



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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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,

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

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

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

¹ Resp. at 1 (Jan. 7, 2021).

2 *Id.* at 2, 8-9.

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

3 **II. FACTUAL BACKGROUND**

4 American Principles Project (“APP”) describes itself as a “conservative, non-profit
 5 advocacy organization” and operates a political action committee (“APP PAC”).³ During the
 6 2020 election cycle, APP PAC created a video criticizing the Equality Act, proposed federal
 7 legislation that would allow transgender female athletes to compete with biological female
 8 athletes. APP PAC attempted to promote a Facebook post containing this embedded video with
 9 the heading “Sen. Gary Peters and Joe Biden support legislation that would destroy women’s
 10 sports. They call it Equality.”⁴ At the bottom of the Facebook post that contained the video, it
 11 states “Biden and Peters would destroy girls’ sports.”⁵

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

³ Compl. at 1 (Nov. 17, 2020).

⁴ *Id.* at 2.

⁵ *Id.* at 3.

⁶ *Id.*

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

⁸ Compl. at 6, 8-10.

⁹ *Id.* at 3.

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

9 Based on this “missing context” designation, APP PAC’s ad was apparently disapproved
 10 and its distribution therefore significantly reduced from September 19 to 21, 2020.¹³ Despite the
 11 short duration, the Complaint argues that the impact of this reduction in circulation was
 12 profound, based on both proximity to the general election and a very competitive Senate race.¹⁴
 13 The Complaint alleges that the activity by Facebook was made for the purpose of assisting the
 14 Biden and Peters campaigns, evidenced by alleged bias exhibited by Facebook and its
 15 employees, as well as news articles reporting that Facebook has interfered with the decisions of
 16 its fact-checkers.¹⁵

¹⁰ *Id.* at 6-7.

¹¹ *Id.* at 8 (quoting email from Managing Editor of Politifact).

¹² *Id.* at 9 (quoting email from Editor-in-Chief of Politifact).

¹³ *Id.* at 7.

¹⁴ *Id.*

¹⁵ *Id.* at 11-23.

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

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

¹⁶ Resp. at 1, 12.

¹⁷ *Id.* at 12.

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *Id.* at 4.

²¹ *Id.*

²² *Id.*

²³ *Id.*

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

3 **III. LEGAL ANALYSIS**

4 **A. Legal Standard**

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

9 A “[c]ontribution” is defined to include any gift of money or “anything of value” for the
 10 purpose of influencing a federal election.²⁷ The term “anything of value” includes “all in-kind
 11 contributions.”²⁸ In-kind contributions include “coordinated expenditures,” that is, expenditures
 12 “made by any person in cooperation, consultation or in concert, with, or at the request or
 13 suggestion of, a candidate, his [or her] authorized committees, or their agents.”²⁹ In-kind
 14 contributions also include “provision of any goods or services without charge or at a charge that
 15 is less than the usual and normal charge for such goods or services.”³⁰

²⁴ *Id.*

²⁵ 52 U.S.C. § 30118(a).

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

²⁷ 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).

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).

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1 The Commission has long considered activity engaged in for *bona fide* commercial
 2 reasons not to be “for the purpose of influencing an election,” and thus not a contribution or
 3 expenditure under section 30118(a).³¹ This is true even if a candidate benefitted from the
 4 commercial activity.³²

5 Under Commission regulations, expenditures that are coordinated with a candidate, but
 6 are neither a coordinated communication nor a party coordinated communication are in-kind
 7 contributions to that candidate.³³ Coordinated means “means made in cooperation, consultation
 8 or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized
 9 committee, or a political party committee.”³⁴

³¹ 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).

³² 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).

³³ 11 C.F.R. § 109.20(b).

³⁴ *Id.* § 109.20(a).

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

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

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

³⁵ Resp. at 1.

³⁶ *Id.* at 2.

³⁷ Compl. at 6.

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- 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,³⁸ 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.³⁹ 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.⁴⁰

³⁸ *Id.*

³⁹ Compl. at 21.

⁴⁰ See Factual and Legal Analysis 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).

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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.⁴¹

⁴¹ 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.