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Covington & Burling LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
T +1 202 662 6000

Via Electronic Mail March 1, 2021

Mr. Jeff S. Jordan
Federal Election Commission
Office of Complaints Examination
and Legal Administration
1050 1st Street NE
Washington, DC 20463

Re: Response of Biden for President – MURs 7868, 7869,

Dear Mr. Jordan:

We write on behalf of our client, Biden for President ("the Committee"), in response to your letters dated January 14 and 15, 2021, and the accompanying complaints.

These complaints should be dismissed with no further action because they fail to allege any violation of the Federal Election Campaign Act of 1971, as amended ("the Act"). As detailed in this response, the complaints' conclusory allegations of coordination between the Committee and Facebook, ("Respondents"), do not proffer any facts on which the Commission could find reason to believe that the Committee violated the Act. Therefore, the Commission should find no reason to believe that Biden for President violated the Act, and dismiss the complaints.

I. Factual Background

On January 12, 2021, Tony McDonald ("Complainant") filed complaints against Biden for President, and Twitter, Facebook, The complaints include several unsubstantiated allegations, including that each of the companies made unlawful corporate in-kind contributions to the Committee by engaging in third-party fact checking and other "content moderation" of "pro-Trump" media.[1]

With respect to the Committee, the complaints each contain only one vague allegation: that Twitter, Facebook, engaged in "coordination" with the Committee. To bolster this allegation, the complaints point to the hiring of two former Twitter and Facebook

[1] *See* FEC MUR 7868 (Twitter), Complaint of Tony McDonald, at 2; FEC MUR 7869 (Facebook), Complaint of Tony McDonald, at 4;

employees by the Presidential Transition—not the Committee—and the service of "at least eight people who work for Facebook, Amazon, Google, and Apple" on a nearly 700-person volunteer group advising the Committee as proof of coordination between the Respondents.[2] Beyond that, there is nothing.

II. Analysis

The complaints should be dismissed because they fail to allege any violation of the Act by the Committee. The complaints' theory appears to be that the fact-checking and moderation of social media posts constitute "expenditures" within the meaning of the Act, and that the Respondent companies coordinated those expenditures with the Committee in some as-of-yet unascertained way, resulting in an impermissible in-kind contribution to the Committee. This theory fails because the complaints cite no authority for the proposition, nor are we aware of any, that a corporation's decision to follow company policies on handling false or misleading content constitutes an in-kind contribution to a candidate. Nor does the Complainant identify any facts that would support his claim under such a theory. In addition, the complaints contain no sworn facts to suggest any coordination between the Respondents and the Committee in fact occurred, or that the Committee violated the Act in any other way.

The complaints neither recite nor analyze the factors for determining whether there has been improper coordination. The complaints contain no facts that would support a claim that any of the Respondents' actions were made in cooperation, consultation or concert with, or at the request or suggestion of any candidate, candidate's authorized committee, or a political party committee. 52 U.S.C. § 30116(a)(7)(B). Nor do the complaints contain any facts that show there has been a "coordinated communication," *i.e*, a communication that (1) is paid for by a person other than a candidate or political committee, (2) meets at least one of the "content standards" set forth in the coordinated communications regulations, and (3) meets at least one of the "conduct standards" set forth in those regulations. *Id*. § 109.21(a). Payment for a communication that is coordinated with a candidate under these rules is not an independent expenditure, and generally must be reported as an in-kind contribution by the candidate with whom it was coordinated. 11 C.F.R. § 109.21(b)(3).

The Commission could dismiss these complaints as to the Committee by reaching any one of the following conclusions: that Respondent companies' moderation of false or misleading online content does not constitute a "contribution" or an "expenditure" by the companies; that the 109.21 content standards are not met; or that the 109.21 conduct standards are not met. While we strongly believe that the Commission can dismiss these complaints on all three

[2] With respect to Twitter, the complaint cites the Presidential Transition's hiring of Twitter's Public Policy Director, Carlos Monje, and Twitter's hiring of Vice President Kamala Harris's Senate Press Secretary. The Facebook complaint points to the Transition's hiring of Facebook's associate general counsel for regulatory matters, Jessica Hertz. And both the Facebook and Google complaints claim that "on Biden's Innovation Policy Committee there are 'at least eight people who work for Facebook, Amazon, Google, and Apple,'" citing a *New York Times* article.

grounds, we focus on the coordination elements as those allegations most directly implicate the Committee.[3]

A. The Communications Do Not Meet the Content Standards of the Coordinated Communication Regulations.

A communication meets the content standards for coordination if it is either (1) an electioneering communication, or (2) a "public communication" that meets certain additional criteria set forth in FEC regulations. *Id.* § 109.21(c). The allegations here satisfy neither requirement.

Commission regulations exempt "any communication that . . . [i]s publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station" from the definition of "electioneering communication." *Id.* § 109.29(c)(1). Specifically, "communications over the Internet," such as the social media posts and other online activities here, are not electioneering communications. *Id.*

Moreover, fact-checked social media posts are not "public communications" under Commission regulations. A "public communication" is "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." *Id.* § 109.26. Once again, "communications over the Internet," are exempt, except if they are "communications placed for a fee on another person's Web site," which these are not. *Id.*; *see also* "Updating our approach to misleading information," available at https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html; "Facebook's Third-Party Fact-Checking Program," available at https://www.facebook.com/journalismproject/programs/third-party-fact-checking; "Expanding fact checks on YouTube to the United States," available at https://blog.youtube/news-and-events/expanding-fact-checks-on-youtube-to-united-states/.

The communications alleged to be "coordinated" in this matter involve notations affixed to online social media posts indicating that the claims in the post are "disputed" or that "independent fact-checkers" have identified the post as containing "false information." The fact-checking notations are not paid advertisements and the notations are visible only to viewers of the posts over the Internet. This and any other internal, unpaid online activity qualifies for the exemption from both the definition of "electioneering communication" and "public communication." Accordingly, the content prong of the coordinated communication rules cannot be met.

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[3] We note that the complaints' suggestion that a social media provider's labeling or deleting of false commentary about a candidate constitutes a "contribution" or "expenditure" to that candidate is unsupported by any authority.

B. The Complaints Do Not Allege Any Facts That Meet the Conduct Standards of the Coordinated Communication Regulations.

Based on little more than innuendo, the complaints ask the Commission to find reason to believe that the employment decisions of the Biden *Transition*, and the participation of eight Facebook, Amazon, Google, and Apple employees in a nearly 700-member *volunteer* advisory group, demonstrate that the Biden Campaign violated the Act. However, these facts do not give rise to reason to believe there were any coordinated communications with Twitter, Facebook, or that any other violation occurred.

The specific employees mentioned in the complaints, Carlos Monje and Jessica Hertz, were hired by the Biden *Transition*, and not by the Biden *Campaign*. *See* S. Overly, "Twitter Public Policy Director Decamps for Biden Transition Team," *Politico*, Sept. 17, 2020, https://www.politico.com/news/2020/09/17/twitter-public-policy-director-decamps-for-biden-transition-team-417293 (reporting that "Twitter's public policy director, Carlos Monje, has left the social media company's Washington office to join the transition team for Democratic presidential nominee Joe Biden []."); A. Thompson and T. Meyer, "Biden Transition Elevates Former Facebook Exec As Ethics Arbiter," *Politico*, Sept. 30, 2020, https://www.politico.com/news/2020/09/30/biden-transition-facebook-ethics-424000 (stating that "Joe Biden's transition team named Jessica Hertz . . . as its general counsel on Wednesday."). Mr. Monje and Ms. Hertz are not now, and were not at the time of their hiring, employees of the Committee. *See* 11 C.F.R. § 109.21(d) (providing, *inter alia*, that a communication is coordinated if it is made at the "request or suggestion of," with the "material involvement" of, or after "substantial discussion with" a "*candidate, authorized committee, or political party committee*." (emphasis added)).

The complaints also generally reference a New York Times article finding that "a nearly 700-person volunteer group advising the campaign, the Innovation Policy Committee, includes at least eight people who work for Facebook, Amazon, Google and Apple." D. McCabe and K. Vogel, "Big Tech Makes Inroads With the Biden Campaign," *The New York Times*, Aug. 10, 2020, https://www.nytimes.com/2020/08/10/technology/big-tech-biden-campaign.html. Once again, the approximately 700 members of the *voluntary* advisory group are not employees of the Committee.

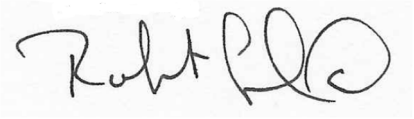
Further, the complaints contain no facts, much less sworn facts, alleging that Mr. Monje, Ms. Hertz, or any of the unnamed volunteers on the Innovation Policy Committee ever took any actions, in any capacity, to coordinate any Committee expenditures with the other Respondents. No activity is alleged that would meet the conduct standards of the coordinated communication regulations. Instead, lacking any good-faith basis to allege coordination, the complaints ask the Commission to launch an investigation to determine "the extent of the coordination." *See* FEC MUR 7869 (Facebook), Complaint, at 2.

Such an investigation is unwarranted and in conflict with prior agency practice.[4] Instead the complaints should be dismissed for failure to allege any activity that amounts to coordination or any other violation of the Act.

III. Conclusion

The complaints in these three matters are totally devoid of any sworn allegations that, even if true, would suggest that the Committee has coordinated any expenditures with the other Respondents, or committed any other violation of the Act. Therefore, the Commission should find no reason to believe that Biden for President has violated the Act and dismiss these complaints.

Respectfully submitted,



Robert D. Lenhard
Derek Lawlor
Darcy Slayton
COVINGTON & BURLING LLP
850 Tenth Street NW
Washington, DC 20001
(202) 662-5940

Counsel for Biden for President

[4] The FEC has long treated speculation as an insufficient basis to find "reason to believe" a violation has occurred. *See, e.g.*, MUR 5467 (Michael Moore), First General Counsel's Report at 5 ("Purely speculative charges, especially when accompanied by a direct refutation, do not form the adequate basis to find reason to believe that a violation of [the Act] has occurred.") (quoting MUR 4960 (Hillary Rodham Clinton et al.), Statement of Reasons at 3); *see also* MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas at 2 ("[a] mere conclusory allegation without any supporting evidence does not shift the burden of proof to the respondents").