FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

MUR 7834	
DATE COMPLAINT FILED:	10/23/2020
DATE OF NOTIFICATION:	10/28/2020
LAST RESPONSE RECEIVED:	03/26/2021
DATE ACTIVATED:	04/13/2021
EXPIRATION OF SOL:	January 2017 (earliest)-08/23/2023 (latest)
ELECTION CYCLES:	2012-2020

COMPLAINANT:	Americans for Legal Immigration PAC
RESPONDENTS:	Facebook, Inc. Google LLC Twitter, Inc.
RELEVANT STATUTES AND REGULATIONS:	52 U.S.C. § 30118 11 C.F.R. § 114.2(b) 11 C.F.R. § 109.20 11 C.F.R. § 109.21
INTERNAL REPORTS CHECKED:	Disclosure Reports
FEDERAL AGENCIES CHECKED:	U.S. Securities and Exchange Commission

I. INTRODUCTION

The Complaint in this matter alleges Facebook, Inc. ("Facebook"), Google LLC ("Google"), and Twitter, Inc. ("Twitter") (collectively, the "Respondents"), discriminated against the social media accounts of Americans for Legal Immigration PAC ("ALI PAC") and others who "oppose [Respondents'] shared political philosophies."[1] The Complaint specifically alleges that Respondents suspended or prohibited use of their products, removed certain online content

[1] Compl. at 1 (Oct. 23, 2020).

from their platforms, prevented online ad purchases, engaged in demonetization and shadow banning, and manipulated search results. According to the Complaint, these acts of "censorship" constitute prohibited corporate in-kind contributions to the Democratic Party, Joe Biden, and other unspecified Democratic Party candidates in violation of the Federal Election Campaign Act of 1971, as amended (the "Act").

Each Respondent argues that they did not make an in-kind corporate contribution because their complained-of activities were undertaken for business reasons and were not for the purpose of influencing federal elections and that their activities were not alleged to have been coordinated with any candidate, authorized committee, or political party.

As discussed below, the available information does not support the Complaint's assertion that Respondents' actions were motivated by an electoral purpose, as opposed to *bona fide* commercial reasons. Nor does the available information indicate that Respondents coordinated with a candidate, authorized committee, or party. Accordingly, we recommend that the Commission find no reason to believe that the Respondents made in-kind corporate contributions in violation 52 U.S.C. § 30118(a).

II. FACTUAL BACKGROUND

A. The Respondents

Facebook is a publicly traded company headquartered in Menlo Park, California.[2] It incorporated in Delaware in 2004.[3] Its products include the Facebook application, which "enables people to connect, share, discover, and communicate with each other on mobile devices

[2] Facebook, Inc., 2020 Annual Report (Form 10-K) at 10 (Jan. 28, 2021) ("2020 Facebook Form 10-K"), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001326801/000132680121000014/fb-20201231.htm#i5d2898d61ccf450cbccb20a5c73005f3_19.

[3] *Id.* at 11.

and personal computers."[4] On Facebook, users can create personal profiles, organize groups, and plan events. Facebook's "News Feed . . . displays an algorithmically-ranked series of stories and advertisements individualized for each person."[5] Users communicate via "posts" and can comment on, "like," and share the posts of others, including the stories in their News Feed. Facebook is free for the public to use[6] and generates substantially all of their revenue through paid advertising on its platforms.[7]

Google is a company based in Mountain View, California,[8] that provides a number of products available on the internet. Two of Google's major products include: (1) Google Search, an internet search engine; and (2) YouTube, an internet application where people can upload, share, and watch videos.[9] Both Google Search and YouTube generate revenue by selling paid advertising and other sponsored content on their platforms so that consumers can use the products for free.[10]

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4 *Id.* at 7.

5 Facebook, Inc., 2018 Annual Report (Form 10-K) at 5, 9 (Jan. 31, 2019) ("Facebook 2018 Annual Report"), https://www.sec.gov/Archives/edgar/data/0001326801/000132680119000009/fb-12312018x10k.htm.

6 *Facebook App | About Facebook*, FACEBOOK, https://about.facebook.com/technologies/facebook-app/ (last visited Aug. 6, 2021).

7 Facebook 2018 Annual Report at 9 ("Substantially all of our revenue is currently generated from third parties advertising on Facebook and Instagram").

8 Alphabet Inc., 2020 Annual Report (Form 10-K) at 25 (Feb. 3, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001652044/000165204421000010/goog-20201231.htm ("2020 Alphabet Form 10-K"); *id.* at Exhibit 21.01 (Subsidiaries of the Registrant). Google was incorporated in California in September 1998 and re-incorporated in Delaware in 2003. *Id.* at 59. In 2015, Alphabet Inc. became the successor issuer to Google Inc. following a holding company reorganization. *Id.* at 25

9 *See* Google Resp. at 3 (Mar. 26, 2021); Press Release, Google Inc., Google To Acquire YouTube for $1.65 Billion in Stock (Oct. 9, 2006), https://www.sec.gov/Archives/edgar/data/1288776/000119312506206884/dex991.htm.

10 Google Resp. at 3.

Twitter is a publicly traded company headquartered in San Francisco, California.[11] It incorporated in Delaware in 2007.[12] Twitter owns the product Twitter, a free internet application that "allows users to publicly communicate in messages of up to 280 characters — regardless of the substantive content of the communication."[13] Like Facebook and Google, Twitter derives the majority of its revenue from advertising, with over 187 million monetizable daily active users.[14]

Facebook, Google, and Twitter see themselves as competitors against each other and against other companies for users and for advertising revenue in a highly competitive market.[15] According to their most recent annual reports filed with the U.S. Securities and Exchange Commission, each company acknowledges that their brands, and thus, their ability to attract advertisers, can be negatively affected by content published on their platforms and by responses to content published on their platforms.[16]

To ensure that their platforms provide a safe environment and positive experience for users, and thus reduce the risk of losing advertising revenue, Respondents have established

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[11] Twitter Resp. at 2 (Dec. 14, 2020); Twitter, Inc., 2020 Annual Report (Form 10-K) at 10 (Feb. 17, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001418091/000141809121000031/twtr-20201231.htm#i957bdaf897ea4c59b82ecfe8fff6aafc_19 ("2020 Twitter Form 10-K").

[12] Twitter Resp. at 2; 2020 Twitter Form 10-K at 10.

[13] Twitter Resp. at 3.

[14] *Id*. at 2-3.

[15] *See* 2020 Alphabet Form 10-K at 7-8, 10; 2020 Facebook Form 10-K at 7; 2020 Twitter Form 10-K at 8.

[16] *See* 2020 Alphabet Form 10-K at 12 ("Our brands may be negatively affected by . . . reputational issues, [and] third-party content shared on our platforms . . . . For example, if we fail to appropriately respond to the sharing of misinformation or objectionable content on our services and/or products"); Facebook Form 10-K at 18-19 ("Our brands may also be negatively affected by the actions of users that are deemed to be hostile or inappropriate to other users . . . . Certain of our past actions, such as . . . concerns around our handling of political speech and advertising, hate speech, and other content, have eroded confidence in our brands."); Twitter Form 10-K at 17-19 ("Our brand may also be negatively affected by the actions of people that are hostile or inappropriate to other people . . . by use or perceived use, directly or indirectly, of our products or services by people (including governments and government-sponsored actors) to disseminate information that may be viewed as misleading.").

policies that govern the behavior of those using their products,[17] and their terms of service inform users that content published on their platforms may be removed.[18] Specifically, Facebook has implemented "Community Standards."[19] Google maintains and enforces numerous policies "against hate speech or material that is excessively violent, unlawful, deceptive, or obscene" to enhance and protect their users' experience,[20] including YouTube's Community Guidelines, which seeks to prevent a variety of harmful conduct.[21]

Similarly, Twitter has established a "hateful conduct policy" that prohibits "repeated and/or non-consensual slurs, epithets, racist and sexist tropes, or other content that degrades someone."[22] In addition, since 2009, Twitter employed a verification program to prevent imposters from impersonating high-profile users on its platform.[23] However, in November 2017, Twitter suspended this program because of growing public confusion that perceived verification "as an endorsement," resulting in negative reactions from users and advertisers when verification

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17 *See Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards/ (last visited Aug. 6, 2021); *Community Guidelines*, YOUTUBE, https://www.youtube.com/howyoutubeworks/policies/community-guidelines/ (last visited Aug. 6, 2021); *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Aug. 6, 2021). Because Respondents use different terms for their respective policies, we use the general term "community standards" as a catchall.

18 *See Terms of Service*, YOUTUBE, https://www.youtube.com/static?template=terms (last visited Aug. 6, 2021) ("If we reasonably believe that any Content is in breach of this Agreement or may cause harm to YouTube, our users, or third parties, we may remove or take down that Content in our discretion."); *Twitter Terms of Service*, TWITTER, https://twitter.com/en/tos (last visited Aug. 6, 2021) ("We may terminate your account or cease providing you with all or part of the Services at any time for any or no reason."); *Terms of Service*, TWITTER https://www.facebook.com/legal/terms (Aug. 6, 2021) ("If we determine that you have clearly, seriously or repeatedly breached our Terms or Policies, including in particular our Community Standards, we may suspend or permanently disable access to your account.").

19 *See* Facebook Resp. at 7 (Dec. 16, 2020).

20 Google Resp. at 3.

21 *See id.* at 5 (citing *YouTube's Community Guidelines*, YOUTUBE, https://support.google.com/youtube/answer/9288567 (describing YouTube's policies against spam and deceptive practices, sensitive content, violent or dangerous content, regulated goods, and misinformation)).

22 Twitter Resp. at 4.

23 *Id.* at 6.

badges were associated with controversial accounts.[24] Twitter states that it added new requirements for obtaining and maintaining verification, as well as a review of already-verified accounts, and worked to remove verification badges from users who engaged in "hate speech."[25] But the company also indicated that in 2019, it largely ceased accepting new applications for verification and stopped acting on thousands of applications that were pending, except for certain limited categories, such as political candidates and officials involved in public health issues.[26]

B. The Complaint's Allegations of Online Suppression by Respondents

Citing an October 2, 2018, report ALI PAC sent to Congress, the Complaint alleges that Respondents engaged in the following acts against ALI PAC:

Allegations against Google

- In January 2012, Google removed ALI PAC from page 1 search results for the search term "illegal immigration."[27]
- In January 2015, a Google employee allowed someone to hack ALI PAC's YouTube channel and remove its videos.[28]
- In 2017, Google "demonetized" ALI PAC on YouTube, permanently blocked ALI PAC from placing ads, and blocked it from livestreaming.[29]
- In 2018, Google removed ALI PAC from the top 100 pages for search term "illegal immigration."[30]

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[24] *Id.* at 7-8

[25] *Id.* at 8.

[26] *Id.* at 16.

[27] Compl. at 3, 5 (citing ALI PAC Report to Congress on Silicon Valley Censorship (Oct. 2, 2018), https://www.alipac.us/f31/alipac-report-congress-media-social-media-company-censorship-363704/ ("ALI PAC Report")).

[28] Compl. at 3; ALI PAC Report.

[29] ALI PAC Report ("[I]n 2017, we began receiving notices that our new videos, including my public speeches at events, were no longer allowed to be monetized on YouTube."). "Monetization" refers to the ability to earn money on YouTube. *See Monetization Policies*, YOUTUBE, https://www.youtube.com/howyoutubeworks/policies/monetization-policies/ (last visited Aug. 6, 2021).

[30] Compl. at 3; ALI PAC Report.

Allegations against Facebook

- In February 2013, Facebook blocked ALI PAC's ads promoting an event called "National Protest Against Barack Obama," allowed only persons invited or associated with the event to find the event using Facebook's search feature, and refused to take action against trolls who attacked the event page and those who signed up.[31]
- In October 2015, Facebook locked ALI PAC out of its main page prior to national protests that ALI PAC organized without explanation.[32]
- Leading up to and during 2018, Facebook shadow banned[33] ALI PAC as evidenced by declining rates of followers when compared to 2010-2013 and minimal responses to Facebook posts of ALI PAC President, William Gheen.[34]
- In July 2018, ALI PAC's Facebook account was blocked on all desktops.[35]
- In August 2018, Facebook removed a comment by Gheen,[36] removed one his posts designating it as "Hate Speech," and temporarily banned him from the platform.[37]

Allegations Against Twitter

- Twitter refused to verify[38] Gheen's Twitter account.[39]
- In November 2017, Twitter rejected an ALI PAC ad asking people to call Congress and voice opposition to "Amnesty legislation."[40]

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[31] Compl. at 3; ALI PAC Report.

[32] Compl. at 3; ALI PAC Report.

[33] The term "shadow ban" generally refers to the situation in which a user is not notified that they have been removed from a social media platform and may continue to interact with the platform, but other users cannot view the content the banned user publishes. The term is also used in instances in which a social media platform has made it more difficult to locate a particular user's published content or account, or in which that user's content is otherwise less likely to appear on another user's social media feed. *See* G.F., *What is "Shadowbanning"?*, THE ECONOMIST (Aug. 1, 2018), https://www.economist.com/the-economist-explains/2018/08/01/what-is-shadowbanning.

[34] Compl. at 3; ALI PAC Report.

[35] Compl. at 3; ALI PAC Report.

[36] Compl. at 3; ALI PAC Report.

[37] Compl. at 3; ALI PAC Report.

[38] Verification is a process by which Twitter confirms the authenticity of certain accounts. *See* Twitter Resp. at 1. When an account is verified, a blue symbol with a white checkmark appears next to the username associated with the given account on its main page and on any tweets or responses to tweets. *Id.*; *About Verified Accounts*, TWITTER, https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts (last visited Aug. 6, 2021).

[39] Compl. at 3-4; ALI PAC Report.

[40] Compl. at 3-4; ALI PAC Report.

- In December 2017, Twitter suspended Gheen's account for seven days for posts that contained "hateful content" as determined by Twitter.[41]
- Twitter took away ALI PAC's ability to place ads.[42]

The Complaint also cites over one hundred online articles with additional examples of Respondents' alleged censorship.[43] They include reports of Respondents suspending or banning people from using their products,[44] removing content,[45] preventing the purchase of ads,[46] demonetizing users,[47] shadow banning users,[48] and manipulating search results.[49] In some cases,

[41] Compl. at 3-4; ALI PAC Report.

[42] Compl. at 4; ALI PAC Report.

[43] Compl. at 5-16.

[44] *Id*. at 10 (linking to Allum Bokhari, *Twitter Bans Conservative Commentator Gavin McGinnis*, BREITBART (Aug. 10, 2018), https://www.breitbart.com/tech/2018/08/10/twitter-bans-conservative-commentator-gavin-mcinnes/#) (reporting that Twitter banned accounts of the Proud Boys and its founder for violating its policies on "violent extremist groups"); *id*. at 6 (linking to Barbara Ortutay, *Twitter Permanently Bans Alex Jones, Infowars Citing Abuse*, ASSOCIATED PRESS (Sept. 6, 2018), *available at* https://www.alipac.us/f19/twitter-permanently-bans-alex-jones-infowars-citing-abuse-362453/) (reporting that Twitter banned Jones and Infowars following his posting of a video that violated Twitter's "abusive behavior" policy").

[45] *See, e.g.,* Compl. at 11 (linking to Allum Bokhari, *Facebook Takes Down Event Page for Anti-Caravan Protest*, BREITBART (Apr. 28, 2018), https://www.breitbart.com/tech/2018/04/28/facebook-takes-down-event-page-for-anti-caravan-protest/) (noting that Facebook's content policy "makes it clear that language regarding the 'immigration status' of persons might be considered 'hate speech.'").

[46] *See, e.g.,* Compl. at 9 (linking to John-Henry Westen, *Lifesite Needs You to Take a Stand Against Aocial Media Censorship*, LIFESITE NEWS (Sept. 12, 2018), https://www.lifesitenews.com/news/lifesite-needs-you-to-take-a-stand-against-social-media-censorship) (reporting that Facebook did not approve LifeSite News' ads because they were "too offensive").

[47] *See, e.g.,* Compl. at 10 (linking to Ian Miles Cheong, *Conservative And Independent YouTube Channels Hit By Censorship and Demonetization*, DAILY CALLER (Aug. 11, 2017), https://dailycaller.com/2017/08/11/conservative-and-independent-youtube-channels-hit-by-censorship-and-demonetization/).

[48] *See, e.g.,* Compl. at 7 (linking to Robert Kraychik, *Michelle Malkin Shreds Twitter: Biased Algorithm 'Triggering Lockdowns…If You Use The Wrong Phrases*, BREITBART (Sept. 13, 2018), https://www.breitbart.com/radio/2018/09/13/michelle-malkin-shreds-twitter-biased-algorithm-triggering-lockdowns-if-you-use-the-wrong-phrases/) (reporting Malkin saying she has been "shadowbanned for about a year and a half").

[49] *See, e.g.,* Compl.at 6 (linking to *Ann Coulter Says Google Is Shadow Banning Her*, FOX NEWS (Aug. 28, 2018), http://video.foxnews.com/v/5827970403001/?#sp=show-clips); *id*. at 8 (linking to Jim Hoft, *Confirmed: Twitter Censors Pro-Trump Accounts: Mike Cernovich, Paul Joseph Watson, TGP's Jim Hoft, Jack Posobiec… But #NeverTrump Accounts Not Blocked*, THE GATEWAY PUNDIT (July 24, 2018), https://www.thegatewaypundit.com/2018/07/confirmed-twitter-censors-pro-trump-accounts-mike-cernovich-paul-joseph-watson-tgps-jim-hoft-jack-posobiec-but-nevertrump-accounts-not-blocked/).

the alleged acts of censorship involved candidates for federal office.[50] Many of the alleged acts of censorship involved non-candidates speaking about immigration, abortion, Islam, and other public issues.[51]

According to the Complaint, these alleged acts of censorship place ALI PAC and others "who oppose the shared political philosophies of [Respondents] and . . . their employees" on an "uneven playing field," and are therefore in-kind contributions to "the Democratic Party and Democratic Campaigns."[52]

C. The Responses

Respondents deny having made in-kind corporate contributions because their complained-of activities were undertaken for business reasons and not for the purpose of influencing federal elections.[53] They also argue that their activities were not alleged to have been coordinated with any candidate, candidate committee, or political party[54] and that the Complaint's legal theory — that viewpoint discrimination regarding political *issues* constitutes something of value, and thus, an in-kind contribution — is unconstitutional and contrary to Supreme Court precedent.[55]

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[50] *See, e.g.,* Compl. at 7 (linking to Staff, *Facebook Temporarily Censors Tennessee Star Articles Critical of Phil Bredesen*, THE TENNESSEE STAR (Aug. 24, 2018), https://tennesseestar.com/2018/08/24/facebook-dry-runs-censorship-of-tennessee-star-articles-critical-of-phil-bredesen/); *id.* (linking to Dave Ruthenberg, *COLUMN: Combating Solicon Valley's Praetorian Guard*, ENID NEWS & EAGLE (Aug. 22, 2018), https://www.enidnews.com/opinion/columns/column-combating-silicon-valley-s-praetorian-guard/article_b87ca2d6-6e2d-56f9-bd3d-e7987952d5ae.html) (reporting Facebook and Twitter blocked ad of candidate Elizabeth Heng with images of the Cambodian genocide).

[51] *See* Compl. at 5-16.

[52] *Id.* at 1-2.

[53] *See* Facebook Resp. at 2, 7; Google Resp. at 1, 6-8, Twitter Resp. at 1, 2, 15.

[54] *See* Facebook Resp. at 5; Google Resp. at 2, 10-11, Twitter Resp. at 19-20.

[55] *See* Facebook Resp. at 1, 2 n.1; Google Resp. at 10; Twitter Resp. at 18-19.

In addition to these common arguments, the Respondents make separate arguments. For example, Facebook asserts that the Complaint fails to allege specific facts showing that Facebook made a contribution to a particular candidate or party.[56] Twitter contends that its activities are exempt under the Act's media exemption and that because its services are free, a denial of verification or dissemination of a tweet cannot be a contribution or expenditure under the Act.[57] Google likewise contends that the Complaint fails to allege that it made a contribution because its Search and YouTube products are free to the public and there is no allegation that Google provided advertising to specific candidates or committees at no charge or below the usual and normal charge.[58]

III. LEGAL ANALYSIS

A. The Commission Should Find No Reason to Believe That Respondents' Complained-of Actions Resulted in Prohibited In-Kind Contributions

The Act prohibits corporations from making contributions to federal candidates and bars candidates and political committees, other than independent expenditure-only political committees and committees with hybrid accounts, from knowingly accepting or receiving corporate contributions.[59] The Act also prohibits corporate officers and directors from consenting to such contributions.[60] The term "contribution" includes "any gift, subscription,

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56 Facebook Resp. at 6.

57 Twitter Resp. at 19-20.

58 Google Resp. at 9.

59 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b), Note to Paragraph (b) (explaining that corporations and labor organizations may make contributions to nonconnected political committees that make only independent expenditures, or to separate accounts maintained by nonconnected political committees for making only independent expenditures).

60 52 U.S.C. § 30118(a).

loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election to Federal office."[61]

1. Respondents' Complained-of Actions Appear to Constitute *Bona Fide* Commercial Activity

The Commission has long considered activity engaged in for *bona fide* commercial reasons not to be "for the purpose of influencing an election," and thus, not a contribution or expenditure under 52 U.S.C. § 30118(a).[62] This is true even if a candidate benefitted from the commercial activity.[63]

The Commission has concluded that protecting one's brand reputation constitutes *bona fide* commercial activity. For example, in Advisory Opinion 2018-11 (Microsoft Corporation), the Commission concluded that Microsoft could provide enhanced online security services for no additional cost to election-sensitive customers because its reasons for doing so were to "protect its brand reputation, which would be at risk of severe and long-term damage" if such customers

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

[62] *See, e.g.*, First Gen. Counsel's Rpt. at 13, MUR 5474 (Dog Eat Dog Films, *et al*.) (determining distributors and marketers of Fahrenheit 9/11 film did so "in connection with bona fide commercial activity and not for the purpose of influencing an election"); Certification (June 8, 2005), MUR 5474 (Commission voted 6-0 to adopt recommendations); First Gen. Counsel's Rpt. at 2, MUR 1051 (Les Aspin) (determining advertisement portraying candidate in glowing terms was made for purpose of promoting Scientific American magazine); Certification (Nov. 16, 1979), MUR 1051 (Commission voted 6-0 to find no reason to believe); First Gen. Counsel's Rpt. at 1-2, MUR 296 (Penthouse Magazine) (recommending no reason to believe where corporate communication was an effort to promote a commercial venture — the selling of a magazine with a controversial article about Jimmy Carter); Certification (Dec. 22, 1976), MUR 296 (Commission voted 5-0 to approve recommendation).

[63] *See* First Gen. Counsel's Rpt. at 16, MUR 3622 (The Clinton/Gore '92 Committee) ("The fact that any of these candidates — Clinton/Gore, Bush, or Perot — may have received an indirect benefit (dissemination of their political positions) as a result of the sale of these tapes does not convert commercial activity into a corporate contribution."); Certification (June 7, 1994), MUR 3622 (no reason to believe recommendation approved 6-0); *cf.* Factual & Legal Analysis at 6, MUR 7024 (Van Hollen for Senate, *et al.*) (finding no contribution resulted where law firm's services to candidate were not provided for the purpose of influencing a federal election and benefit received by candidate was not dispositive).

were hacked.[64] The Commission has also concluded that businesses may establish and apply commercially reasonable business criteria to protect the commercial viability of its business without making contributions to the committees that meet those criteria.[65]

Here, the available information indicates that the Respondents sought to enforce their content policies on ALI PAC in order to protect their brands or improve the usefulness of their products, and their actions appear to constitute *bona fide* commercial activity.[66] First, Twitter states that it decided to prohibit ALI PAC from posting its advertisement alongside the term "illegal alien," which Twitter determined violated the company's hateful conduct policy.[67] According to Twitter, a number of media outlets and public officials have stopped using such language,[68] and therefore in Twitter's business judgment, allowing such language would deter

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64 *See* Advisory Op. 2018-11 (Microsoft Corporation) at 4; *see also* Factual & Legal Analysis at 4, MUR 6586 (World Wrestling Entertainment, Inc.) (finding no reason to believe that respondent made a contribution or expenditure where respondent asserted that it acted with the "sole intent to defend its business reputation" and the activity in question did not appear to be for the purpose of influencing a federal election).

65 Advisory Op. 2017-06 (Stein & Gottlieb) at 6 (corporation proposed to select only Democratic candidates and market its product to Democratic users, "based on its determination that this is the best way to attract users and promote the [product's] commercial success in the current political environment" and would "select candidates it believes will increase user participation and use of the [product], based on its own research and analysis and user feedback"); *see also* Advisory Op. 2012-28 (CTIA) at 8 ("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 program does not result in an in-kind contribution where the selection is "subject to 'objective and to commercially reasonable' criteria"); Advisory Op. 2006-34 (Working Assets) at 2, 5 (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'"); Advisory Op. 1994-30 (Conservative Concepts) at 6 (concluding that business's focus on candidates with a "conservative ideology" would not "by itself, negate the commercial nature of the activity").

66 We note that some of the Complaint's allegations concern activity dated as far back as 2012. Here, we only address the alleged conduct remaining within the five-year statute of limitations period. *See* 28 U.S.C. § 2462 (barring "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise. . . unless commenced within five years from the date when the claim first accrued").

67 *See* Twitter Resp. at 16-17.

68 *See id.* at 16-17 (describing actions of Associated Press, USA Today, and California Governor Jerry Brown).

individuals from using its platform and result in a decrease in advertising dollars.[69] With respect to Twitter's failure to verify ALI PAC's account, Twitter indicates that it did not verify the account due to a company-wide practice made in November 2017 of not acting on applications for verifications generally, outside a limited number of categories,[70] and the content of ALI PAC's account had no bearing on its decision not to verify the account.[71]

Although neither Google nor Facebook identify how ALI PAC specifically violated its community guidelines or policies, they both contend that their policies are based upon business considerations and to improve their users' experience on their respective platforms.[72] Using internal algorithms, they remove content that does not comply with their terms of service.[73] In particular, Google states that it applies its policies widely to all of its users and advertisers. In 2019, Google blocked and removed approximately 2.7 billion ads in 2019 and terminated 1.2 million accounts,[74] and in the fourth quarter of 2020, it removed more than 9.3 million videos and more than 2 million channels from YouTube due to violations of YouTube's Community Guidelines.[75]

The Complaint for its part does not sufficiently allege facts that undermine Respondents' arguments that their actions were *bona fide* commercial activity. For example, the Complaint does not indicate why Google's search engine results for "illegal immigration," which leaves

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69 *Id.* at 17.

70 *See supra* pp. 5-6.

71 Twitter Resp. at 16.

72 *See* Google Resp. at 3, 9 ("The alleged acts — removal of videos, demonetization, etc. — are the types of actions that Google takes in the ordinary course of business to enforce its terms of service and policies."); Facebook Resp. at 7.

73 Google Resp. at 3-5; Facebook Resp. at 7.

74 Google Resp. at 3.

75 *Id.* at 4.

ALI PAC outside the top 100, is a product of political affiliation, viewpoint, and ideology, and not a product of an algorithm that delivers results based on nonpartisan technical factors.[76] Similarly, the Complaint does not sufficiently indicate that ALI PAC's grievances against YouTube, Facebook, and Twitter stem from something other than enforcement of their content policies. The Complaint cites an instance where YouTube would not permit ALI PAC to show "graphic pictures . . . that showed horrible atrocities."[77] But this appears consistent with YouTube's content policy with respect to violent or graphic content, not evidence of an intent to influence federal elections.[78] In another example, the Complaint cites Facebook's removal of a comment by ALI PAC's president saying "[m]any Americans are fighting to stop the thousands of murders of U.S. citizens by illegals that occur each year."[79] This decision appears to be consistent with Facebook's content policy regarding objectionable content.[80] The same can be said for the Complaint's allegations against Twitter for removing content containing the terms "illegals" and "illegal aliens."[81]

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[76] *See* Google Resp. at 4 (describing features of Google Search, including its "Search quality rater guidelines").

[77] Compl.at 3 (citing ALI PAC Report).

[78] *See Violent or Graphic Content Policies*, YOUTUBE, https://support.google.com/youtube/answer/2802008?hl=en (last visited Aug. 6, 2021).

[79] Compl.at 3 (citing ALI PAC Report).

[80] *See Community Standards – Objectional Content – Hate Speech*, FACEBOOK, https://m.facebook.com/communitystandards/hate_speech/ (last visited Aug. 6, 2021). ALI PAC also acknowledges that Facebook blocked their ability to purchase ads only after ALI PAC "refused to share the home addresses of any of [its] officers." *Facebook Cuts Off ALIPAC access to our certified account*, ALIPAC (July 17, 2018), https://www.alipac.us/f8/facebook-cuts-off-alipac-access-our-certified-account-360644/. Facebook's requirement that ad purchasers supply a home address was implemented in order to combat foreign interference on its platform and is now standard for persons wishing to advertise on Facebook. *See* Jack Nicas, *Facebook to Require Verified Identities for Future Political Ads*, N.Y. TIMES (Apr. 6, 2018), https://www.nytimes.com/2018/04/06/business/facebook-verification-ads.html; *Business Help Center – Confirm Your Identity*, FACEBOOK, https://www.facebook.com/business/help/2992964394067299?id=288762101909005 (last visited Aug. 6, 2021).

[81] *See* ALI PAC Report (displaying the tweets alleged to have violated Twitter's content policy). The term "illegal alien" is viewed by some as dehumanizing. *See* Gabriel Chin, *Bond eligibility for certain noncitizens*

The Complaint's list of examples of alleged censorship of third parties also supports the conclusion that Respondents were attempting to enforce their content policies and were not acting for the purpose of influencing an election. For instance, the Complaint cites Twitter's suspension of President Trump's account on October 15, 2020, but the record indicates that the suspension occurred as a result of violating Twitter's community standards regarding distribution of hacked materials.[82] In another example, the Complaint points to hacked emails from 2018 where a Google employee expressed a negative opinion of Republican candidate Marsha Blackburn.[83] But the Complaint fails to link that individual employee's personal views with politically biased conduct. The Complaint's other examples of alleged censorship reveal that Respondents could reasonably be viewed as attempting to enforce their community standards.[84]

divides court along ideological lines, SCOTUSBLOG (June 29, 2021), https://www.scotusblog.com/2021/06/bond-eligibility-for-certain-noncitizens-divides-court-along-ideological-lines/ (reporting that some Supreme Court Justices use different terms for that reason).

[82] *See* Compl. at 5 (citing *Twitter Suspends Trump Campaign Account for Posting Video of Bombshell Hunter Biden Story*, ALIPAC (Oct. 15, 2020), https://www.alipac.us/f9/twitter-suspends-trump-campaign-account-posting-video-bombshell-hunter-biden-s-380134/).

[83] *See* Compl. at 5 (citing *LEAKED EMAILS: Senior Google Search Engineer Advocates for Censorship of "Terrorist" Marsha Blackburn*, ALIPAC (Oct. 1, 2018), https://www.alipac.us/f19/leaked-emails-senior-google-search-engineer-advocates-censorship-%91terrorist%92-363693/).

[84] *See, e.g.* Allum Bokhari, *Twitter Bans Conservative Commentator Gavin McGinnis*, BREITBART (Aug. 10, 2018), https://www.breitbart.com/tech/2018/08/10/twitter-bans-conservative-commentator-gavin-mcinnes/# (reporting that Twitter banned accounts of the Proud Boys and its founder for violating its policies on "violent extremist groups"); Peter Hasson, *Twitter Suspends Conservative Commentator for Opposing Trans in the Military, Tying 'Extreme Muslim Beliefs' to Honor Killings*, THE DAILY CALLER (July 27,2018), https://dailycaller.com/2018/07/27/twitter-suspends-transgender-military/ (reporting Twitter suspended user for statement opposing transgender people in the military (referring to it as a "mental disorder"), and another saying "'Extreme Muslim Beliefs' condone Honor Killings"); Aja Romano, *Milo Yiannopoulos's Twitter ban, explained*, VOX (July 20,2016) https://www.vox.com/2016/7/20/12226070/milo-yiannopoulus-twitter-ban-explained (describing harassment); William A. Jacobson, *YouTube has removed Legal Insurrection's channel (UPDATE: restored)*, LEGAL INSURRECTION (Jan. 12, 2017), https://legalinsurrection.com/2017/01/youtube-has-removed-legal-insurrections-channel/) (reporting YouTube channel removed because of "multiple third-party claims of copyright infringement").

2. There is no Information Indicating Respondents Coordinated with any Candidate or Political Party

The Act treats expenditures made "in cooperation, consultation, or concert, with or at the request or suggestion of, a candidate, his [or her] authorized political committees, or their agents" as in-kind contributions to that candidate and must be reported as expenditures made by the candidate's authorized committee.[85] Expenditures for "coordinated communications" are addressed under a three prong test at 11 C.F.R. § 109.21 and other coordinated expenditures are addressed under 11 C.F.R. 4 § 109.20(b). The Commission has explained that section 109.20(b) applies to "expenditures that are not made for communications but that are coordinated with a candidate, authorized committee, or political party committee."[86] Under the three-prong test for coordinated communications, a communication is coordinated and treated as an in-kind contribution when (1) the communication is paid for, partly or entirely, by a person other than the candidate, authorized committee, political party committee, or agent thereof; (2) the communication satisfies at least one of the "content standards" at 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the "conduct standards" at 11 C.F.R. § 109.21(d).[87] All three prongs must be satisfied for a communication to be considered coordinated under the regulations.

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[85] 52 U.S.C. § 30116(a)(7)(B). Authorized committees are required to report the identification of each person who contributes an aggregate amount of $200 or more per election cycle, along with the date and amount of the contribution, including in-kind contributions. 52 U.S.C. § 30104(b)(3); 11 C.F.R. § 100.52(d)(1) (term "anything of value" in the Act's definition of contribution includes all in-kind contributions; 11 C.F.R. §§ 109.20, 109.21 (coordinated expenditures and coordinated communications treated as in-kind contributions and must also be reported as an expenditures).

[86] Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) ("2003 Coordination E&J"); *see also* Advisory Opinion 2011-14 (Utah Bankers Association).

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

Here, the Complaint does not allege that Respondents' actions were coordinated with a candidate, authorized committee, or political party. Nor is there any information in the record indicating that Respondents' alleged actions were coordinated with a candidate, authorized committee, or political party.

* * * * *

Because the available information indicates that Respondents' conduct was motivated by *bona fide* commercial reasons and was not coordinated with Respondents, we recommend that the Commission find no reason to believe that the Respondents made in-kind corporate contributions in violation 52 U.S.C. § 30118(a).[88]

IV. RECOMMENDATIONS

1. Find no reason to believe Facebook, Inc., Google LLC, and Twitter, Inc., violated 52 U.S.C. § 30118(a) by making prohibited in-kind contributions;

2. Approve the Factual and Legal Analysis;

3. Approve the appropriate letters; and

4. Close the file

[88] Because Respondents' activities lacked the requisite election-influencing purpose to come within the Act's definition of contribution, and because their alleged actions were not coordinated with Respondents, the Commission need not analyze the merits of their First Amendment, media exemption, and Communications Decency Act arguments.

Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Associate General Counsel for Enforcement

08.11.21
DATE

Stephen Gura
Stephen Gura
Deputy Associate General Counsel for Enforcement

Jin Lee
Jin Lee
Acting Assistant General Counsel

Christopher S. Curran
Christopher S. Curran
Attorney

Attachment:
1. Factual and Legal Analysis for Facebook, Inc., Google LLC, and Twitter, Inc.

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Facebook, Inc
Google LLC
Twitter, Inc.

MUR: 7834

I. INTRODUCTION

The Complaint in this matter alleges Facebook, Inc. ("Facebook"), Google LLC ("Google"), and Twitter, Inc. ("Twitter") (collectively, the "Respondents"), discriminated against the social media accounts of Americans for Legal Immigration PAC ("ALI PAC") and others who "oppose [Respondents'] shared political philosophies."[1] The Complaint specifically alleges that Respondents suspended or prohibited use of their products, removed certain online content from their platforms, prevented online ad purchases, engaged in demonetization and shadow banning, and manipulated search results. According to the Complaint, these acts of "censorship" constitute prohibited corporate in-kind contributions to the Democratic Party, Joe Biden, and other unspecified Democratic Party candidates in violation of the Federal Election Campaign Act of 1971, as amended (the "Act").

Each Respondent argues that they did not make an in-kind corporate contribution because their complained-of activities were undertaken for business reasons and were not for the purpose of influencing federal elections and that their activities were not alleged to have been coordinated with any candidate, authorized committee, or political party.

[1] Compl. at 1 (Oct. 23, 2020).

As discussed below, the available information does not support the Complaint's assertion that Respondents' actions were motivated by an electoral purpose, as opposed to *bona fide* commercial reasons. Nor does the available information indicate that Respondents coordinated with a candidate, authorized committee, or party. Accordingly, the Commission finds no reason to believe that the Respondents made in-kind corporate contributions in violation 52 U.S.C. § 30118(a).

II. FACTUAL BACKGROUND

A. The Respondents

Facebook is a publicly traded company headquartered in Menlo Park, California.[2] It incorporated in Delaware in 2004.[3] Its products include the Facebook application, which "enables people to connect, share, discover, and communicate with each other on mobile devices and personal computers."[4] On Facebook, users can create personal profiles, organize groups, and plan events. Facebook's "News Feed . . . displays an algorithmically-ranked series of stories and advertisements individualized for each person."[5] Users communicate via "posts" and can comment on, "like," and share the posts of others, including the stories in their News Feed.

[2] Facebook, Inc., 2020 Annual Report (Form 10-K) at 10 (Jan. 28, 2021) ("2020 Facebook Form 10-K"), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001326801/000132680121000014/fb-20201231.htm#i5d2898d61ccf450cbccb20a5c73005f3_19.

[3] *Id.* at 11.

[4] *Id.* at 7.

[5] Facebook, Inc., 2018 Annual Report (Form 10-K) at 5, 9 (Jan. 31, 2019) ("Facebook 2018 Annual Report"), https://www.sec.gov/Archives/edgar/data/0001326801/000132680119000009/fb-12312018x10k.htm.

Facebook is free for the public to use[6] and generates substantially all of their revenue through paid advertising on its platforms.[7]

Google is a company based in Mountain View, California,[8] that provides a number of products available on the internet. Two of Google's major products include: (1) Google Search, an internet search engine; and (2) YouTube, an internet application where people can upload, share, and watch videos.[9] Both Google Search and YouTube generate revenue by selling paid advertising and other sponsored content on their platforms so that consumers can use the products for free.[10]

Twitter is a publicly traded company headquartered in San Francisco, California.[11] It incorporated in Delaware in 2007.[12] Twitter owns the product Twitter, a free internet application that "allows users to publicly communicate in messages of up to 280 characters — regardless of the substantive content of the communication."[13] Like Facebook and Google, Twitter derives

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6 *Facebook App | About Facebook*, FACEBOOK, https://about.facebook.com/technologies/facebook-app/ (last visited Aug. 6, 2021).

7 Facebook 2018 Annual Report at 9 ("Substantially all of our revenue is currently generated from third parties advertising on Facebook and Instagram").

8 Alphabet Inc., 2020 Annual Report (Form 10-K) at 25 (Feb. 3, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001652044/000165204421000010/goog-20201231.htm ("2020 Alphabet Form 10-K"); *id.* at Exhibit 21.01 (Subsidiaries of the Registrant). Google was incorporated in California in September 1998 and re-incorporated in Delaware in 2003. *Id.* at 59. In 2015, Alphabet Inc. became the successor issuer to Google Inc. following a holding company reorganization. *Id.* at 25

9 *See* Google Resp. at 3 (Mar. 26, 2021); Press Release, Google Inc., Google To Acquire YouTube for $1.65 Billion in Stock (Oct. 9, 2006), https://www.sec.gov/Archives/edgar/data/1288776/000119312506206884/dex991.htm.

10 Google Resp. at 3.

11 Twitter Resp. at 2 (Dec. 14, 2020); Twitter, Inc., 2020 Annual Report (Form 10-K) at 10 (Feb. 17, 2021), https://www.sec.gov/ix?doc=/Archives/edgar/data/0001418091/000141809121000031/twtr-20201231.htm#i957bdaf897ea4c59b82ecfe8fff6aafc_19 ("2020 Twitter Form 10-K").

12 Twitter Resp. at 2; 2020 Twitter Form 10-K at 10.

13 Twitter Resp. at 3.

the majority of its revenue from advertising, with over 187 million monetizable daily active users.[14]

Facebook, Google, and Twitter see themselves as competitors against each other and against other companies for users and for advertising revenue in a highly competitive market.[15] According to their most recent annual reports filed with the U.S. Securities and Exchange Commission, each company acknowledges that their brands, and thus, their ability to attract advertisers, can be negatively affected by content published on their platforms and by responses to content published on their platforms.[16]

To ensure that their platforms provide a safe environment and positive experience for users, and thus reduce the risk of losing advertising revenue, Respondents have established policies that govern the behavior of those using their products,[17] and their terms of service inform users that content published on their platforms may be removed.[18] Specifically,

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[14] *Id.* at 2-3.

[15] *See* 2020 Alphabet Form 10-K at 7-8, 10; 2020 Facebook Form 10-K at 7; 2020 Twitter Form 10-K at 8.

[16] *See* 2020 Alphabet Form 10-K at 12 ("Our brands may be negatively affected by . . . reputational issues, [and] third-party content shared on our platforms . . . . For example, if we fail to appropriately respond to the sharing of misinformation or objectionable content on our services and/or products"); Facebook Form 10-K at 18-19 ("Our brands may also be negatively affected by the actions of users that are deemed to be hostile or inappropriate to other users . . . . Certain of our past actions, such as . . . concerns around our handling of political speech and advertising, hate speech, and other content, have eroded confidence in our brands."); Twitter Form 10-K at 17-19 ("Our brand may also be negatively affected by the actions of people that are hostile or inappropriate to other people . . . by use or perceived use, directly or indirectly, of our products or services by people (including governments and government-sponsored actors) to disseminate information that may be viewed as misleading.").

[17] *See Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards/ (last visited Aug. 6, 2021); *Community Guidelines*, YOUTUBE, https://www.youtube.com/howyoutubeworks/policies/community-guidelines/ (last visited Aug. 6, 2021); *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Aug. 6, 2021). Because Respondents use different terms for their respective policies, we use the general term "community standards" as a catchall.

[18] *See Terms of Service*, YOUTUBE, https://www.youtube.com/static?template=terms (last visited Aug. 6, 2021) ("If we reasonably believe that any Content is in breach of this Agreement or may cause harm to YouTube, our users, or third parties, we may remove or take down that Content in our discretion."); *Twitter Terms of Service*, TWITTER, https://twitter.com/en/tos (last visited Aug. 6, 2021) ("We may terminate your account or cease providing you with all or part of the Services at any time for any or no reason."); *Terms of Service*, TWITTER https://www.facebook.com/legal/terms (Aug. 6, 2021) ("If we determine that you have clearly, seriously or

Facebook has implemented "Community Standards."[19] Google maintains and enforces numerous policies "against hate speech or material that is excessively violent, unlawful, deceptive, or obscene" to enhance and protect their users' experience,[20] including YouTube's Community Guidelines, which seeks to prevent a variety of harmful conduct.[21]

Similarly, Twitter has established a "hateful conduct policy" that prohibits "repeated and/or non-consensual slurs, epithets, racist and sexist tropes, or other content that degrades someone."[22] In addition, since 2009, Twitter employed a verification program to prevent imposters from impersonating high-profile users on its platform.[23] However, in November 2017, Twitter suspended this program because of growing public confusion that perceived verification "as an endorsement," resulting in negative reactions from users and advertisers when verification badges were associated with controversial accounts.[24] Twitter states that it added new requirements for obtaining and maintaining verification, as well as a review of already-verified accounts, and worked to remove verification badges from users who engaged in "hate speech."[25] But the company also indicated that in 2019, it largely ceased accepting new applications for

repeatedly breached our Terms or Policies, including in particular our Community Standards, we may suspend or permanently disable access to your account.").

19 *See* Facebook Resp. at 7 (Dec. 16, 2020).

20 Google Resp. at 3.

21 *See id.* at 5 (citing *YouTube's Community Guidelines*, YOUTUBE, https://support.google.com/youtube/answer/9288567 (describing YouTube's policies against spam and deceptive practices, sensitive content, violent or dangerous content, regulated goods, and misinformation)).

22 Twitter Resp. at 4.

23 *Id.* at 6.

24 *Id.* at 7-8

25 *Id.* at 8.

verification and stopped acting on thousands of applications that were pending, except for certain limited categories, such as political candidates and officials involved in public health issues.[26]

B. The Complaint's Allegations of Online Suppression by Respondents

Citing an October 2, 2018, report ALI PAC sent to Congress, the Complaint alleges that Respondents engaged in the following acts against ALI PAC:

Allegations against Google

- In January 2012, Google removed ALI PAC from page 1 search results for the search term "illegal immigration."[27]
- In January 2015, a Google employee allowed someone to hack ALI PAC's YouTube channel and remove its videos.[28]
- In 2017, Google "demonetized" ALI PAC on YouTube, permanently blocked ALI PAC from placing ads, and blocked it from livestreaming.[29]
- In 2018, Google removed ALI PAC from the top 100 pages for search term "illegal immigration."[30]

Allegations against Facebook

- In February 2013, Facebook blocked ALI PAC's ads promoting an event called "National Protest Against Barack Obama," allowed only persons invited or associated with the event to find the event using Facebook's search feature, and refused to take action against trolls who attacked the event page and those who signed up.[31]
- In October 2015, Facebook locked ALI PAC out of its main page prior to national protests that ALI PAC organized without explanation.[32]

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[26] *Id.* at 16.

[27] Compl. at 3, 5 (citing ALI PAC Report to Congress on Silicon Valley Censorship (Oct. 2, 2018), https://www.alipac.us/f31/alipac-report-congress-media-social-media-company-censorship-363704/ ("ALI PAC Report")).

[28] Compl. at 3; ALI PAC Report.

[29] ALI PAC Report ("[I]n 2017, we began receiving notices that our new videos, including my public speeches at events, were no longer allowed to be monetized on YouTube."). "Monetization" refers to the ability to earn money on YouTube. *See Monetization Policies*, YOUTUBE, https://www.youtube.com/howyoutubeworks/policies/monetization-policies/ (last visited Aug. 6, 2021).

[30] Compl. at 3; ALI PAC Report.

[31] Compl. at 3; ALI PAC Report.

[32] Compl. at 3; ALI PAC Report.

- Leading up to and during 2018, Facebook shadow banned[33] ALI PAC as evidenced by declining rates of followers when compared to 2010-2013 and minimal responses to Facebook posts of ALI PAC President, William Gheen.[34]
- In July 2018, ALI PAC's Facebook account was blocked on all desktops.[35]
- In August 2018, Facebook removed a comment by Gheen,[36] removed one his posts designating it as "Hate Speech," and temporarily banned him from the platform.[37]

Allegations Against Twitter

- Twitter refused to verify[38] Gheen's Twitter account.[39]
- In November 2017, Twitter rejected an ALI PAC ad asking people to call Congress and voice opposition to "Amnesty legislation."[40]
- In December 2017, Twitter suspended Gheen's account for seven days for posts that contained "hateful content" as determined by Twitter.[41]
- Twitter took away ALI PAC's ability to place ads.[42]

The Complaint also cites over one hundred online articles with additional examples of Respondents' alleged censorship.[43] They include reports of Respondents suspending or banning

[33] The term "shadow ban" generally refers to the situation in which a user is not notified that they have been removed from a social media platform and may continue to interact with the platform, but other users cannot view the content the banned user publishes. The term is also used in instances in which a social media platform has made it more difficult to locate a particular user's published content or account, or in which that user's content is otherwise less likely to appear on another user's social media feed. *See* G.F., *What is "Shadowbanning"?*, THE ECONOMIST (Aug. 1, 2018), https://www.economist.com/the-economist-explains/2018/08/01/what-is-shadowbanning.

[34] Compl. at 3; ALI PAC Report.

[35] Compl. at 3; ALI PAC Report.

[36] Compl. at 3; ALI PAC Report.

[37] Compl. at 3; ALI PAC Report.

[38] Verification is a process by which Twitter confirms the authenticity of certain accounts. *See* Twitter Resp. at 1. When an account is verified, a blue symbol with a white checkmark appears next to the username associated with the given account on its main page and on any tweets or responses to tweets. *Id.*; *About Verified Accounts*, TWITTER, https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts (last visited Aug. 6, 2021).

[39] Compl. at 3-4; ALI PAC Report.

[40] Compl. at 3-4; ALI PAC Report.

[41] Compl. at 3-4; ALI PAC Report.

[42] Compl. at 4; ALI PAC Report.

[43] Compl. at 5-16.

people from using their products,[44] removing content,[45] preventing the purchase of ads,[46] demonetizing users,[47] shadow banning users,[48] and manipulating search results.[49] In some cases, the alleged acts of censorship involved candidates for federal office.[50] Many of the alleged acts of censorship involved non-candidates speaking about immigration, abortion, Islam, and other public issues.[51]

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[44] *Id*. at 10 (linking to Allum Bokhari, *Twitter Bans Conservative Commentator Gavin McGinnis*, BREITBART (Aug. 10, 2018), https://www.breitbart.com/tech/2018/08/10/twitter-bans-conservative-commentator-gavin-mcinnes/#) (reporting that Twitter banned accounts of the Proud Boys and its founder for violating its policies on "violent extremist groups"); *id*. at 6 (linking to Barbara Ortutay, *Twitter Permanently Bans Alex Jones, Infowars Citing Abuse*, ASSOCIATED PRESS (Sept. 6, 2018), *available at* https://www.alipac.us/f19/twitter-permanently-bans-alex-jones-infowars-citing-abuse-362453/) (reporting that Twitter banned Jones and Infowars following his posting of a video that violated Twitter's "abusive behavior" policy").

[45] *See, e.g.,* Compl. at 11 (linking to Allum Bokhari, *Facebook Takes Down Event Page for Anti-Caravan Protest*, BREITBART (Apr. 28, 2018), https://www.breitbart.com/tech/2018/04/28/facebook-takes-down-event-page-for-anti-caravan-protest/) (noting that Facebook's content policy "makes it clear that language regarding the 'immigration status' of persons might be considered 'hate speech.'").

[46] *See, e.g.,* Compl. at 9 (linking to John-Henry Westen, *Lifesite Needs You to Take a Stand Against Aocial Media Censorship*, LIFESITE NEWS (Sept. 12, 2018), https://www.lifesitenews.com/news/lifesite-needs-you-to-take-a-stand-against-social-media-censorship) (reporting that Facebook did not approve LifeSite News' ads because they were "too offensive").

[47] *See, e.g.,* Compl. at 10 (linking to Ian Miles Cheong, *Conservative And Independent YouTube Channels Hit By Censorship and Demonetization*, DAILY CALLER (Aug. 11, 2017), https://dailycaller.com/2017/08/11/conservative-and-independent-youtube-channels-hit-by-censorship-and-demonetization/).

[48] *See, e.g.,* Compl. at 7 (linking to Robert Kraychik, *Michelle Malkin Shreds Twitter: Biased Algorithm 'Triggering Lockdowns…If You Use The Wrong Phrases*, BREITBART (Sept. 13, 2018), https://www.breitbart.com/radio/2018/09/13/michelle-malkin-shreds-twitter-biased-algorithm-triggering-lockdowns-if-you-use-the-wrong-phrases/) (reporting Malkin saying she has been "shadowbanned for about a year and a half").

[49] *See, e.g.,* Compl.at 6 (linking to *Ann Coulter Says Google Is Shadow Banning Her*, FOX NEWS (Aug. 28, 2018), http://video.foxnews.com/v/5827970403001/?#sp=show-clips); *id*. at 8 (linking to Jim Hoft, *Confirmed: Twitter Censors Pro-Trump Accounts: Mike Cernovich, Paul Joseph Watson, TGP's Jim Hoft, Jack Posobiec… But #NeverTrump Accounts Not Blocked*, THE GATEWAY PUNDIT (July 24, 2018), https://www.thegatewaypundit.com/2018/07/confirmed-twitter-censors-pro-trump-accounts-mike-cernovich-paul-joseph-watson-tgps-jim-hoft-jack-posobiec-but-nevertrump-accounts-not-blocked/).

[50] *See, e.g.,* Compl. at 7 (linking to Staff, *Facebook Temporarily Censors Tennessee Star Articles Critical of Phil Bredesen*, THE TENNESSEE STAR (Aug. 24, 2018), https://tennesseestar.com/2018/08/24/facebook-dry-runs-censorship-of-tennessee-star-articles-critical-of-phil-bredesen/); *id*. (linking to Dave Ruthenberg, *COLUMN: Combating Solicon Valley's Praetorian Guard*, ENID NEWS & EAGLE (Aug. 22, 2018), https://www.enidnews.com/opinion/columns/column-combating-silicon-valley-s-praetorian-guard/article_b87ca2d6-6e2d-56f9-bd3d-e7987952d5ae.html) (reporting Facebook and Twitter blocked ad of candidate Elizabeth Heng with images of the Cambodian genocide).

[51] *See* Compl. at 5-16.

According to the Complaint, these alleged acts of censorship place ALI PAC and others "who oppose the shared political philosophies of [Respondents] and . . . their employees" on an "uneven playing field," and are therefore in-kind contributions to "the Democratic Party and Democratic Campaigns."[52]

C. The Responses

Respondents deny having made in-kind corporate contributions because their complained-of activities were undertaken for business reasons and not for the purpose of influencing federal elections.[53] They also argue that their activities were not alleged to have been coordinated with any candidate, candidate committee, or political party[54] and that the Complaint's legal theory — that viewpoint discrimination regarding political *issues* constitutes something of value, and thus, an in-kind contribution — is unconstitutional and contrary to Supreme Court precedent.[55]

In addition to these common arguments, the Respondents make separate arguments. For example, Facebook asserts that the Complaint fails to allege specific facts showing that Facebook made a contribution to a particular candidate or party.[56] Twitter contends that its activities are exempt under the Act's media exemption and that because its services are free, a denial of verification or dissemination of a tweet cannot be a contribution or expenditure under the Act.[57] Google likewise contends that the Complaint fails to allege that it made a contribution

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52 *Id.* at 1-2.

53 *See* Facebook Resp. at 2, 7; Google Resp. at 1, 6-8, Twitter Resp. at 1, 2, 15.

54 *See* Facebook Resp. at 5; Google Resp. at 2, 10-11, Twitter Resp. at 19-20.

55 *See* Facebook Resp. at 1, 2 n.1; Google Resp. at 10; Twitter Resp. at 18-19.

56 Facebook Resp. at 6.

57 Twitter Resp. at 19-20.

because its Search and YouTube products are free to the public and there is no allegation that Google provided advertising to specific candidates or committees at no charge or below the usual and normal charge.[58]

III. LEGAL ANALYSIS

A. The Commission Finds No Reason to Believe That Respondents' Complained-of Actions Resulted in Prohibited In-Kind Contributions

The Act prohibits corporations from making contributions to federal candidates and bars candidates and political committees, other than independent expenditure-only political committees and committees with hybrid accounts, from knowingly accepting or receiving corporate contributions.[59] The Act also prohibits corporate officers and directors from consenting to such contributions.[60] The term "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election to Federal office."[61]

1. Respondents' Complained-of Actions Appear to Constitute *Bona Fide* Commercial Activity

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

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[58] Google Resp. at 9.

[59] 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b), Note to Paragraph (b) (explaining that corporations and labor organizations may make contributions to nonconnected political committees that make only independent expenditures, or to separate accounts maintained by nonconnected political committees for making only independent expenditures).

[60] 52 U.S.C. § 30118(a).

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

expenditure under 52 U.S.C. § 30118(a).[62] This is true even if a candidate benefitted from the commercial activity.[63]

The Commission has concluded that protecting one's brand reputation constitutes *bona fide* commercial activity. For example, in Advisory Opinion 2018-11 (Microsoft Corporation), the Commission concluded that Microsoft could provide enhanced online security services for no additional cost to election-sensitive customers because its reasons for doing so were to "protect its brand reputation, which would be at risk of severe and long-term damage" if such customers were hacked.[64] The Commission has also concluded that businesses may establish and apply commercially reasonable business criteria to protect the commercial viability of its business without making contributions to the committees that meet those criteria.[65]

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[62] *See, e.g.*, First Gen. Counsel's Rpt. at 13, MUR 5474 (Dog Eat Dog Films, *et al.*) (determining distributors and marketers of Fahrenheit 9/11 film did so "in connection with bona fide commercial activity and not for the purpose of influencing an election"); Certification (June 8, 2005), MUR 5474 (Commission voted 6-0 to adopt recommendations); First Gen. Counsel's Rpt. at 2, MUR 1051 (Les Aspin) (determining advertisement portraying candidate in glowing terms was made for purpose of promoting Scientific American magazine); Certification (Nov. 16, 1979), MUR 1051 (Commission voted 6-0 to find no reason to believe); First Gen. Counsel's Rpt. at 1-2, MUR 296 (Penthouse Magazine) (recommending no reason to believe where corporate communication was an effort to promote a commercial venture — the selling of a magazine with a controversial article about Jimmy Carter); Certification (Dec. 22, 1976), MUR 296 (Commission voted 5-0 to approve recommendation).

[63] *See* First Gen. Counsel's Rpt. at 16, MUR 3622 (The Clinton/Gore '92 Committee) ("The fact that any of these candidates — Clinton/Gore, Bush, or Perot — may have received an indirect benefit (dissemination of their political positions) as a result of the sale of these tapes does not convert commercial activity into a corporate contribution."); Certification (June 7, 1994), MUR 3622 (no reason to believe recommendation approved 6-0); *cf.* Factual & Legal Analysis at 6, MUR 7024 (Van Hollen for Senate, *et al.*) (finding no contribution resulted where law firm's services to candidate were not provided for the purpose of influencing a federal election and benefit received by candidate was not dispositive).

[64] *See* Advisory Op. 2018-11 (Microsoft Corporation) at 4; *see also* Factual & Legal Analysis at 4, MUR 6586 (World Wrestling Entertainment, Inc.) (finding no reason to believe that respondent made a contribution or expenditure where respondent asserted that it acted with the "sole intent to defend its business reputation" and the activity in question did not appear to be for the purpose of influencing a federal election).

[65] Advisory Op. 2017-06 (Stein & Gottlieb) at 6 (corporation proposed to select only Democratic candidates and market its product to Democratic users, "based on its determination that this is the best way to attract users and promote the [product's] commercial success in the current political environment" and would "select candidates it believes will increase user participation and use of the [product], based on its own research and analysis and user feedback"); *see also* Advisory Op. 2012-28 (CTIA) at 8 ("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 program does not result in an in-kind contribution where the selection is "subject to 'objective and to

Here, the available information indicates that the Respondents sought to enforce their content policies on ALI PAC in order to protect their brands or improve the usefulness of their products, and their actions appear to constitute *bona fide* commercial activity.[66] First, Twitter states that it decided to prohibit ALI PAC from posting its advertisement alongside the term "illegal alien," which Twitter determined violated the company's hateful conduct policy.[67] According to Twitter, a number of media outlets and public officials have stopped using such language,[68] and therefore in Twitter's business judgment, allowing such language would deter individuals from using its platform and result in a decrease in advertising dollars.[69] With respect to Twitter's failure to verify ALI PAC's account, Twitter indicates that it did not verify the account due to a company-wide practice made in November 2017 of not acting on applications for verifications generally, outside a limited number of categories,[70] and the content of ALI PAC's account had no bearing on its decision not to verify the account.[71]

Although neither Google nor Facebook identify how ALI PAC specifically violated its community guidelines or policies, they both contend that their policies are based upon business

commercially reasonable' criteria"); Advisory Op. 2006-34 (Working Assets) at 2, 5 (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'"); Advisory Op. 1994-30 (Conservative Concepts) at 6 (concluding that business's focus on candidates with a "conservative ideology" would not "by itself, negate the commercial nature of the activity").

66 Some of the Complaint's allegations concern activity dated as far back as 2012. Here, we only address the alleged conduct remaining within the five-year statute of limitations period. *See* 28 U.S.C. § 2462 (barring "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise. . . unless commenced within five years from the date when the claim first accrued").

67 *See* Twitter Resp. at 16-17.

68 *See id.* at 16-17 (describing actions of Associated Press, USA Today, and California Governor Jerry Brown).

69 *Id.* at 17.

70 *See supra* pp. 5-6.

71 Twitter Resp. at 16.

considerations and to improve their users' experience on their respective platforms.[72] Using internal algorithms, they remove content that does not comply with their terms of service.[73] In particular, Google states that it applies its policies widely to all of its users and advertisers. In 2019, Google blocked and removed approximately 2.7 billion ads in 2019 and terminated 1.2 million accounts,[74] and in the fourth quarter of 2020, it removed more than 9.3 million videos and more than 2 million channels from YouTube due to violations of YouTube's Community Guidelines.[75]

The Complaint for its part does not sufficiently allege facts that undermine Respondents' arguments that their actions were *bona fide* commercial activity. For example, the Complaint does not indicate why Google's search engine results for "illegal immigration," which leaves ALI PAC outside the top 100, is a product of political affiliation, viewpoint, and ideology, and not a product of an algorithm that delivers results based on nonpartisan technical factors.[76] Similarly, the Complaint does not sufficiently indicate that ALI PAC's grievances against YouTube, Facebook, and Twitter stem from something other than enforcement of their content policies. The Complaint cites an instance where YouTube would not permit ALI PAC to show "graphic pictures . . . that showed horrible atrocities."[77] But this appears consistent with YouTube's content policy with respect to violent or graphic content, not evidence of an intent to

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[72] *See* Google Resp. at 3, 9 ("The alleged acts — removal of videos, demonetization, etc. — are the types of actions that Google takes in the ordinary course of business to enforce its terms of service and policies."); Facebook Resp. at 7.

[73] Google Resp. at 3-5; Facebook Resp. at 7.

[74] Google Resp. at 3.

[75] *Id.* at 4.

[76] *See* Google Resp. at 4 (describing features of Google Search, including its "Search quality rater guidelines").

[77] Compl.at 3 (citing ALI PAC Report).

influence federal elections.[78] In another example, the Complaint cites Facebook's removal of a comment by ALI PAC's president saying "[m]any Americans are fighting to stop the thousands of murders of U.S. citizens by illegals that occur each year."[79] This decision appears to be consistent with Facebook's content policy regarding objectionable content.[80] The same can be said for the Complaint's allegations against Twitter for removing content containing the terms "illegals" and "illegal aliens."[81]

The Complaint's list of examples of alleged censorship of third parties also supports the conclusion that Respondents were attempting to enforce their content policies and were not acting for the purpose of influencing an election. For instance, the Complaint cites Twitter's suspension of President Trump's account on October 15, 2020, but the record indicates that the suspension occurred as a result of violating Twitter's community standards regarding distribution of hacked materials.[82] In another example, the Complaint points to hacked emails from 2018

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[78] *See Violent or Graphic Content Policies*, YOUTUBE, https://support.google.com/youtube/answer/2802008?hl=en (last visited Aug. 6, 2021).

[79] Compl.at 3 (citing ALI PAC Report).

[80] *See Community Standards – Objectional Content – Hate Speech*, FACEBOOK, https://m.facebook.com/communitystandards/hate_speech/ (last visited Aug. 6, 2021). ALI PAC also acknowledges that Facebook blocked their ability to purchase ads only after ALI PAC "refused to share the home addresses of any of [its] officers." *Facebook Cuts Off ALIPAC access to our certified account*, ALIPAC (July 17, 2018), https://www.alipac.us/f8/facebook-cuts-off-alipac-access-our-certified-account-360644/. Facebook's requirement that ad purchasers supply a home address was implemented in order to combat foreign interference on its platform and is now standard for persons wishing to advertise on Facebook. *See* Jack Nicas, *Facebook to Require Verified Identities for Future Political Ads*, N.Y. TIMES (Apr. 6, 2018), https://www.nytimes.com/2018/04/06/business/facebook-verification-ads.html; *Business Help Center – Confirm Your Identity*, FACEBOOK, https://www.facebook.com/business/help/2992964394067299?id=288762101909005 (last visited Aug. 6, 2021).

[81] *See* ALI PAC Report (displaying the tweets alleged to have violated Twitter's content policy). The term "illegal alien" is viewed by some as dehumanizing. *See* Gabriel Chin, *Bond eligibility for certain noncitizens divides court along ideological lines*, SCOTUSBLOG (June 29, 2021), https://www.scotusblog.com/2021/06/bond-eligibility-for-certain-noncitizens-divides-court-along-ideological-lines/ (reporting that some Supreme Court Justices use different terms for that reason).

[82] *See* Compl. at 5 (citing *Twitter Suspends Trump Campaign Account for Posting Video of Bombshell Hunter Biden Story*, ALIPAC (Oct. 15, 2020), https://www.alipac.us/f9/twitter-suspends-trump-campaign-account-posting-video-bombshell-hunter-biden-s-380134/).

where a Google employee expressed a negative opinion of Republican candidate Marsha Blackburn.[83] But the Complaint fails to link that individual employee's personal views with politically biased conduct. The Complaint's other examples of alleged censorship reveal that Respondents could reasonably be viewed as attempting to enforce their community standards.[84]

2. There is No Information Indicating Respondents Coordinated with any Candidate or Political Party

The Act treats expenditures made "in cooperation, consultation, or concert, with or at the request or suggestion of, a candidate, his [or her] authorized political committees, or their agents" as in-kind contributions to that candidate and must be reported as expenditures made by the candidate's authorized committee.[85] Expenditures for "coordinated communications" are addressed under a three prong test at 11 C.F.R. § 109.21 and other coordinated expenditures are addressed under 11 C.F.R. 4 § 109.20(b). The Commission has explained that section 109.20(b) applies to "expenditures that are not made for communications but that are coordinated with a

[83] *See* Compl. at 5 (citing *LEAKED EMAILS: Senior Google Search Engineer Advocates for Censorship of "Terrorist" Marsha Blackburn*, ALIPAC (Oct. 1, 2018), https://www.alipac.us/f19/leaked-emails-senior-google-search-engineer-advocates-censorship-%91terrorist%92-363693/).

[84] *See, e.g.* Allum Bokhari, *Twitter Bans Conservative Commentator Gavin McGinnis*, BREITBART (Aug. 10, 2018), https://www.breitbart.com/tech/2018/08/10/twitter-bans-conservative-commentator-gavin-mcinnes/# (reporting that Twitter banned accounts of the Proud Boys and its founder for violating its policies on "violent extremist groups"); Peter Hasson, *Twitter Suspends Conservative Commentator for Opposing Trans in the Military, Tying 'Extreme Muslim Beliefs' to Honor Killings*, THE DAILY CALLER (July 27, 2018), https://dailycaller.com/2018/07/27/twitter-suspends-transgender-military/ (reporting Twitter suspended user for statement opposing transgender people in the military (referring to it as a "mental disorder"), and another saying "'Extreme Muslim Beliefs' condone Honor Killings"); Aja Romano, *Milo Yiannopoulos's Twitter ban, explained*, VOX (July 20, 2016) https://www.vox.com/2016/7/20/12226070/milo-yiannopoulus-twitter-ban-explained (describing harassment); William A. Jacobson, *YouTube has removed Legal Insurrection's channel (UPDATE: restored)*, LEGAL INSURRECTION (Jan. 12, 2017), https://legalinsurrection.com/2017/01/youtube-has-removed-legal-insurrections-channel/) (reporting YouTube channel removed because of "multiple third-party claims of copyright infringement").

[85] 52 U.S.C. § 30116(a)(7)(B). Authorized committees are required to report the identification of each person who contributes an aggregate amount of $200 or more per election cycle, along with the date and amount of the contribution, including in-kind contributions. 52 U.S.C. § 30104(b)(3); 11 C.F.R. § 100.52(d)(1) (term "anything of value" in the Act's definition of contribution includes all in-kind contributions; 11 C.F.R. §§ 109.20, 109.21 (coordinated expenditures and coordinated communications treated as in-kind contributions and must also be reported as an expenditures).

candidate, authorized committee, or political party committee."[86] Under the three-prong test for coordinated communications, a communication is coordinated and treated as an in-kind contribution when (1) the communication is paid for, partly or entirely, by a person other than the candidate, authorized committee, political party committee, or agent thereof; (2) the communication satisfies at least one of the "content standards" at 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the "conduct standards" at 11 C.F.R. § 109.21(d).[87] All three prongs must be satisfied for a communication to be considered coordinated under the regulations.

Here, the Complaint does not allege that Respondents' actions were coordinated with a candidate, authorized committee, or political party. Nor is there any information in the record indicating that Respondents' alleged actions were coordinated with a candidate, authorized committee, or political party.

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Because the available information indicates that Respondents' conduct was motivated by *bona fide* commercial reasons and was not coordinated with Respondents, the Commission finds no reason to believe that the Respondents made in-kind corporate contributions in violation 52 U.S.C. § 30118(a).[88]

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[86] Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) ("2003 Coordination E&J"); *see also* Advisory Opinion 2011-14 (Utah Bankers Association).

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

[88] Because Respondents' activities lacked the requisite election-influencing purpose to come within the Act's definition of contribution, we need not analyze the merits of their coordination, First Amendment, media exemption, and Communications Decency Act arguments.