FEDERAL ELECTION COMMISSION
Washington, DC 20463

March 29, 2022

VIA ELECTRONIC MAIL AND CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Eugene Delgaudio
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RE: MUR 7841

Dear Mr. Delgaudio:

The Federal Election Commission has considered the allegations contained in your complaint dated October 28, 2020. On March 22, 2022, based upon the information provided in the complaint and information provided by the respondents, the Commission decided to find no reason to believe that Twitter, Inc., violated 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(b) and that Biden for President and Andrea Wise in her official capacity as treasurer violated 52 U.S.C. §§ 30104(b)(3)(A), 30118(a) and 11 C.F.R. §§ 104.3(a), 114.2. The Factual and Legal Analysis, which more fully explains the basis for the Commission's decision, is enclosed.

Documents related to the case will be placed on the public record within 30 days. *See Disclosure of Certain Documents in Enforcement and Other Matters*, 81 Fed. Reg. 50,702 (Aug. 2, 2016).

The Federal Election Campaign Act allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 52 U.S.C. § 30109(a)(8). If you have any questions, please contact Aaron Rabinowitz, the attorney assigned to this matter, at (202) 694-1476 or arabinowitz@fec.gov.

Sincerely,

Lisa J. Stevenson
Acting General Counsel

By: Jin Lee
Jin Lee
Acting Assistant General Counsel

Enclosure:
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Twitter, Inc. **MUR: 7841**
Biden for President and Andrea Wise
in her official capacity as treasurer

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.

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

As discussed below, the Complaint's allegations of an electoral purpose behind Twitter's suspension of the Complainants' account lack factual support and are refuted by Twitter's response, which provides a plausible and unrefuted commercial motivation for the suspension. Moreover, the Complaint provides no information that reasonably suggests that Twitter coordinated with the Biden Committee in temporarily suspending the Complainants' account.

Therefore, the Commission finds no reason to believe that: (1) Twitter violated 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(b) by making a prohibited in-kind corporate contribution to the Biden Committee; and (2) the Biden Committee violated 52 U.S.C. §§ 30104(b)(3)(A), 30118(a) and 11 C.F.R. §§ 104.3(a), 114.2(d) by knowingly accepting or failing to report such a contribution.

II. FACTUAL BACKGROUND

Twitter, Inc. is a social media platform and publicly-traded Delaware corporation.[1] The platform serves as a venue within which users may publish tweets, some of which focus on current events including elections and political campaigns.[2] Twitter states that all 100 United States Senators, 50 state governors, and nearly every member of the U.S. House of Representatives have Twitter accounts.[3] Twitter generates the bulk of its revenue from advertisements and represents that it "had quarterly revenues of more than $936 million in Q3 of 2020."[4] Biden for President was the principal campaign committee for Joe Biden's 2020 presidential campaign; Andrea Wise is its treasurer.[5] The Complainants are Eugene Delgaudio and Public Advocate of the United States, Inc.[6] The Complainants maintain an account with Twitter, @PublicFreedom, which as of the writing of this Report has approximately 4,000 followers and 15,000 tweets.[7]

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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.

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.

Twitter states that "'abuse, malicious automation, and manipulation' are company-wide concerns" because such conduct disrupts users' experience on the platform.[8] As a result, it has developed algorithms that attempt to "determine that an account might be controlled by an automated bot, rather than a human, or that an account may be engaging in 'spammy' behavior."[9] According to Twitter, when its algorithms detect such behavior, the account is "put into a read-only state . . . until it passes a challenge, like confirming a phone number through a text message authentication process."[10] Twitter represents that it makes these authentication requests approximately 10 million times per week, and that these processes are similar to those used by other large social media sites.[11] Twitter further represents that its "automated spam processes and its efforts to address harmful speech are not motivated by a desire to influence any election."[12]

On October 8, 2020, Twitter temporarily restricted the Complainants' account and thereafter suspended the account on October 23, 2020.[13] According to Twitter, when the account "exhibited signs of automated behavior," Twitter requested that the Complainants verify the account, which the Complainants failed to do.[14] Thereafter, the Complainants appealed the

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

9 *Id.*

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.

suspension through Twitter's internal review process, and Twitter lifted the suspension on December 14, 2020.[15] Twitter does not specify what automated behavior the account exhibited.

The Complaint claims that Twitter suspended the account to "discourage[] and suppress[] the public's access to information from Public Advocate on important public policy issues involving the Presidential election in a way to reduce conservative criticism of the policies of the [Democratic] candidates."[16] The Complaint bases these allegations solely on the fact that the Complainants' account promoted policies that the Trump administration supported and criticized policies that the Biden campaign supported.[17] The Complaint asserts that Twitter's actions constituted an in-kind contribution to the Biden Committee.[18] The Complaint also alleges that Twitter coordinated with the Biden Committee in suspending the account based on "circumstantial evidence" that individuals have worked for both Twitter and for Harris, the Biden transition team, or the Obama administration at different times.[19]

Twitter contends that it suspended the Complainants' account for business reasons, namely that Twitter detected possible spam activity, requested that the Complainants verify the account, and temporarily suspended the account after the Complainants failed to do so.[20] Twitter states that it has a business interest in preventing "abuse, malicious automation, and manipulation,"[21] because, "[b]y focusing on healthy conversations and combatting abuse,

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15 *Id.* at 10.

16 Compl. at 3.

17 *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.*

18 *Id.* at 7-8.

19 *Id.*

20 *Id.*

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

Twitter's audience has grown substantially and analysts have noted a commensurate increase in the company's revenue and profits."[22] Twitter also disputes that it coordinated with the Biden Committee and submitted a declaration from a Twitter employee who worked as press secretary for Harris while she was the California Attorney General — the only individual mentioned in the Complaint that is a current Twitter employee; he attests that he did not coordinate with the Biden Committee, was not involved in the suspension decision, and is not aware of any coordination by other individuals.[23] The Biden Committee also responded, representing that it did not coordinate with Twitter.[24]

III. LEGAL ANALYSIS

A. Relevant Law

The Act prohibits corporations from making contributions to federal candidates and likewise bars candidates, political committees (other than independent expenditure-only political committees and committees with hybrid accounts), and other persons, from knowingly accepting or receiving corporate contributions.[25] Under the Act, a "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 for Federal office."[26] The term "anything of value" includes

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22 *Id.* at 4-5.

23 *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.

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

25 52 U.S.C. § 30118(a); *accord* 11 C.F.R. § 114.2(b) (NOTE: Pursuant to *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), and *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011), 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, notwithstanding 11 CFR 114.2(b) and 11 CFR 114.10(a), (d)).

26 52 U.S.C. § 30101(8)(A); *accord* 11 C.F.R. § 100.52.

"all in-kind contributions."[27] In-kind contributions include "coordinated expenditures," that is, expenditures "made by any person in cooperation, consultation or in concert, with, or at the request or suggestion of, a candidate, his [or her] authorized committees, or their agents."[28] In-kind contributions also include "provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services."[29]

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 section 30118(a).[30] This is true even if a candidate benefitted from the commercial activity.[31]

Under Commission regulations, expenditures that are coordinated with a candidate but are neither a coordinated communication nor a party coordinated communication are in-kind contributions to that candidate.[32] Coordinated "means made in cooperation, consultation or

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[27] 11 C.F.R. § 100.52(d).

[28] 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.20.

[29] 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).

[30] *See, e.g.*, Factual & Legal Analysis at 13–16, MURs 7821, 7827 & 7868 (Twitter, Inc., *et al.*) (finding, *inter alia*, that social media company's decision to block sharing of critical articles concerning a presidential candidate's son on its platform was undertaken for commercial reasons and not for the purpose of influencing an election); Factual & Legal Analysis at 4, MUR 6586 (World Wrestling Entertainment, Inc.) (finding that the WWE acted with the "sole intent to defend its business reputation" and not for the purpose of influencing an election when the WWE's senior vice president sent a letter to a newspaper seeking a retraction of a negative article about Senate candidate Linda McMahon, who owned and served as CEO of the WWE); 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).

[31] *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).

[32] 11 C.F.R. § 109.20(b).

concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee."[33]

B. The Commission Finds No Reason to Believe that Twitter Made, and the Committee Knowingly Accepted and Failed to Report, Prohibited In-Kind Corporate Contributions

The actions taken by Twitter appear to reflect commercial considerations, rather than an effort to influence a federal election. Twitter represents that it has an interest in preventing spam and abuse on its platform, that it identified the Complainants' account as a possible risk, that it suspended the account when the Complainants did not verify the account, and that it unsuspended the account after the Complainants appealed the decision. It appears that these actions accorded with Twitter's pre-existing policies that it established for a *bona fide* commercial purpose, i.e., preventing spam posts that might detract from the experience of users and thereby threaten Twitter's ad revenue.[34]

The Complaint, meanwhile, provides no information to suggest that Twitter actually acted for the purpose of influencing a federal election, instead the Complaint merely posits this motive from the fact that the account expressed views in support of Trump and critical of Biden and Harris. According to Twitter's representations, the Complainants could have avoided the suspension by taking what appears to be relatively simple steps to verify the account, such as by responding to a text message to authenticate the account.[35] As a result, particularly given the lack of affirmative factual allegations put forth by the Complaint, Twitter has credibly explained

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[33] *Id.* § 109.20(a).

[34] *Supra* nn. 8-12 and accompanying text.

[35] *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.").

its commercial motivations behind its decisions as part of a larger effort to protect its brand and attract advertisers.

There is also no basis to conclude that Twitter suspended the Complainants' account "in cooperation, consultation or concert with, or at the request or suggestion of" the Biden Committee.[36] The Complaint's allegations of coordination rest solely on the fact that three individuals who have worked for Twitter were previously employed at different times for Biden's presidential transition team, Harris when she was Attorney General of California, or the Obama administration. Both Twitter and the Biden Committee, however, dispute that any coordination occurred, and Twitter has submitted a declaration from one of the individuals — the only one currently employed by Twitter — who states that to his knowledge none of the three individuals coordinated Twitter's suspension of the account with any federal candidate, party, or committee.[37] In sum, there is no basis to conclude that Twitter coordinated with the Biden Committee in suspending the Complainants' account.

In light of the commercial, rather than electoral, purpose of the suspension and the lack of any basis to conclude that coordination occurred, the Commission finds no reason to believe that: (1) Twitter made an in-kind corporate contribution in violation of 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(b); and (2) the Biden Committee knowingly accepted or failed to report an in-kind corporate contribution in violation of 52 U.S.C. §§ 30104(b)(3)(A), 30118(a) and 11 C.F.R. §§ 104.3(a), 114.2(d).[38]

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[36] 11 C.F.R. § 109.20 (definition of "coordination" in the context of an expenditure).

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

[38] 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.