies as “legal insurrection.” The complaint contends that the respondents’ operation of their respective internet platforms and services disadvantages “conservatives and varied opponents of the political left,” has an “indirect impact” on U.S. elections, and—even in the absence of any alleged coordination—results in corporate “contributions” in violation of the Federal Election Campaign Act (“FECA” or “the Act”). The complaint in MUR 7834 fails as a matter of law for at least the following reasons:

**First**, the complaint does not allege specific facts sufficient to establish a FECA violation. The vague, conclusory, and speculative allegations provide no reason to believe that Facebook has violated the Act.

**Second**, insofar as the complaint can be understood in relation to FECA at all, it concerns the respondents’ *independent activities* in regards to third-party *issue advocacy*, two realms in which the Supreme Court has substantially limited FECA’s scope in light of the significant First Amendment interests at stake in any governmental regulation of political speech. Whatever the basis or merits of the complainant’s individual grievances, they fall well outside the purview of FECA.

**Third**, the complaint has not alleged a “contribution” under FECA and Commission precedent. In particular, it does not allege any coordination with any candidate or campaign, or

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even which candidate or campaign should be deemed to have *received* the supposed contribution. But even if these facial defects could be overcome, the complaint fails to allege that any of Facebook's activities were done "for the purpose of influencing" a federal election, 52 U.S.C. § 30101(8)(A)(i), rather than for independent business reasons related to maximizing users' experience on the Facebook platform.

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 as alleged in the MUR 7834 complaint; 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.<sup>1</sup>

### LEGAL STANDARD

The Act requires the Commission to find "reason to believe that a person has committed, or is about to commit," a FECA violation before it may initiate an investigation.<sup>2</sup> 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."<sup>3</sup> The Commission may find "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."<sup>4</sup> 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."<sup>5</sup>

The Commission has further clarified that "[u]nwarranted legal conclusions from asserted facts, ... or mere speculation, ... will not be accepted as true."<sup>6</sup> More specifically, "[c]omplaints

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<sup>1</sup> In the interest of brevity, this response focuses on the fundamental defects in the complaint's theories of liability under FECA and Commission regulations and precedent. 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 additional defenses available under 47 U.S.C. § 230 and the First Amendment.

<sup>2</sup> 52 U.S.C. § 30109(a)(2).

<sup>3</sup> 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.").

<sup>4</sup> *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](https://www.fec.gov/resources/cms-content/documents/notice_2007-6.pdf) (emphasis added).

<sup>5</sup> *Id.*

<sup>6</sup> MUR 4960, Statement of Reasons, at 2.

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not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented.”<sup>7</sup> The Commission does not find reason to believe FECA violations have occurred absent reliable 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.<sup>8</sup>

Even if the allegations in a complaint do not fail as a matter of law, the Commission also has discretion to dismiss complaints that do not warrant further expenditure of Commission resources.<sup>9</sup>

## RESPONSE

### A. The Complaint Is Too Vague And Speculative To Support A “Reason To Believe” Finding

The complaint does not come anywhere close to alleging facts that establish a “reason to believe” Facebook has violated FECA. It broadly alleges “unequal treatment of Republicans, conservatives, Christians, and other individuals and groups who oppose the shared political philosophies of [the collective respondents] and the vast majority of their employees,” without providing any factual specificity to support that sweeping charge. It does not identify any *election-related* content (e.g., express advocacy or electioneering communications) that was allegedly subjected to unequal treatment online, let alone allege that such treatment was coordinated with any campaign. Indeed, other than a passing reference to “Joe Biden for President,” the body of the complaint does not identify any candidate, campaign, or election that

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<sup>7</sup> *Id.* at 1 (first citing 11 C.F.R. § 111.4(d)(2); then quoting MUR 4545 (Clinton/Gore '96 Primary Comm./Amtrak), First General Counsel’s Report, at 15; and then quoting MUR 3534 (Bibleway Church of Atlas Road, Inc., *et al.*), 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).

<sup>8</sup> *See* MUR 3534, Statement of Reasons, 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).

<sup>9</sup> *See generally Heckler v. Chaney*, 470 U.S. 821 (1985).

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was allegedly affected. The complaint thus, quite literally, provides “no reason to believe” that FECA was violated. Indeed, it is difficult to discern how FECA is even implicated at all.

The single paragraph directed at Facebook fares no better. It alleges only that the complainant “believe[s]” (for unstated reasons) that “Facebook has applied hidden restraints on our pages to limit our growth and reach,” interfered with “attempts to assemble in favor of our issues,” and temporarily banned ALIPAC’s president from maintaining a personal Facebook profile in August 2018. Whatever the basis or merits of these individualized grievances, the complaint does not even *allege* a violation of FECA based on them, let alone provide reason to believe that one occurred.

Accordingly, the complaint is simply too vague—lacking even the barest of factual or legal specificity—to support a “reason to believe” finding. Commission regulations state that a complaint “should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction.”<sup>10</sup> This complaint fails to meet that standard. The Commission has regularly found “no reason to believe” in similar circumstances, and it should do so here.<sup>11</sup>

## **B. The Complaint Concerns Matters Outside The Purview Of FECA**

To the extent the complaint can be understood in relation to FECA at all, it concerns the respondents’ treatment of online issue advocacy in a manner the complainant perceives to favor “the left,” notwithstanding the absence of any alleged coordination between the respondents and any candidate or committee. So understood, the complaint falls well outside the purview of FECA.

In light of the significant First Amendment interests implicated by any governmental regulation of speech in the political realm, the Supreme Court has distinguished between express advocacy (and its functional equivalent) on one hand, and issue advocacy that does not entail express advocacy on the other. *See Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 476 (2007) (“This Court has never recognized a compelling interest in regulating [issue advocacy] that [is] neither express advocacy nor its functional equivalent.”); *see generally id.* at 476-81.

Likewise, the Court has distinguished between independent political activity on one hand, and activity that is coordinated with a candidate or committee on the other. *See, e.g., Buckley v.*

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<sup>10</sup> 11 C.F.R. § 111.4(d)(3).

<sup>11</sup> *See, e.g.,* MUR 4960, Statement of Reasons, at 3 (finding no reason to believe where complaint failed to allege “sufficiently specific allegation” and where complaint did not allege facts sufficient to show “essential element” of violation); MUR 4869, Statement of Reasons, at 2 (unanimously finding no reason to believe because “no violation of [FECA] had been alleged”); MUR 3534, Statement of Reasons, at 1-2 (unanimously rejecting OGC recommendation and finding no reason to believe on the basis of a “lengthy and disjointed complaint” that was “quite vague” as to the facts alleged).

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*Valeo*, 424 U.S. 1, 43-45 (1976) (invalidating FECA’s limits on independent expenditures on issue advocacy by individuals on First Amendment grounds, and agreeing with the argument that “funds spent to propagate one’s views on issues without expressly calling for a candidate’s election or defeat are thus not covered.”); *Citizens United v. Federal Elections Commission*, 558 U.S. 310, 357, 365 (2010) (invalidating ban on independent corporate expenditures, including for express advocacy and other electioneering communications, on First Amendment grounds).

Here, the complaint does not allege either that Facebook engaged in any express advocacy for or against a candidate, or that Facebook acted in coordination with any campaign or committee. Instead, the complaint appears to take issue with the growth and reach of ALIPAC pages, which are dedicated to advocacy against illegal immigration. Accordingly, the complaint’s basic theory of liability cannot be reconciled with Supreme Court precedent. In essence, the complaint alleges that a corporation’s independent treatment of third-party issue advocacy on its own communications platform violates FECA, even though none of the content at issue entails any express advocacy (or its functional equivalent) and even though respondents are not alleged to have coordinated or cooperated with any candidate, campaign, or political committee. We are aware of no precedent—from the Commission or otherwise—to support that breathtaking proposition. Embracing the complaint’s theory would disregard Supreme Court campaign finance jurisprudence since *Buckley*, and subject private parties to regulation for independent activity in the realm of genuine issue advocacy. That position has no basis in the law.

### **C. The Complaint Fails To Allege That Facebook Made An Improper Contribution**

The complaint alleges that Facebook’s independent treatment of what the complainant deems to be “conservative” content on its platform amounts to an improper contribution under 52 U.S.C. § 30118(a). This argument fails for multiple reasons.

*First*, independent activity is, by definition, not a contribution under FECA. FECA and its implementing regulations distinguish between activities performed in cooperation or coordination with a candidate or campaign, which may constitute in-kind contributions,<sup>12</sup> and activities

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<sup>12</sup> See, e.g., *How To Report In-Kind Contributions*, FEC, <https://www.fec.gov/help-candidates-and-committees/filing-reports/in-kind-contributions/> (last visited Dec. 15, 2020) (“Goods or services offered free or at less than the usual charge result in an in-kind contribution. Similarly, when a person or entity pays for services on the committee’s behalf, the payment is an in-kind contribution. An expenditure made by any person or entity in cooperation, consultation or concert with, or at the request or suggestion of, a candidate’s campaign is also considered an in-kind contribution to the candidate.”).

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performed independently, which do not.<sup>13</sup> Independent activities are subject to reporting requirements only if they qualify as “independent expenditures.”<sup>14</sup> Other independent activities are simply outside the scope of FECA.<sup>15</sup> The complaint does not allege that Facebook acted in coordination with any candidate or campaign to favor or disfavor particular political perspectives. Indeed, the complaint does not allege any interaction between Facebook and any candidate or campaign *at all*. As a matter of law, independent corporate action cannot be a contribution under FECA.

*Second*, a contribution under FECA necessarily requires that a contribution be made *to* someone. But, here, the complaint fails to identify any specific candidate or campaign that should be deemed the recipient of Facebook’s alleged contribution. The complaint makes a passing reference to “the Democratic Party and Democratic campaigns for public office (including but not limited to Joe Biden for President),” but it offers no facts to tie any specific Facebook activity to those groups or efforts, let alone to any particular election. Indeed, the single paragraph about Facebook is limited to grievances about the complainant’s own user profile and interference with unspecified “national events” the complainant sought to organize. Simply stated, the complaint fails to support a reason to believe that Facebook made an improper contribution because it cannot even identify an alleged recipient of the alleged contribution.

*Third*, to be an in-kind contribution under FECA, an activity must have “the purpose of influencing [an] election for Federal office.”<sup>16</sup> To determine the “purpose” of an alleged contribution, the Commission first applies a two-part test for distinguishing between partisan and nonpartisan intent. An activity is not a “contribution” under this test if (1) it is not “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

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<sup>13</sup> See, e.g., 52 U.S.C. § 30101(17) (defining “independent expenditure” as “not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents”); 11 C.F.R. § 100.16 (same); *Making Independent Expenditures*, FEC, <https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/> (last visited Dec. 15, 2020) (“Independent expenditures are not contributions”); AO 2019-18 at 3 (corporate activities are not a contribution where the corporation does not “have any interaction with any candidate or political party, or make any contributions directly to any political committee”).

<sup>14</sup> 11 C.F.R. § 114.10(b) (prescribing reporting requirements for corporations that make independent expenditures); see also *Making Independent Expenditures* (“individuals, groups, corporations and labor organizations that make independent expenditures must disclose them quarterly on Form 5 and also as required on 24-hour and 48-hour reports”).

<sup>15</sup> AO 2019-18 at 3, 5 (corporate activities that are independent of candidates or political committees and that do not expressly advocate for or against a candidate are neither contributions nor independent expenditures).

<sup>16</sup> 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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the [candidate] in connection with the [activity].”<sup>17</sup> The complaint here fails both elements: The complaint does not identify any candidate that Facebook has *expressly* advocated for or against, nor does it point to any contribution solicitation or acceptance. Generic allegations that conservative content was disfavored on Facebook are not enough to show that Facebook somehow designed its algorithms and systems *for the purpose of* influencing elections for Federal office.

The Commission may also consider the totality of the circumstances to assess whether an activity would be objectively perceived as an intentional attempt to influence an election.<sup>18</sup> If the “activity in question ... appear[s] to have any specific and significant non-election related aspects that might distinguish it from election influencing activity,” then it is not made for the purpose of influencing an election.<sup>19</sup>

Facebook has independent business reasons for serving personalized content and managing the flow of information—both political and nonpolitical—to individuals on the platform. The News Feed and search features are designed to improve the *user experience*: to help Facebook users see what they want to see on Facebook.<sup>20</sup> Facebook analyzes thousands of signals to show content that will be most relevant to any individual user.<sup>21</sup> These algorithmic ranking processes apply across the range of content, whether or not it has anything to do with the political realm. Facebook also has strong business reasons to prevent the spread of harmful content on the platform, which is why it removes content that violates its well-publicized Community Standards.<sup>22</sup> Content removal assessments and decisions are not based on the political affiliation of the user generating the content.<sup>23</sup> Accordingly, because Facebook has significant non-election-related reasons for its algorithmic ranking and removal of users’ posts, these activities do not have the purpose of influencing a federal election.

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<sup>17</sup> *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.

<sup>18</sup> *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.”).

<sup>19</sup> AO 1983-12.

<sup>20</sup> *See News Feed Ranking in Three Minutes Flat*, FACEBOOK NEWSROOM (May 22, 2018), <https://about.fb.com/news/2018/05/inside-feed-news-feed-ranking/>; *How Facebook Search Works, in Under Two Minutes*, FACEBOOK NEWSROOM (Nov. 30, 2018), <https://about.fb.com/news/2018/11/inside-feed-how-search-works/>.

<sup>21</sup> *Id.*

<sup>22</sup> *See People, Publishers, the Community*, FACEBOOK NEWSROOM (Apr. 10, 2019), <https://about.fb.com/news/2019/04/people-publishers-the-community/>.

<sup>23</sup> *See Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards/>.

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**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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