

FEDERAL ELECTION COMMISSION**FIRST GENERAL COUNSEL'S REPORT****MUR: 7841**

DATE COMPLAINT FILED: October 28, 2020

DATE OF NOTIFICATION: November 4, 2020

LAST RESPONSE Received: December 21, 2020

DATE ACTIVATED: May 13, 2021

ELECTION CYCLE: 2020

EXPIRATION OF SOL: October 8, 2025

COMPLAINANTS:Public Advocate of the United States, Inc.
Eugene Delgaudio**RESPONDENTS:**Twitter, Inc.
Biden for President and Andrea Wise
in her official capacity as treasurer**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30104(b)(3)(A)

52 U.S.C. § 30118(a).

11 C.F.R. § 104.3(a)

11 C.F.R. § 114.2(b)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint in this matter alleges that Twitter, Inc. suspended the Complainants' account in late October 2020 because the account promoted the policies of former President Donald J. Trump and criticized policies promoted by then-candidates President Joseph R. Biden and Vice President Kamala Harris. The Complaint further alleges that Twitter did so in coordination with Biden for President and Andrea Wise in her official capacity as treasurer ("the Biden Committee") and that Twitter thereby made, and the Biden Committee accepted and failed to report, a prohibited corporate contribution.

1 Twitter, in its response, represents that it suspended the account because Twitter's
2 automated algorithms detected that the Complainants' account was potentially engaged in spam
3 activity, and the Complainants did not respond to a request to verify the account. Twitter further
4 represents that it reactivated the account after Complainants appealed the suspension. Twitter
5 also disputes the allegation that it coordinated with the Biden campaign in suspending the
6 account. The Biden Committee similarly argues that it was not involved in Twitter's decision to
7 suspend the Complainants' account.

8 As discussed below, the Complaint's allegations of an electoral purpose behind Twitter's
9 suspension of the Complainants' account lack factual support and are refuted by Twitter's
10 response, which provides a plausible and unrefuted commercial motivation for the suspension.
11 Moreover, the Complaint provides no information that reasonably suggests that Twitter
12 coordinated with the Biden Committee in temporarily suspending the Complainants' account.
13 Therefore, we recommend that the Commission find no reason to believe that Twitter violated
14 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(b) by making a prohibited in-kind corporate
15 contribution to the Biden Committee and find no reason to believe that the Biden Committee
16 violated 52 U.S.C. §§ 30104(b)(3)(A), 30118(a) and 11 C.F.R. §§ 104.3(a), 114.2 by knowingly
17 accepting or failing to report such a contribution.

18 **II. FACTUAL BACKGROUND**

19 Twitter, Inc. is a social media platform and publicly-traded Delaware corporation.¹ The
20 platform serves as a venue within which users may publish tweets, some of which focus on

¹ See Twitter, Inc., Fiscal Year 2019 Annual Report (Feb. 19, 2020),
[https://s22.q4cdn.com/826641620/files/doc_financials/2019/FiscalYR2019_Twitter_Annual_Report-\(3\).pdf](https://s22.q4cdn.com/826641620/files/doc_financials/2019/FiscalYR2019_Twitter_Annual_Report-(3).pdf).

1 current events including elections and political campaigns.² Twitter states that all 100 United
2 States Senators, 50 state governors, and nearly every member of the U.S. House of
3 Representatives have Twitter accounts.³ Twitter generates the bulk of its revenue from
4 advertisements and represents that it “had quarterly revenues of more than \$936 million in Q3 of
5 2020.”⁴ Biden for President was the principal campaign committee for Joe Biden’s 2020
6 presidential campaign; Andrea Wise is its treasurer.⁵ The Complainants are a political activist,
7 Eugene Delgaudio, and his advocacy organization, Public Advocate of the United States, Inc.⁶
8 The Complainants maintain an account with Twitter, @PublicFreedom, which as of the writing
9 of this Report has approximately 4,000 followers and 15,000 tweets.⁷

10 Twitter states that “‘abuse, malicious automation, and manipulation’ are company-wide
11 concerns” because such conduct disrupts users’ experience on the platform.⁸ As a result, it has
12 developed algorithms that attempt to “determine that an account might be controlled by an
13 automated bot, rather than a human, or that an account may be engaging in ‘spammy’
14 behavior.”⁹ According to Twitter, when its algorithms detect such behavior, the account is “put
15 into a read-only state . . . until it passes a challenge, like confirming a phone number through a

² *About*, Twitter, <https://about.twitter.com/en/who-we-are/our-company> (last visited June 29, 2021).

³ Twitter Resp. at 2 (Dec. 21, 2020).

⁴ *Id.*

⁵ Biden for President, Statement of Organization (Mar. 18, 2021).

⁶ Compl. at 1 (Oct. 28, 2020).

⁷ Public Advocate (@PublicFreedom), TWITTER, <https://twitter.com/publicfreedom>.

⁸ Twitter Resp. at 4 (internal quotations and brackets omitted).

⁹ *Id.*

1 text message authentication process.”¹⁰ Twitter represents that it makes these authentication
2 requests approximately 10 million times per week, and that these processes are similar to those
3 used by other large social media sites.¹¹ Twitter further represents that it has not created these
4 “automated spam processes” out of a desire to influence any election.¹²

5 On October 8, 2020, Twitter temporarily restricted the Complainants’ account and
6 thereafter suspended the account on October 23, 2020.¹³ According to Twitter, when the account
7 “exhibited signs of automated behavior,” Twitter requested that the Complainants verify the
8 account, which the Complainants failed to do.¹⁴ Thereafter, the Complainants appealed the
9 suspension through Twitter’s internal review process, and Twitter lifted the suspension on
10 December 14, 2020.¹⁵ Twitter does not specify what automated behavior the account exhibited,
11 and the account’s publicly available tweets prior to the suspension do not appear to be
12 automated.¹⁶ During the weeks prior to the suspension, the account tweeted on a number of

¹⁰ *Id.* (internal quotations and ellipses omitted).

¹¹ *Id.*

¹² *Id.* at 5.

¹³ *Id.* at 2. Twitter also added the following warning to the account profile: “Caution: This account is temporarily restricted. You’re seeing this warning because there has been some unusual activity from this account. Do you still want to view it?” *Id.* at 3.

¹⁴ *Id.* at 1.

¹⁵ *Id.* at 10.

¹⁶ However, Twitter users can also engage in non-public activity, such as sending direct messages, *How to Send Direct Messages*, TWITTER, <https://help.twitter.com/en/resources/twitter-guide/topics/how-to-join-the-conversation-on-twitter/how-to-use-direct-messages-on-twitter> (last visited July 28, 2021), and we have no information about the account’s non-public activity.

1 topics, including “pro family” policies and the confirmation of Justice Barrett, and it linked to
2 messages that supported Trump and criticized Biden.¹⁷

3 The Complaint claims that Twitter suspended the account to “discourage[] and suppress[]
4 the public’s access to information from Public Advocate on important public policy issues
5 involving the Presidential election in a way to reduce conservative criticism of the policies of the
6 [Democratic] candidates.”¹⁸ The Complaint bases these allegations solely on the fact that the
7 Complainants’ account promoted policies that the Trump administration supported and criticized
8 policies that the Biden campaign supported.¹⁹ The Complaint asserts that Twitter’s actions
9 constituted an in-kind contribution to the Biden Committee.²⁰ The Complaint also alleges that
10 Twitter coordinated with the Biden Committee in suspending the account based on
11 “circumstantial evidence” that individuals have worked for both Twitter and for Harris, the
12 Biden transition team, or the Obama administration at different times.²¹

13 Twitter contends that it suspended the Complainants’ account for business reasons,
14 namely that Twitter’s automated systems detected possible spam activity, requested that the
15 Complainants verify the account, and temporarily suspended the account after the Complainants
16 failed to do so.²² Twitter states that its automated systems further its business interest in

¹⁷ Compl. at 4; Public Advocate (@PublicFreedom), TWITTER, <https://twitter.com/publicfreedom>.

¹⁸ Compl. at 3.

¹⁹ *Id.* at 3-4. The Complaint also alleges that Twitter did not allow the Complainants to “purchase ads (known as ‘promoting’ a tweet on Twitter) to Support President Trump’s nomination for Associate Justice of the United States Supreme Court, Amy Coney Barrett.” *Id.*

²⁰ *Id.* at 7-8.

²¹ *Id.*

²² *Id.*

1 preventing “abuse, malicious automation, and manipulation.”²³ Twitter, however, does not
2 explain why its algorithmic spam detection methods were triggered by the Complainants’ posts.
3 Twitter also disputes that it coordinated with the Biden Committee and submitted a declaration
4 from a Twitter employee who worked as press secretary for Harris while she was the California
5 Attorney General — the only individual mentioned in the Complaint that is a current Twitter
6 employee Twitter; he attests that he did not coordinate with the Biden Committee, was not
7 involved in the suspension decision, and is not aware of any coordination by other individuals.²⁴
8 The Biden Committee also responded, arguing that Twitter appears to have acted for business
9 reasons and representing that the Biden Committee did not coordinate with Twitter.²⁵

10 **III. LEGAL ANALYSIS**

11 **A. Relevant Law**

12 The Act prohibits corporations from making contributions to federal candidates and
13 likewise bars candidates, political committees (other than independent expenditure-only political
14 committees and committees with hybrid accounts), and other persons, from knowingly accepting
15 or receiving corporate contributions.²⁶ Under the Act, a “contribution” includes “any gift,
16 subscription, loan, advance, or deposit of money or anything of value made by any person for the
17 purpose of influencing any election for Federal office.”²⁷ The term “anything of value” includes

²³ *Id.* at 4 (quotations and brackets omitted).

²⁴ *Id.* at 11; Decl. of Nicholas Pacilio (Dec. 21, 2020) (“Pacilio Decl.”). Twitter further claims that the media exemption and the Communications Decency Act immunize its conduct. Twitter Resp. at 12-13.

²⁵ Biden Committee Resp. at 1-2 (Dec. 21, 2020).

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

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

1 “all in-kind contributions.”²⁸ In-kind contributions include “coordinated expenditures,” that is,
2 expenditures “made by any person in cooperation, consultation or in concert, with, or at the
3 request or suggestion of, a candidate, his [or her] authorized committees, or their agents.”²⁹ In-
4 kind contributions also include “provision of any goods or services without charge or at a charge
5 that is less than the usual and normal charge for such goods or services.”³⁰

6 The Commission has concluded that a commercial vendor providing services to political
7 committees will not make a contribution for the purpose of influencing an election when its
8 business activity “reflects commercial considerations and does not reflect considerations outside
9 of a business relationship.”³¹ A commercial vendor need not make its services available to
10 committees representing all political ideologies, but rather may establish objective business
11 criteria to protect the commercial viability of its business without making contributions to the
12 committees that meet those criteria.³²

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

²⁸ 11 C.F.R. § 100.52(d).

²⁹ 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.20.

³⁰ 11 C.F.R. § 100.52(d) (listing examples of goods or services, such as securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists).

³¹ Advisory Opinion 2012-31 (AT&T) at 4.

³² Advisory Opinion 2004-06 (Mectup) at 1 (explaining that a corporation may provide goods and services to political committees without being considered to have made an in-kind contribution so long as it does so “on the same terms and conditions available to all similarly situated persons in the general public”); Advisory Opinion 2012-26 (Cooper for Congress, *et al.*) at 10 (concluding that no contribution to committee resulted where its participation in a text message fundraising program was subject to “objective and . . . commercially reasonable” criteria).

1 expenditure under section 30118(a).³³ This is true even if a candidate benefitted from the
 2 commercial activity.³⁴

3 Under Commission regulations, expenditures that are coordinated with a candidate, but
 4 are neither a coordinated communication nor a party coordinated communication are in-kind
 5 contributions to that candidate.³⁵ Coordinated means “means made in cooperation, consultation
 6 or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized
 7 committee, or a political party committee.”³⁶

8 **B. The Commission Should Find No Reason to Believe that Twitter Made and**
 9 **the Committee Knowingly Accepted and Failed to Report Prohibited**
 10 **In-Kind Corporate Contributions**

11 The actions taken by Twitter appear to reflect commercial considerations, rather than an
 12 effort to influence a federal election. Twitter represents that it has an interest in preventing spam
 13 and abuse from its users, that its automated systems identified the Complainants’ account as a
 14 possible risk, that it automatically suspended the account when the Complainants did not verify
 15 the account, and that it unsususpended the account after the Complainants appealed the decision. It

³³ See, e.g., Factual & Legal Analysis (“F&LA”) at 4, MUR 6586 (World Wrestling Entertainment, Inc.) (finding that the WWE acted with the “sole intent to defend its business reputation” and not for the purpose of influencing an election when the WWE’s senior vice president sent a letter to a newspaper seeking a retraction of a negative article about Senate candidate Linda McMahon, who owned and served as CEO of the WWE); Advisory Opinion 2018-11 (Microsoft Corp.) at 4 (concluding that commercially reasonable efforts “to protect [Microsoft’s] brand reputation” by providing election-sensitive customers with free account security services were not in-kind contributions).

³⁴ See Factual & Legal Analysis at 6, MUR 7024 (Van Hollen for Senate, *et al.*) (opining that the “question under the Act is whether the legal services were provided for the purpose of influencing a federal election, not whether they provided a benefit to Van Hollen’s campaign,” and concluding there was no contribution given the “absence of any objective or subjective indication” respondents acted for the purpose of influencing the election).

³⁵ 11 C.F.R. § 109.20(b).

³⁶ *Id.* § 109.20(a).

1 appears that these actions accorded with Twitter's pre-existing policies that it established for a
2 *bona fide* commercial purpose, i.e. preventing spam posts that might detract from the experience
3 of users and thereby threaten Twitter's ad revenue.³⁷

4 The Complaint, meanwhile, provides no information to suggest that Twitter actually
5 acted for the purpose of influencing a federal election, instead the Complaint merely posits this
6 motive from the fact that the account expressed views in support of Trump and critical of Biden
7 and Harris. Moreover, according to Twitter's representations, the Complainants could have
8 avoided the suspension by taking what appears to be relatively simple steps to verify the account,
9 such as by responding to a text message to authenticate the account.³⁸ Moreover because the
10 suspension appears to have been automated, rather than the decision of a particular Twitter
11 employee, the suspension presumably could not have been motivated by an electoral purpose
12 unless the *algorithms* that Twitter uses to prevent spam were designed in a manner that was for
13 the purpose of influencing a federal election, and there are no allegations or information
14 suggesting that was the case here. As a result, particularly given the lack of affirmative factual

³⁷ *Supra* nn. 8-12 and accompanying text. Twitter's response is sparse on details regarding why or how its algorithms determined that the Complainants' account was a spam risk, other than to state that the account "exhibited signs of automated behavior." Twitter Resp. at 1. Moreover, Twitter does not assert that the Complainants' account actually engaged in such behavior — indeed, the fact that Twitter reactivated the Complainants' account after they appealed the suspension suggests that the account might not have been engaged in such behavior. However, we do not have information about the account's non-public activities, such as whether it may have been sending direct messages to other users that suggested automated behavior. *See Platform Manipulation and Spam Policy*, Twitter, <https://help.twitter.com/en/rules-and-policies/platform-manipulation> (last visited July 28, 2021) (listing, among other violations of Twitter's anti-spam policy, "sending bulk, aggressive, high-volume unsolicited replies, mentions, or Direct Messages"). All told, for the reasons explained herein, Twitter's explanation is adequate to warrant recommending that the Commission find no reason to believe that a violation occurred in this matter.

³⁸ *Supra* n. 10 and accompanying text; *see also Platform Manipulation and Spam Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/platform-manipulation> (last visited July 28, 2021) ("When we detect suspicious levels of activity, accounts may be locked and prompted to provide additional information (e.g., a phone number) or to solve a reCAPTCHA.").

1 allegations put forth by the Complaint, Twitter has credibly explained its commercial
2 motivations behind its decisions as part of a larger effort to protect its brand and attract
3 advertisers.

4 There is also no basis to conclude that Twitter suspended the Complainants' account
5 "in cooperation, consultation or concert with, or at the request or suggestion of" the Biden
6 Committee.³⁹ The Complaint's allegations of coordination rest solely on the fact that three
7 individuals who have worked for Twitter were previously employed at different times for
8 Biden's presidential transition team, Harris when she was Attorney General of California, or the
9 Obama administration. But these allegations fall far afield of any indicia that Twitter
10 coordinated the decision to suspend the Complainants' account with Biden's presidential
11 campaign. First, the three individuals are not alleged to have ever worked for Biden's 2020
12 presidential campaign.⁴⁰ Second, the three individuals identified in the Complaint do not appear
13 to have had anything to do with the suspension of the Complainants' account; the suspension
14 was automated and the identified individuals do not appear to have worked in designing those
15 automated processes. Third, both Twitter and the Biden Committee dispute that any
16 coordination occurred, and Twitter has submitted a declaration from one of the individuals — the
17 only current Twitter employee — who states that to his knowledge none of the three individuals
18 coordinated Twitter's suspension of the account with any federal candidate, party, or

³⁹ 11 C.F.R. § 109.20 (definition of "coordination" in the context of an expenditure).

⁴⁰ Compl. at 7-8. More specifically: one individual worked as Harris's press secretary while she was California's Attorney General years before the 2020 election; another worked in the Obama and Trump administrations and is merely claimed to have taken actions that were "hostile" to Trump, which would not indicate coordination with the Biden campaign even if true; and a third joined the Biden transition team after the election and after the suspension of the Complainants' account. *Id.*

1 committee.⁴¹ In sum, there is no basis to conclude that Twitter coordinated with the Biden
 2 Committee in suspending the Complainants' account.

3 In light of the commercial, rather than electoral, purpose of the suspension and the lack of
 4 any basis to conclude that coordination occurred, we recommend that the Commission find no
 5 reason to believe that Twitter made an in-kind corporate contribution in violation of 52 U.S.C.
 6 § 30118(a) and 11 C.F.R. § 114.2(b); and find no reason to believe that the Biden Committee
 7 knowingly accepted or failed to report an in-kind corporate contribution in violation of 52 U.S.C.
 8 § 30104(b)(3)(A), 30118(a) and 11 C.F.R. §§ 104.3(a), 114.2(d).⁴²

9 **IV. RECOMMENDATIONS**

- 10 1. Find no reason to believe that Twitter, Inc., violated 52 U.S.C. § 30118(a) and
 11 11 C.F.R. § 114.2(b) by making a corporate in-kind contribution;
- 12 2. Find no reason to believe that Biden for President and Andrea Wise in her official
 13 capacity as treasurer violated 52 U.S.C. §§ 30104(b)(3)(A), 30118(a) and
 14 11 C.F.R. §§ 104.3(a), 114.2(d) by receiving and failing to report a corporate in-
 15 kind contribution;
- 16 3. Approve the attached Factual and Legal Analysis; and
- 17 4. Close the file.

18 Lisa J. Stevenson
 19 Acting General Counsel

20 Charles Kitcher
 21 Associate General Counsel for
 22 Enforcement
 23
 24

⁴¹ Twitter Resp. at 11; Biden Committee Resp. at 1-2; Pacilio Decl. ¶¶ 8-9.

⁴² Because Twitter's actions were not for the purpose of influencing a federal election and were not coordinated, there is no need to address whether the press exemption or the Communications Decency Act apply.

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Date: Sept. 10, 2021

Peter G. Blumberg

Peter G. Blumberg
Acting Deputy Associate General
Counsel for Enforcement

Jin Lee

Jin Lee
Acting Assistant General Counsel

Aaron Rabinowitz by JH

Aaron Rabinowitz
Attorney