



**FEDERAL ELECTION COMMISSION**  
Washington, DC 20463

March 29, 2022

**VIA EMAIL:**

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Dear Counsel:

RE: MUR 7858  
Facebook, Inc.

On November 20, 2020, the Federal Election Commission notified you of a complaint alleging that your client, Facebook, Inc., violated certain sections of the Federal Election Campaign Act of 1971, as amended. On March 22, 2022, the Commission found, on the basis of the information in the complaint, and information provided by you and your client, that there is no reason to believe Facebook, Inc. violated 52 U.S.C § 30118(a). Accordingly, the Commission closed its file in this matter.

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 Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Amanda Andrade, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in cursive script that reads "Jin Lee".

Jin Lee  
Acting Assistant General Counsel

Enclosure  
Factual and Legal Analysis

**FEDERAL ELECTION COMMISSION**  
**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Facebook, Inc.

MUR 7858

**I. INTRODUCTION**

The Complaint in this matter alleges that Facebook, Inc. (“Facebook”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by reducing the distribution of an advertisement posted by the Complainant after it was flagged by Facebook’s fact-checking program. Specifically, the Complaint alleges that Facebook made prohibited corporate contributions to Senator Gary Peters and then-presidential candidate Joe Biden by suppressing the ad, which criticized Peters and Biden for their support of legislation that would allow transgender women athletes to compete against cisgender women athletes. Facebook denies the allegations, asserting that its actions were part of its “broader effort to protect against all manner of misinformation on its platform”<sup>1</sup> and were not undertaken for the purpose of influencing any election for federal office. In addition, Facebook asserts that there is no evidence of coordination between Facebook and any candidate.<sup>2</sup>

As explained below, based on the available information, Facebook’s conduct does not appear to constitute a contribution under the Act because Facebook has credibly explained that it has a commercial, rather than electoral, motivation underlying the fact-checking program at issue in the Complaint. Moreover, there is no basis to reasonably conclude that Facebook coordinated with Biden, Peters, or either of their committees. Accordingly, the Commission finds no reason

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<sup>1</sup> Resp. at 1 (Jan. 7, 2021).

<sup>2</sup> *Id.* at 2, 8-9.

MUR 7858  
Facebook, Inc.  
Factual and Legal Analysis

to believe that Facebook violated 52 U.S.C. § 30118(a) by making prohibited in-kind contributions.

## II. FACTUAL BACKGROUND

American Principles Project (“APP”) describes itself as a “conservative, non-profit advocacy organization” and operates a political action committee (“APP PAC”).<sup>3</sup> During the 2020 election cycle, APP PAC created a video criticizing the Equality Act, proposed federal legislation that would allow transgender female athletes to compete with biological female athletes. APP PAC attempted to promote a Facebook post containing this embedded video with the heading “Sen. Gary Peters and Joe Biden support legislation that would destroy women’s sports. They call it Equality.”<sup>4</sup> At the bottom of the Facebook post that contained the video, it states “Biden and Peters would destroy girls’ sports.”<sup>5</sup>

Beginning on September 19, 2020, Facebook allegedly “severely restricted” the reach of APP PAC’s ad.<sup>6</sup> According to the Complaint, the ad was restricted because PolitiFact, one of Facebook’s fact-checking partners,<sup>7</sup> determined that the ad was “missing context.”<sup>8</sup> The Complaint argues that this determination was incorrect. It quotes from PolitiFact’s analysis of the ad, which stated that the core message — that the Equality Act would destroy girls’ sports — was ““a prediction we can’t fact-check.””<sup>9</sup>

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<sup>3</sup> Compl. at 1 (Nov. 17, 2020).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.*

<sup>7</sup> *See* Resp. at 3 (explaining that PolitiFact is one of Facebook’s “third-party fact-checking program partners”).

<sup>8</sup> Compl. at 6, 8-10.

<sup>9</sup> *Id.* at 3.

MUR 7858  
Facebook, Inc.  
Factual and Legal Analysis

APP PAC appealed to several employees of PolitiFact, arguing that PolitiFact had already admitted that its ad could not be fact-checked and forwarding numerous studies about transgender athletes.<sup>10</sup> In response, however, APP PAC was told that the ““prediction about cisgender girls and women being dominated by transgender athletes is unsupported in the places where this policy is already the case, and the ad gives a different impression.””<sup>11</sup> PolitiFact’s Editor-in-Chief ultimately told APP PAC that its ““ad fits the definition of missing context. . . . Any objective fact-checker who reviewed your ad . . . would agree your ad is ‘missing context.’””<sup>12</sup>

Based on this “missing context” designation, APP PAC’s ad was apparently disapproved and its distribution therefore significantly reduced from September 19 to 21, 2020.<sup>13</sup> Despite the short duration, the Complaint argues that the impact of this reduction in circulation was profound, based on both proximity to the general election and a very competitive Senate race.<sup>14</sup> The Complaint alleges that the activity by Facebook was made for the purpose of assisting the Biden and Peters campaigns, evidenced by alleged bias exhibited by Facebook and its employees, as well as news articles reporting that Facebook has interfered with the decisions of its fact-checkers.<sup>15</sup>

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<sup>10</sup> *Id.* at 6-7.

<sup>11</sup> *Id.* at 8 (quoting email from Managing Editor of PolitiFact).

<sup>12</sup> *Id.* at 9 (quoting email from Editor-in-Chief of PolitiFact).

<sup>13</sup> *Id.* at 7.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 11-23.

MUR 7858  
Facebook, Inc.  
Factual and Legal Analysis

In Response, Facebook states that it has long made clear that “[m]isinformation is bad for our community and bad for our business”<sup>16</sup> and asserts that it launched its third-party fact-checking program in December 2016 in order “to prevent the spread of viral misinformation and help users better understand what they see online.”<sup>17</sup> It states that “[i]f a post is identified as potentially false, Facebook may temporarily reduce its distribution pending third-party review and place it into a digital queue for potential review by third-party fact-checkers, who are independent.”<sup>18</sup> These fact-checkers may also identify content to review on their own.<sup>19</sup> After they have analyzed potentially misleading content, the fact-checkers rate the content and write an article explaining how they arrived at their rating.<sup>20</sup> If ultimately deemed to contain false content, the post is labeled, showing the fact-check article and its distribution remains reduced.<sup>21</sup>

Facebook asserts that its fact-checking program applies not only to political subjects but also other subjects, such as false information relating to mask wearing and COVID-19, false stories about the cause of wildfires in California, Oregon, and Washington, and untrue stories about celebrities.<sup>22</sup> Further, Facebook states that even among the fact-checking posts regarding political subjects, the posts “span the political spectrum.”<sup>23</sup> Facebook states that negative

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<sup>16</sup> Resp. at 1, 12.

<sup>17</sup> *Id.* at 12.

<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 4.

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

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

MUR 7858  
Facebook, Inc.  
Factual and Legal Analysis

articles about Republican candidates have also been fact-checked, deemed false, and thus subjected to reduction in distribution and labeling as false.<sup>24</sup>

### III. LEGAL ANALYSIS

#### A. Legal Standard

The Act and Commission regulations prohibit any corporation from making contributions to a candidate's principal campaign committee.<sup>25</sup> Further, no person shall make contributions to any candidate, his or her authorized committee, or their agents with respect to any election for federal office which, in the aggregate, exceed \$2,800 during the 2020 election cycle.<sup>26</sup>

A "[c]ontribution" is defined to include any gift of money or "anything of value" for the purpose of influencing a federal election.<sup>27</sup> The term "anything of value" includes "all in-kind contributions."<sup>28</sup> 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."<sup>29</sup> 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."<sup>30</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> 52 U.S.C. § 30118(a).

<sup>26</sup> *Id.* § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1).

<sup>27</sup> 52 U.S.C. § 30101(8)(A); 11 C.F.R. §§ 100.52(a), 100.111(a). "Expenditure" is likewise defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9).

<sup>28</sup> 11 C.F.R. § 100.52(d).

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

<sup>30</sup> 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).

MUR 7858  
Facebook, Inc.  
Factual and Legal Analysis

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).<sup>31</sup> This is true even if a candidate benefitted from the commercial activity.<sup>32</sup>

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.<sup>33</sup> Coordinated means “means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or a political party committee.”<sup>34</sup>

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<sup>31</sup> 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); First Gen. Counsel’s Rpt. at 13, MUR 5474 (Dog Eat Dog Films, *et al.*) (determining that distributors and marketers of *Fahrenheit 9/11* film did so “in connection with bona fide commercial activity and not for the purpose of influencing an election”); Cert. ¶ A.1, MUR 5474 (Dog Eat Dog Films, *et al.*) (Commission voted to approve no reason to believe recommendations) (June 7, 2005); Advisory Op. 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 are not an in-kind contribution).

<sup>32</sup> See Cert. ¶ 5, MUR 3622 (The Clinton/Gore ‘92 Committee) (approving no reason to believe recommendation) (June 6, 1994); First Gen. Counsel’s Rpt. at 16, MUR 3622 (The Clinton/Gore ‘92 Committee) (“[T]he fact that any of these candidates . . . may have received an indirect benefit (dissemination of their political positions) as a result of the sale of these tapes does not convert commercial activity into a corporate contribution.”); Factual & Legal Analysis at 6, MUR 7024 (Van Hollen for Senate, *et al.*) (explaining 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).

<sup>33</sup> 11 C.F.R. § 109.20(b).

<sup>34</sup> *Id.* § 109.20(a).

MUR 7858  
Facebook, Inc.  
Factual and Legal Analysis

**B. The Commission Finds No Reason to Believe that Facebook Made a Prohibited Corporate Contribution to Any of the Candidates At Issue**

As an initial matter, Facebook’s actions appear consistent with its general fact-checking program and its asserted commercial purposes. As described above, PolitiFact analyzed APP PAC’s advertisement, determined that it was “missing context,” and Facebook flagged it accordingly. While the Complaint argues that Facebook has overridden its fact-checkers in the past, the Complaint also cites conversations with numerous PolitiFact employees showing that the merits of APP PAC’s appeal appear to have been decided entirely by PolitiFact in this instance. Facebook states that it has assessed that misinformation “is bad for our community and bad for our business,”<sup>35</sup> and that it implemented fact-checking procedures “to combat misinformation on its platform for independent business reasons,”<sup>36</sup> not for the purpose of influencing any election for federal office.

The Complaint argues that Facebook’s purpose was electoral, based on an alleged imbalance in political contributions made by individual Facebook employees in their personal capacities to Republican and Democratic campaigns generally, as well as allegations that “Facebook arbitrarily uses its own judgment to selectively override the determinations of its agent fact-checkers whenever it desires to do so.”<sup>37</sup> However, a disparity in contributions by Facebook employees may reflect the partisan leanings of these employees in their personal capacities, but it does not indicate that the purpose of Facebook’s operations was electoral. Accordingly, without more, these contributions are of limited value and do not provide an

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<sup>35</sup> Resp. at 1.

<sup>36</sup> *Id.* at 2.

<sup>37</sup> Compl. at 6.



MUR 7858  
Facebook, Inc.  
Factual and Legal Analysis

1 indication of the underlying purpose of Facebook’s fact-checking program generally, or  
2 specifically regarding the purpose of its actions that are the subject of the Complaint.

3 Further, the premise that Facebook has undertaken its fact-checking program for the  
4 purpose of influencing an election should be considered in the context of the scope of the overall  
5 program. Facebook states that it applies these same fact-checking policies to various subjects  
6 unrelated to elections, such as misinformation surrounding public health issues including  
7 COVID-19 and false statements about other public figures,<sup>38</sup> adding credibility to Facebook’s  
8 position that misinformation about candidates is one type of misinformation it is seeking to  
9 address for business reasons. In sum, the foregoing information concerning the scope and  
10 structure of the Facebook’s fact-checking program provides credible support to Facebook’s  
11 asserted commercial motivation.

12 In addition, there is no indication that Facebook coordinated its activities with Biden,  
13 Peters, or either of their committees. The Complaint generally points to “close staffing ties  
14 between Facebook, Silicon Valley, and the Democratic Party,” including a former associate  
15 general counsel of Facebook who worked with the Biden transition team, but about whom no  
16 specific factual allegations are made in the context of this matter.<sup>39</sup> But this information does  
17 not provide a reasonable basis to infer that the Biden campaign coordinated with Facebook  
18 regarding the specific activities alleged in the Complaint under Commission regulations.<sup>40</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> Compl. at 21.

<sup>40</sup> See Factual and Legal Analysis at at 16-17, MURs 7812, 7825, 7869 (Facebook et al.) (finding that complaints failed to allege facts to provide reasonable basis to infer that Biden Committee coordinated with Facebook).

MUR 7858  
Facebook, Inc.  
Factual and Legal Analysis

1           In light of the above, the available information indicates that the actions taken by  
2 Facebook to fact-check and reduce the distribution of potential misinformation appear to reflect  
3 commercial considerations, rather than an effort to influence a federal election. Moreover, there  
4 is no basis to reasonably conclude that Facebook coordinated its activities with the Biden or  
5 Peters campaigns. Therefore, the Commission finds no reason to believe that Facebook violated  
6 52 U.S.C. § 30118(a) by making a prohibited in-kind contribution.<sup>41</sup>

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<sup>41</sup> The Complaint also alleges that Facebook violated the Act's reporting requirements by failing to report its contributions to the Biden and Peters campaigns. Compl. at 2, 26. For the same reasons that Facebook's actions did not amount of a prohibited contribution, they did not need to be reported.