

VIA EMAIL

Federal Election Commission
 Office of Complaints, Examination & Legal Administration
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June 16, 2022

RE: MUR 7991; Response of Google LLC

Dear Mr. Luckett:

On behalf of our client, Google LLC (“Google”), we respond to the Complaint filed by the Republican National Committee, National Republican Senatorial Committee, and National Republican Congressional Committee (collectively, the “Complainants”) in Matter Under Review (“MUR”) 7991.

Complainants incorrectly allege that Google’s Gmail spam filters operate in a partisan manner and disproportionately harm Republican candidates, causing Google to make in-kind contributions to unspecified Democratic candidates in the 2020 election. Complainants’ allegations rest solely on a limited, flawed academic study¹ (the “N.C. State Study” or the “Study”) that found “biased” outcomes in the spam filtering of three major email services, including Gmail. Yet the Study’s own researchers acknowledged multiple limitations in the Study’s parameters and ultimately concluded that they had “*no reason to believe* that there were deliberate attempts from these email services to create these biases to influence the voters.”² Moreover, a lead author of the Study has since stated that it is being mischaracterized, telling the Washington Post: “Gmail isn’t biased like the way it’s being portrayed[.]”³

The Complaint’s speculation that political bias motivates Google’s spam filters is simply false. Complainants do not dispute that Gmail is a commercial product, and its spam filters are one of a number of features that Gmail offers to enable more than 1.5 billion users to be more secure and efficient in their use of the product. The Commission has routinely found that *bona fide* commercial activities are not contributions because a contribution must be made for the purpose of influencing an election, and activities undertaken for reasons other than influencing an election fall outside the Federal Election Campaign Act’s (“FECA” or the “Act”) ambit altogether. *See* analysis *infra* Section III.A.1. Indeed, on

¹ North Carolina State University’s Department of Computer Science, “A Peek into the Political Biases in Email Spam Filtering Algorithms During US Election 2020,” published on March 31, 2022 (the “N.C. State Study” or the “Study”).

² Compl., Ex. A at 2498 (emphasis added).

³ Cristiano Lima, *Republicans Seized on a Study as Proof of Google’s Bias. Its Authors Say It’s Being Misrepresented*, WASH. POST (May 25, 2022),

<https://www.washingtonpost.com/politics/2022/05/25/republicans-seized-study-proof-googles-bias-its-authors-say-it-being-misrepresented/>.

two recent occasions, the Commission found that various features of other Google products, Google Search and YouTube, operate for the commercial purpose of enhancing the user experience and not to influence an election. MURs 7834 and 7870 (Google LLC, *et al.*). Here, as in those prior cases, Gmail’s spam filters operate solely for commercial purposes: to enhance Gmail users’ experience by fostering a secure, safe, and effective email system, which, in turn, promotes Google’s brand and financial success. Put simply: Gmail offers spam filters because Gmail users find them useful and Google seeks to put its users’ needs first.⁴

Further, Google offers its free Gmail product to all users on the same terms and conditions, using objective criteria to determine whether a given email should be classified as spam. Any person—politically affiliated or not—can open a consumer Gmail account for free. Gmail’s spam filter policies apply to all bulk senders—regardless of political affiliation and regardless of whether the sender is a political campaign or any other enterprise. Indeed, Google does not even exempt its own products from the spam filters; for example, bulk mail sent by YouTube to YouTube users’ Gmail accounts is subject to the same spam filters as bulk mail from any other sender.

As Google has stated on multiple occasions,⁵ all of Google’s products are built for everyone without regard to politics or political viewpoint. As Google’s CEO, Sundar Pichai, has testified before Congress, “[w]e approach our work without political bias, full stop. To do otherwise would be contrary to both our business interests and our mission, which compels us to make information accessible to every type of person, no matter where they live or what they believe.”⁶

For these reasons, the Complaint—and the Study on which it is solely based—fails to support or establish a violation under the Act.⁷ Moreover, the allegations are vague, speculative, and draw unwarranted legal conclusions. Accordingly, the allegations do not warrant an investigation, and the Commission should find no reason to believe that a violation has occurred and dismiss the Complaint.

I. THE COMPLAINT

The Complainants allege that Google has “made illegal, corporate in-kind contributions to the Biden campaign and Democrat candidates across the country by its overwhelmingly—and indefensibly—disproportionate suppression of Republican candidate emails.” Compl. at 2.

⁴ *Ten Things We Know To Be True*, GOOGLE, <https://about.google/philosophy/> (setting out Google’s philosophy, where the first item is to focus on the user, stating: “Since the beginning, we’ve focused on providing the best user experience possible.”).

⁵ See MUR 7870 (Google LLC, *et al.*), Response of Google LLC, at 1; MUR 7834 (Google LLC, *et al.*), Response of Google LLC, at 1; see also Neil Kumaran, *Understanding Gmail’s Spam Filters*, GOOGLE WORKSPACE (May 27, 2022), <https://cloud.google.com/blog/products/workspace/an-overview-of-gmails-spam-filters>.

⁶ *Sundar Pichai’s testimony before the Senate Commerce Committee*, GOOGLE THE KEYWORD (Oct. 28, 2020), <https://blog.google/outreach-initiatives/public-policy/sundar-pichai-testimony-senate-commerce-committee/>; see also, e.g., Shirin Ghaffary & Kurt Wagner, *Google CEO Sundar Pichai’s testimony to Congress today*, VOX (Dec. 11, 2018), <https://www.vox.com/2018/12/11/18134984/live-googleceo-congress-hearing-china-testimony-house-judiciary-committee-censored-search> (quoting Pichai as saying, “I lead this company without political bias and work to ensure that our products continue to operate that way . . . To do otherwise would be against our core principles and our business interests.”).

⁷ Guidebook for Complainants and Respondents on the FEC Enforcement Process (“FEC Guidebook”), at 13 (2012), https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf.

These allegations rely solely on a 2020 N.C. State Study, which examined three email services—Microsoft’s Outlook, Verizon’s Yahoo! Mail, and Google’s Gmail.⁸ The researchers created 34 new email accounts for each service.⁹ The Study occurred over 153 days, from July 1, 2020 through November 30, 2020 (including for 27 days *after* the election),¹⁰ and, yet, Complainants allege that the purported in-kind contributions occurred for an unspecified amount of time “during the 2020 elections,” apparently extrapolating the Study’s timeframe across the entire two-year election cycle. Compl. at 1.

The Study had two components: (1) the so-called baseline experiment, where 22 email accounts for each service were analyzed without any user preferences; and (2) the so-called interaction experiment, where only 12 email accounts for each service were studied to examine the impact of different user actions—reading the email, moving it to spam, or moving it to inbox. The Study’s authors were clear that these limited conclusions could not be further expanded to suggest any differential outcomes were deliberate, stating: “we have no reason to believe that there were deliberate attempts from these email services to create these biases to influence the voters.” Compl., Ex. A at 2498.

Despite the extremely limited nature of the Study—and the researchers’ own acknowledgement that the Study does not support a conclusion that the email services intended to influence an election—Complainants allege that it indisputably establishes that Google’s spam filters operated in a partisan manner. As a result, Complainants assert that there must have been “massive in-kind contributions to Biden’s campaign and the campaigns of scores of Democrat candidates”¹¹ and speculate that this “*presumably* had a similar effect on emails sent by the Party Committees as well.”¹² The Complaint does not identify any of the “scores” of Democratic Party candidates, other than Presidential candidate Joe Biden.¹³

Complainants further allege that “Google also provided its services to Republican senders and individual Gmail account holders on different terms and conditions than it provided other similarly situated Democrat senders and individual Gmail account holders, without reflecting any plausible commercial consideration.” *Id.* at 6. Again, the only basis the Complaint cites for this allegation is the Study.

Complainants request that the Commission authorize an investigation “to determine the amount and total recipients of Google’s illegal in-kind contributions.” *Id.*

II. FACTUAL BACKGROUND

A. Google and Gmail

Alphabet Inc., Google’s parent company, is a publicly-traded company, incorporated in Delaware with its principal place of business in Mountain View, California.¹⁴ Google is the largest of the Alphabet businesses.¹⁵ Google is a commercial company with a mission to organize the world’s information and

⁸ Compl., Ex. A at 2492. Note that subsequent to the Study, Verizon sold Yahoo!.

⁹ *Id.*

¹⁰ *Id.* at 2493.

¹¹ Compl. at 6.

¹² *Id.* at 6 n.28 (emphasis added).

¹³ Complainants instead explain that “the N.C. State Study does not identify all of the hundreds of candidates whose emails it tested.” *Id.* at 2.

¹⁴ Alphabet Inc., SEC Form 10-K (2021) at 1 (“Alphabet Form 10-K”).

¹⁵ *Id.* at 4.

make it universally accessible and useful.¹⁶ More than 1.5 billion users across the world trust Google’s products to deliver the most helpful and reliable information available on the web.¹⁷

Google is committed to building helpful products that can improve the lives of its users. Google’s product innovations have made its services widely used, and its brand is one of the most recognized in the world. Google’s core products and platforms include Android, Chrome, hardware, Gmail, Google Drive, Google Maps, Google Photos, Google Play, Search, and YouTube, each with broad and growing adoption by users around the world.¹⁸ Gmail is the world’s largest email platform because it puts users first. Given that Gmail is free for senders, spam filters are a key component of this.

In its public securities filings, Google has identified that a significant asset to its business is its “strong brands, and failing to maintain and enhance our brands would hurt our ability to expand our base of users, advertisers, customers, content providers, and other partners.”¹⁹ The filings emphasize that Google’s brands may be “negatively affected” by such factors as “third-party content shared on our platforms, data privacy and security issues and developments.”²⁰ In sum, ensuring that Gmail operates in such a way to comport with user expectations, including filtering out unwanted emails, is essential to maintaining the Gmail brand, business, and financial condition.

Paid advertising and other sponsored content on certain Google platforms, in large part, make it possible for Google to provide many products for anyone to use for free, including Google’s Gmail service. While Google does not scan or process email content for advertising purposes, users may see ads in their free Gmail accounts. Gmail is also a foundational component of the “Google Workspace” product, which bundles a set of secure collaboration and productivity apps created for businesses of all sizes and which can be purchased for a fee.²¹ More than five million paying businesses use Gmail in the workplace.²²

B. Spam Filtering

More than 1.5 billion people use Gmail each month to send and receive email, and Gmail’s spam filters are important to its users.²³ Roughly half of all email traffic across the Internet consists of unwanted spam.²⁴ Without such filtering, the volume of spam reaching inboxes would be overwhelming. All major email services use spam filtering to provide a better experience for their users.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 12.

²⁰ *Id.*

²¹ *How Teams of All Sizes Connect, Create, and Collaborate*, GOOGLE WORKSPACE, <https://workspace.google.com/>.

²² Neil Kumaran, *Spam Does Not Bring Us Joy—Ridding Gmail of 100 Million More Spam Messages with TensorFlow*, GOOGLE WORKSPACE (Feb. 6, 2019), <https://cloud.google.com/blog/products/g-suite/ridding-gmail-of-100-million-more-spam-messages-with-tensorflow/>.

²³ *Id.*

²⁴ See Tatyana Kulikova & Tatyana Shcherbakova, *Spam and Phishing in 2021*, SECURELIST BY KASPERSKY (Feb. 9, 2022), <https://securelist.com/spam-and-phishing-in-2021/105713/> (“On average, 45.56% of global mail traffic was spam in 2021.”); Tatyana Kulikova, Tatyana Shcherbakova, & Tatyana Sidorina, *Spam and Phishing in 2020*, SECURELIST BY KASPERSKY (Feb. 15, 2021), <https://securelist.com/spam-and-phishing-in-2020/100512/> (“The share of spam in global email traffic in 2020 . . . averag[ed] 50.37%.”); Maria Vergelis, Tatyana Shcherbakova, Tatyana Sidorina, & Tatyana Kulikova, *Spam and Phishing in 2019*, SECURELIST BY

Just as Gmail’s terms of service and policies apply to every user and advertiser, Gmail’s spam filter policies apply to emails from all senders—including Google—whether they are politically affiliated or not. Google’s spam filters detect and filter over 99.9% of spam, phishing, and malware from ever reaching users’ inboxes.²⁵ Gmail’s spam filters block nearly 10 million spam emails every minute.²⁶ Gmail’s filtering capabilities and security protections are built to give users the best overall Gmail experience by delivering the emails they want to see.²⁷ Prioritizing Gmail’s users is not only integral to Google’s purpose, but is how Google continues to grow.

From its inception, Gmail sought to assist users with reporting suspected spam and then filtering it.²⁸ Gmail did so in recognition of the fact that, each day, every Gmail user receives myriad types of emails—messages from friends, social notifications, deals and offers, confirmations and receipts, and large amounts of unwanted and unsolicited messages—all of which compete for the user’s attention and can make it harder for the user to utilize their inbox efficiently.

Gmail employs a number of filters that determine what gets marked as spam. Gmail describes these signals in its May 27, 2022 blog post, “Understanding Gmail’s Spam Filters,” as follows: “These filters look at a variety of signals, including characteristics of the IP address, domains/subdomains, whether bulk senders are authenticated, and user input. User feedback, such as when a user marks a certain email as spam or signals they want a sender’s emails in their inbox, is key to this filtering process, and our filters learn from user actions.”²⁹ The Study did not examine IP addresses, domains/subdomains, whether bulk senders are authenticated or other key factors. As a result, the Study cannot be said to measure how the spam filters work in the vast majority of cases.

One of the most important factors in the operation of spam filtering is the user’s preferences. The user’s actions teach Gmail how best to sort the received email based on the user’s preferences. Users flag emails as spam for a variety of reasons, which may include not knowing they subscribed to a mailing list, the amount and frequency of emails, or simply cleaning up a cluttered inbox. For example, if a user moves one message to the Spam folder, future emails from that sender generally are filtered to that user’s Spam folder. And if a user adds a sender to their contact list, future messages from that email address generally will be placed in the user’s inbox, except, for example, in cases in which malware is detected.

Just as Google aims to keep emails its users do not want to receive out of their inboxes, Google also aims to make sure users receive emails they wish to receive by placing these emails in the user’s inbox. As noted above, Google’s systems block more than 99.9% of spam phishing and malware.³⁰

KASPERSKY (Apr. 8, 2020), <https://securelist.com/spam-report-2019/96527/> (“The share of spam in mail traffic in 2019 increased . . . to 56.51%.”).

²⁵ *Choose Your Google Workspace Pricing Plan*, GOOGLE WORKSPACE, <https://workspace.google.com/pricing.html> (last visited June 4, 2022); Kumaran, *supra* note 5.

²⁶ *Email That Keeps Your Private Information Safe*, GOOGLE SAFETY CTR., <https://safety.google/gmail/#:~:text=Email%20that,million%20spam%20emails%20every%20minute>.

²⁷ Kumaran, *supra* note 5.

²⁸ Tom Holman, *Hitting send on the next 15 years of Gmail*, GOOGLE THE KEYWORD (Apr. 1, 2019), <https://www.google.com/url?q=https://blog.google/products/gmail/hitting-send-on-the-next-15-years-of-gmail/&sa=D&source=docs&ust=1655220562006688&usg=AOvVaw3ElgJTdGGY3G3dHkOjjake>.

²⁹ Kumaran, *supra* note 5.

³⁰ *Id.*

Google works hard to help bulk senders understand how to maximize deliverability (without providing a roadmap for spammers). Key components of this effort include the publicly available Bulk Sender Guidelines,³¹ Postmaster Tools,³² and a best practices learning module.³³ Google provides these easily accessible resources to educate the public—including bulk senders—on steps they can take to maximize inboxing rates. Inboxing rate refers to the percentage of emails sent by a bulk sender that are filtered directly into an inbox.

Other examples of important signals to the spam filters are the IP addresses and domains used to send emails. The Bulk Sender Guidelines explain that, to reduce the chances that messages from their domains are sent to spam or blocked by Gmail, bulk senders should take technical steps regarding their IP addresses, like setting up valid “reverse DNS records” or a “Pointer (PTR) record.”³⁴ These are querying techniques to determine if a domain name is associated with an IP address and help reduce the chance that messages from the sender’s domain are sent to spam or blocked by the Gmail spam filters. Google also recommends that bulk senders send all messages from the same IP address to avoid incorrect spam filtering. None of these sender-controlled settings were considered in the N.C. State Study.³⁵

III. LEGAL ANALYSIS

The Commission should find no reason to believe a violation has occurred because the Complaint fails to describe a violation of FECA.³⁶ Further, the claims are vague and speculative and do not state sufficient specific facts, which, if proven, would constitute a violation of FECA.

The Act requires the Commission to find “reason to believe” that a person has committed a FECA violation before it may initiate an investigation.³⁷ “The Commission may find ‘reason to believe’ only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA.”³⁸

The Commission may find “no reason to believe” if “the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or, even if the allegations were true, would not constitute a violation of the law.”³⁹ A “no reason to believe” finding is appropriate where the allegation “is so vague that an

³¹ *Prevent Mail to Gmail Users from Being Blocked or Sent to Spam*, GMAIL HELP, <https://support.google.com/mail/answer/81126?hl=en> (“Bulk Sender Guidelines”).

³² *Postmaster Tools*, GMAIL, <https://gmail.com/postmaster/>.

³³ *Best Practices: Send Emails to Gmail Users*, GOOGLE TRAINING CTR., https://civicsresources.withgoogle.com/training-center/amplify/lesson-7/?_sm_au_=isVknNWP9V1nRWNB2RNkKQT82pFc.

³⁴ *Bulk Sender Guidelines*, *supra* note 31.

³⁵ *See* Compl., Ex. A at 2495–96.

³⁶ FEC Guidebook, *supra* note 7, at 13.

³⁷ 52 U.S.C. § 30109(a)(2).

³⁸ MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, *et al.*), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas (“Statement of Reasons”), at 1–2; *see also* MUR 5467 (Michael Moore), First Gen. Counsel’s Rpt., at 5 (citing MUR 4960) (“Purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find a reason to believe that a violation of the FECA has occurred.”).

³⁹ *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12545 (Mar. 16, 2007), https://www.fec.gov/resources/cms-content/documents/notice_2007-6.pdf.

investigation would be effectively impossible” or where the complaint “fails to describe a violation of the Act.”⁴⁰

A. The Complaint Fails To Describe a Violation of the Act.

1. *The Commission has long viewed activities undertaken for a commercial purpose as not for the purpose of influencing an election and not contributions, even if there is a benefit to a candidate.*

The Act prohibits corporations from making contributions in connection with any election. 52 U.S.C. § 30118(a). Under the Act, a “contribution” means “anything of value made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A).

That a contribution must be “for the purpose of influencing” an election is the foundational principle upon which the Act’s scope and the Commission’s jurisdiction is based. *See Buckley v. Valeo*, 424 U.S. 1, 60, 77 (1976) (affirming the determination that the Act, “if narrowly construed, [] is within constitutional bounds”). The Commission may consider the totality of the circumstances to assess whether an activity would be objectively perceived as an intentional attempt to influence an election.⁴¹ If the “activity in question . . . appear[s] to have any specific and significant non-election related aspects that might distinguish it from election influencing activity,” then the activity is not done for the purpose of influencing an election.⁴²

The term “anything of value” includes “all in-kind contributions.” 11 C.F.R. § 100.52(d).⁴³ In-kind contributions include the “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.” *Id.*

The Commission has concluded that a vendor providing services to political committees will not make a contribution for the purpose of influencing an election when its business activity “reflects commercial considerations and does not reflect considerations outside of a business relationship.” Advisory Opinion (“AO”) 2012-31 (AT&T), at 4. A commercial vendor need not make its services available to committees representing all political ideologies, but rather may establish objective business criteria to protect the commercial viability of its business without making contributions to the committees that meet those criteria.⁴⁴

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

⁴⁰ *Id.* at 12546.

⁴¹ *See, e.g.*, AO 1990-05 (Mueller); AO 1983-12 (National Conservative PAC), at 4 (“The purpose and functions of an organizational entity are material and relevant to the Commission’s characterization of the underlying purpose of a specific activity or program of that entity.”).

⁴² AO 1983-12, at 4.

⁴³ A contribution may also include expenditures made in cooperation with or with the consent of a candidate. *Buckley v. Valeo*, 424 U.S. 1, 78 (1976). Complainants do not allege that Google’s spam filters were made in cooperation or consent with any candidate, and neither the Complaint nor the N.C. State Study on which it relies include any facts evidencing any such conduct.

⁴⁴ *See, e.g.*, MUR 7870 (Google LLC, *et al.*), First Gen. Counsel’s Rpt., at 7; AO 2012-26 (Cooper for Congress, *et al.*), at 10 (finding no contribution where involvement in text message fundraising programs would be subject to criteria that was “objective and . . . commercially reasonable”).

30118(a).⁴⁵ This is true even if a candidate benefited from the commercial activity.⁴⁶

The Commission has routinely found that the operation of technology companies' policies and procedures for regulating content and users do not create a prohibited in-kind contribution because those policies have a *bona fide* commercial purpose. *See, e.g.*, MUR 7870 (Google LLC, *et al.*), Factual & Legal Analysis, at 8 (finding Google's filtering of Internet content "to provide a more attractive service to users" constituted *bona fide* commercial activity); MUR 7834 (Google LLC, *et al.*), Factual & Legal Analysis, at 11–14 (finding that the actions of Google, Facebook, and Twitter constituted *bona fide* commercial activity when all three enforced their content policies with respect to a PAC "to protect their brands or improve the usefulness of their products"); MUR 7811 (Reddit, Inc.), Legal & Factual Analysis, at 6–8 (finding that Reddit acted with reasonable commercial considerations in mind, rather than to influence an election, when it removed content that violated its Content Policy because Reddit explained that its platform could "only exist if we operate by a shared set of rules" and that users should expect privacy and safety); MUR 7807 (Snap Inc., *et al.*), Factual & Legal Analysis, at 8–10 (finding Snap acted for commercial reasons when it removed President Trump from its platform because Trump's spread of misinformation violated its Community Guidelines, which promoted Snap's "values-driven business model"); MURs 7812, 7825, 7869 (Facebook, Inc., *et al.*), Factual & Legal Analysis, at 13–15 (finding Facebook acted in its commercial interest when it applied its fact-checking program to posted articles that potentially contained misinformation because misinformation could harm its community and business); MURs 7821, 7827, 7868 (Twitter, Inc., *et al.*), Factual & Legal Analysis, at 13–14 (finding Twitter acted for the commercial purpose of removing misinformation when it blocked users from sharing newspaper articles that appeared to have hacked and personal information).

⁴⁵ *See, e.g.*, MUR 6586 (World Wrestling Entertainment, Inc., *et al.*), Factual & Legal Analysis, at 4 (finding that the company acted with the "sole intent [] to defend its business reputation" and not for the purpose of influencing an election when its senior vice president sent a letter to a newspaper seeking a retraction of a negative article about a Senate candidate who owned and served as CEO of the company); MUR 5474 (Dog Eat Dog Films, *et al.*), First Gen. Counsel's Rpt., at 13 (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"); AO 2018-11 (Microsoft Corp., *et al.*), at 3–4 (concluding that commercially reasonable efforts to protect the reputation of Microsoft by providing election-sensitive customers with free account security services did not amount to an in-kind contribution).

⁴⁶ MUR 7024 (Van Hollen for Senate, *et al.*), Factual & Legal Analysis, at 6 (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); MUR 5485 (Conversagent, *et al.*), First Gen. Counsel's Rpt., at 8 (concluding that the chatbot program in question was "bona fide commercial activity" notwithstanding that the program appeared to convey messages favoring presidential candidate John Kerry over George W. Bush); MUR 3622 (The Clinton/Gore '92 Committee, *et al.*), First Gen. Counsel's Rpt., at 16 ("[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.") (Commission voted to approve no reason to believe recommendation).

2. *The operation of Google’s spam filters does not result in a contribution to any candidate because the filters operate for a commercial purpose and not an electoral one.*

Relying solely upon the extremely limited N.C. Study and cherry-picking select findings out of context, the Complainants allege that “[t]here are only two conceivable explanations” for the Study’s findings of disparity in spam filters: “Either Google’s [spam filter] is significantly worse than those of its major competitors, which still would hardly explain the magnitude of this disparity, or Google is putting its thumb on the scale to benefit one party’s candidates over another in violation of federal law.” Compl. at 3.

Contrary to Complainants’ assertions, Google’s spam filters are not designed to have any electoral purpose; their use is driven by commercial considerations. The filters are designed to improve the user experience, which enhances Google’s reputation and commercial success. Further, the filters incorporate a large number of objective factors, described above, the most important of which is the user’s actions with respect to an email. That the filters are driven by commercial goals and incorporate objective criteria demonstrates that the purpose is not electoral.

- a. *Google’s spam filters operate to further Google’s commercial purposes, including to enhance the user experience and Google’s brand reputation, not for electoral purposes, consistent with prior Commission findings as to Google products.*

Google’s spam filters are designed to protect users, improve the user experience, and enhance the company’s brand reputation for security, safety, and efficiency. These are commercial objectives, not electoral. In its public securities filings to shareholders, Alphabet has stated that “[p]roblematic content on our platforms, including low-quality user-generated content, web spam, content farms, and other violations of our guidelines could affect the quality of our services, which could damage our reputation and deter our current and potential users from using our products and services.”⁴⁷ Ensuring that Gmail filters out unwanted emails helps maintain the Gmail brand, business, and financial condition.

Gmail users expect robust spam filtering capabilities, and Google has worked hard to develop a system that conforms closely to user preferences. This effort is remarkably successful—of the 10 million spam emails that Google blocks every minute, Google’s spam filters detect more than 99.9% of spam, phishing, and malware.⁴⁸ The better the user experience on Gmail, the more likely users are to continue to use Gmail, which enhances Google’s commercial enterprise and brand.

The Commission has previously found that Google’s filtering of search content did not amount to a prohibited in-kind contribution because Google “operate[d] its technologies for filtering content on the Internet to provide a more attractive service to users . . . at all relevant times with a commercial purpose.” MUR 7870 (Google LLC, *et al.*), Factual & Legal Analysis, at 8. The Commission also found that YouTube’s enforcement of its generally applicable terms of service in the ordinary course was “to protect and enhance the user experience.” *Id.* at 10. As a result, the Commission concluded that Google’s enforcement of its “commercially motivated policies” as to both products (Google Search and YouTube) were intended to “improve the user experience and protect[] advertising revenue rather than influence an

⁴⁷ Alphabet Form 10-K, *supra* note 14, at 12.

⁴⁸ *Choose Your Google Workspace Pricing Plan*, *supra* note 25; Kumaran, *supra* note 5.

election,” and thus did not constitute a violation of the Act. *Id.* at 8, 11 (“the Complaint does not support an inference that Google did anything more than enforce preexisting, apolitical policies.”). The Commission reached the same conclusion regarding the operation of these same two Google products across five election cycles (2012 – 2020). MUR 7834 (Google LLC, *et al.*), Factual & Legal Analysis, at 11–14.

Similarly, the Commission found that Twitter’s suspension of an account based on the operation of algorithms that Twitter uses to detect spam did not amount to a prohibited in-kind contribution because the actions were taken in accordance with Twitter’s pre-existing spam policies that were “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.” MUR 7841 (Twitter, Inc., *et al.*), Factual & Legal Analysis, at 7.

The Commission has also concluded that protecting one’s brand reputation constitutes *bona fide* commercial activity. For example, in AO 2018-11 (Microsoft Corp.), the Commission concluded that Microsoft could provide enhanced security services for no additional cost to election-sensitive customers because its motivation was to “protect its brand reputation, which would be at risk of severe and long-term damage” if such customers were hacked.⁴⁹ Similarly, Google’s brand is centered on the safety and protection of its users and their data. An important component of that is ensuring that phishing attempts, spam, and other types of unwanted content do not flood a user’s inbox.

In sum, consistent with the Commission’s long line of similar findings as to technology companies, Google’s spam filters are designed to enhance the user experience and brand reputation, both of which are clearly *bona fide* commercial activity and not electoral.

b. Google’s spam filters incorporate objective criteria and therefore cannot be deemed to have the purpose of influencing an election.

Gmail’s spam filters are not designed to operate in a partisan manner and cannot be deemed to be for the purpose of influencing an election. Gmail’s spam filters incorporate a number of objective signals and, most importantly, user preference, to filter harmful and unwanted emails from user inboxes. *See supra* Section II.B. The filters operate in a manner that is neutral to the political affiliation of a sender and reflects user preferences. Emails sent by political actors are not subject to differential spam filter treatment based on political affiliation.

The spam filters incorporate objective criteria when filtering emails from senders. Indeed, Google does not even exempt its own email from the operation of the spam filters; for example, bulk mail sent by YouTube to YouTube users with Gmail accounts is subject to the same spam filters as bulk mail from any other sender. Google also provides guidance to senders on how to minimize having the emails they send filtered out of Gmail users’ inboxes in various resources, including its Bulk Sender Guidelines,⁵⁰ Postmaster Tools,⁵¹ and a best practices learning module.⁵² All of these resources are publicly available and therefore equally accessible to all senders without regard for political affiliation.

⁴⁹ AO 2018-11 (Microsoft Corp.), at 4.

⁵⁰ *Bulk Sender Guidelines*, *supra* note 31.

⁵¹ *Gmail Postmaster Tools*, *supra* note 32.

⁵² *Best Practices: Send Emails to Gmail Users*, *supra* note 33.

Thus, given that Google’s spam filters apply objective business criteria to determine whether an email should be filtered into spam—no matter whether the senders are politically affiliated or not—Google’s spam filters do not operate for the purpose of influencing an election.

3. *Google is not providing services subject to different terms and conditions for Republican candidates and therefore is not making a contribution to any candidate or committee.*

Complainants allege that “Google also provided its services to Republican senders and individual Gmail account holders on different terms and conditions than it provided other similarly situated Democrat senders and individual Gmail account holders, without reflecting any plausible commercial consideration.” Compl. at 6. Complainants provide no evidence or even further detail in support of this allegation.

Gmail and Google Workspace users and senders to Gmail users are subject to the same policies, without regard to political affiliation. Any person may create a free consumer Gmail account and will receive the same services.⁵³ Bulk mail senders do not even need to have or use a Gmail account. Google does not charge for sending an email to a Gmail user’s account, no matter from whom or from what type of account that email is sent. Rather, bulk mail senders are seeking to reach Google’s customers—its users of the Gmail product.

And even though Google does not charge bulk senders to send email to Gmail users, Google makes available various free resources and tools to all bulk mail senders to improve email delivery performance to Gmail users. All of these resources are publicly available and thus are equally accessible to all senders without regard for political affiliation.⁵⁴ These tools also benefit Gmail’s users, many of whom have expressed interest in receiving bulk mail.

As described above, Gmail’s spam filters apply the same policies to all senders and users, regardless of their political affiliation, identity, or purpose.

B. The Complaint is Vague, Speculative, and Draws Unwarranted Legal Conclusions.

Not only does the Complaint fail to describe a violation of the Act, but the Study upon which Complainants rely as the sole basis for their claims, by its own admission, does not and cannot be used to support a finding that there is reason to believe Google has engaged in a violation of the Act.

1. *The Complaint does not satisfy the Commission’s standards to warrant further action.*

Complainants do not assert any personal knowledge or experience giving rise to the Complaint’s allegations. Complaints that are not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented. 11 C.F.R.

⁵³ The only instance in which a fee is associated with use of Gmail is in the context of a user’s purchase of Google’s Workspace product, which includes Gmail as part of a bundle of apps created by Google for businesses. The fees associated with purchase of Google Workspace apply equally to political and non-political actors.

⁵⁴ See *Bulk Sender Guidelines*, *supra* note 31; *Postmaster Tools*, *supra* note 32; *Best Practices: Send Emails to Gmail Users*, *supra* note 33.

§ 111.4(d)(2). Relying solely on a limited and flawed Study and without any other “evidence,” Complainants speculate that partisan electoral and financial harm must have resulted from the operation of Google’s spam filters.

But vague, speculative claims such as these do not meet the Commission’s standards for evaluating a Complaint and are therefore insufficient to warrant an investigation or reason to believe. The Commission does not accept as true an “unwarranted legal conclusion from asserted facts” or “mere speculation.”⁵⁵ Rather, the Commission disregards such speculative allegations, particularly when the respondent directly refutes them. *See* MUR 4960 (Hillary Rodham Clinton, *et al.*), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas, at 3 (“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.”).

The Complainant vaguely asserts that “harm” occurred, but does not identify the basic elements of that purported harm. For example, the Complaint does not allege which candidates received a purported in-kind contribution. The Complaint merely alleges that there must have been an in-kind contribution to the Biden campaign and “hundreds of Democrat House and Senate candidates across the country,” and that the operation of Gmail’s spam filters “*presumably* had a similar effect on emails sent by the Party Committees,” even though Party Committee emails were never tested as part of the N.C. State Study. Compl. at 6 n.28 (emphasis added).

In addition, the Complainants allege that “Republican candidates have been financially harmed by Gmail’s [spam filtering tools], while at the same time, Democrat candidates have financially and politically benefitted.” *Id.* at 6. The study provides no evidence to support the Complaint’s speculation that Republican candidates raised fewer contributions or fared worse in the election than they would have otherwise but for the operation of Gmail’s spam filters.

These vague, speculative claims are insufficient to warrant an investigation. The Commission should therefore find no reason to believe and dismiss the complaint.

2. *The study upon which the Complaint relies is flawed and does not support the Complainants’ baseless assertions.*

The Complainants rely solely on the flawed results of the N.C. State Study, but that Study falls short of providing a basis for their claims.

First, a lead author of the Study has since publicly stated that those who claim the Study demonstrates political bias are mischaracterizing it. He told the Washington Post: “Gmail isn’t biased like the way it’s being portrayed . . . I’m not advocating for Gmail or anything. I’m just stating that when we take the observation out of a study, you should take all of the observations, not just cherry-pick a few and try to use them.”⁵⁶

Second, the Study itself states that the apparent biases identified in the limited study are insufficient to draw a conclusion of any deliberate attempt to influence, stating: “we have no reason to believe that there

⁵⁵ *See* MUR 7868 (Twitter, Inc., *et al.*), Factual & Legal Analysis, at 13 (rejecting allegations as “vague, speculative, and otherwise not supported by the available information”); MUR 4960 (Hillary Rodham Clinton, *et al.*), Statement of Reasons, at 1–2.

⁵⁶ Lima, *supra* note 3.

were deliberate attempts from these email services to create these biases to influence the voters.” Compl., Ex. A at 2498.

Third, the N.C. State Study is unreliable for multiple reasons, including the following:

1. The data in the N.C. State Study is too small to draw any meaningful conclusions. Gmail has 1.5 billion users, yet the study created 34 Gmail addresses, of which 22 were controls,⁵⁷ and examined them for a mere 153 days, 27 of which were post-election.⁵⁸
 - a. The N.C. State Study explains in a section on its “Limitations” that because the data is limited to a five-month period, “we cannot make inferences about the behaviors of [spam filter algorithms] in general.” *Id.*
 - b. The portion of the N.C. State Study designed to test how user preferences altered the operation of the spam filters (the “Interaction Experiment”) was based on only 12 Gmail accounts, which were then evenly divided into three categories: (1) read all emails; (2) move all emails from inbox to spam folder; and (3) move all emails from spam folder to inbox. *Id.* at 2493. As a result, any conclusions drawn based on the impact of user preferences were based on information from an exceedingly small sample of accounts that were established expressly for the N.C. Study for a short duration.
2. The researchers acknowledge that the “ideal way” to determine whether there is bias based on political affiliation is to compare identical emails, one sent by a Republican campaign domain to one sent by a Democrat campaign domain; however, the researchers state that this kind of apples-to-apples comparison is “impractical” and “beyond our control.” *Id.* at 2495.
3. The N.C. State Study acknowledges in its “Limitations” section that there are various key factors beyond the researchers’ control that affect spam rates: “i) how many emails these campaigns sent out; ii) how long the campaigns have been active; and, iii) how many users marked a specific email as spam? Thus, we cannot determine the extent to which these factors influence spam percentages.” *Id.* at 2498. Given that all these parameters—and particularly user preferences—are factors in the operation of Gmail’s spam filters, these limitations prevent any extrapolation to the real world from the operation of the researchers’ created accounts. *See, e.g.,* Spam Filtering *infra* Section II.B.
4. The Study did not take into account each candidate’s and committee’s differing IP address, domain, and other email infrastructure and sending strategies (volume, frequency, narrow versus broad lists, purchased versus organic lists, etc.), which can significantly impact deliverability and inboxing rates. For example, if a sender’s domain is misconfigured, all or the vast majority of emails sent by that sender will be automatically sent to spam. Moreover, Google recommends that senders take technical steps regarding their IP addresses, such as setting up valid “reverse DNS records” or a “Pointer (PTR) record,” and that bulk senders send all messages from the same IP address to avoid incorrect spam filtering. None of these sender-controlled settings were

⁵⁷ Compl., Ex. A at 2494.

⁵⁸ *Id.* at 2493.

considered in the Study.⁵⁹ Given the small sample size used, even one of these elements could drastically affect the Study's results.

As a result, the N.C. State Study cannot “reasonably give[] rise to a belief in the truth of the allegations presented.” *See* MUR 4960 (Hillary Rodham Clinton, et al.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas, at 1 (citing 11 C.F.R. § 111.4(d)(2)). Complainants are thus engaged in “mere speculation” based on the results of the N.C. State Study and drawing an unwarranted legal conclusion that Google has engaged in a violation of the Act.

IV. CONCLUSION

For the reasons stated above, the Complaint fails to describe a violation and the Commission should find no reason to believe that Google violated the Act and dismiss the Complaint.

Sincerely,



Claire Rajan
Partner

⁵⁹ *See id.* at 2495–96.