

**FEDERAL ELECTION COMMISSION**  
**FIRST GENERAL COUNSEL’S REPORT**

**MUR: 7641**

DATE COMPLAINT FILED: Sept. 6, 2019

DATE OF NOTIFICATION: Sept. 9, 2019

LAST RESPONSE RECEIVED: Nov. 4, 2019

DATE ACTIVATED: Nov. 22, 2019

EXPIRATION OF SOL: Aug. 4, 2024

ELECTION CYCLE: 2020

**COMPLAINANT:** Darin Knepper**RESPONDENT:** Facebook, Inc.**RELEVANT STATUTES** 52 U.S.C. § 30104(c)(1)**AND REGULATIONS:** 52 U.S.C. § 30118(a)

11 C.F.R. § 109.20

11 C.F.R. § 109.21

11 C.F.R. § 114.2(b)

11 C.F.R. § 114.10(b)(1)

**INTERNAL REPORTS CHECKED:** None**FEDERAL AGENCIES CHECKED:** None**I. INTRODUCTION**

The Complaint alleges that Facebook, Inc., violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by appending “counterposts” to certain users’ Facebook posts that were critical of candidates Beto O’Rourke and Ilhan Omar to correct apparent misinformation contained in those original posts.<sup>1</sup> The Complaint argues that the counterposts were prohibited in-kind corporate contributions by Facebook to the candidates because Facebook

---

<sup>1</sup> Compl. at 1 (Sept. 6, 2019). A version of the Complaint with labeling and pagination for the attachments has been added to the relevant folder for this matter.

1 “attempt[ed] to assist a political candidate in his or her campaign.”<sup>2</sup> Facebook responds that the  
2 counterposts were part of an official fact-checking program and followed standard, neutral  
3 procedures.<sup>3</sup> According to Facebook, the program is non-partisan and was developed for  
4 business reasons to create a better user experience.<sup>4</sup> Facebook asserts that the counterposts  
5 contained no election-related content and were not made for the purpose of influencing an  
6 election.<sup>5</sup>

7 As explained below, based on the available information concerning the counterposts at  
8 issue, Facebook’s conduct does not satisfy the meaning of an in-kind contribution, particularly as  
9 either a coordinated communication or coordinated expenditure, given the lack of any indication  
10 that Facebook coordinated with the candidates. In addition, the counterposts do not appear to  
11 satisfy the meaning of independent expenditure because they do not expressly advocate for the  
12 election or defeat of any candidate.

13 Therefore, we recommend that the Commission find no reason to believe that Facebook  
14 violated 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(b) by making prohibited in-kind corporate  
15 contributions. In addition, we recommend that the Commission find no reason to believe that  
16 Facebook violated 52 U.S.C. § 30104(c)(1) and 11 C.F.R. § 114.10(b)(1) by failing to report  
17 independent expenditures, and close the file.

---

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

<sup>3</sup> Resp. at 2-5 (Nov. 4, 2019).

<sup>4</sup> *Id.* at 4, 11.

<sup>5</sup> *Id.* at 7-12.

1     **II.     FACTS**

2             Complainant alleges that “Facebook has been inserting counterposts following posts that  
3     contain negative information about Democratic political candidates in [his] Facebook account  
4     feeds.”<sup>6</sup> According to the Complaint, the counterposts dispute the accuracy of information  
5     contained in the posts to “assist” the candidates.<sup>7</sup> The Complaint does not provide a specific  
6     legal theory under which the counterposts should be found impermissible but generally argues  
7     that the alleged conduct “constitutes unreported, in-kind campaign contributions by the Facebook  
8     corporation.”<sup>8</sup> Attached to the Complaint are two example counterposts that consist of an initial  
9     post by a Facebook friend of the Complainant that the Complainant characterizes as critical of a  
10    candidate, followed by official Facebook counterposts (or fact-checks) disputing the accuracy of  
11    the post and a link to an article explaining why the information in the original post is purportedly  
12    false.

13            The first example involves Ilhan Omar, a 2020 candidate for Minnesota’s 5th  
14    Congressional District. The original post contains a photo of Omar alongside another photo of a  
15    piece of meat with a slash mark over it.<sup>9</sup> The caption reads: “Ilhan Omar Proposes Tax on Pork  
16    Products, ‘So Costly Nobody Will Buy them Anymore.’”<sup>10</sup> Facebook appended a “Related  
17    Articles” section below the original post with a link to an article by LeadStories.com (with a blue  
18    “FactCheck” banner appearing directly above the link).<sup>11</sup> The title of the article is “Fake News:

---

6            Compl. at 1.

7            *Id.*

8            *Id.*

9            *Id.*, Attach. 1 at 1 (undated post by Facebook user Deb Watson).

10          *Id.*

11          *Id.*

1 Ilhan Omar Did NOT Propose Tax on Pork Products ‘So Costly Nobody Will Buy Them  
 2 Anymore.’”<sup>12</sup> The article, hosted on the Lead Stories website, explains that the information in  
 3 the original post was not real and originally published by BustaTroll.org, a liberal satire  
 4 website.<sup>13</sup>

5 The second example involves Beto O’Rourke, former presidential candidate. The  
 6 original post contains a purported photo of O’Rourke, naked, with large, provocative phrases  
 7 written on his body.<sup>14</sup> Above the photo is written: “REMIND EVERYONE OF THIS PIC  
 8 WHEN THIS FOOL SAYS HE IS GONNA RUN FOR PRESIDENT. THIS IS ROBERT  
 9 O’ROURKE (beto).”<sup>15</sup> As it did with the Omar post, Facebook appended a Related Articles  
 10 section directly below the original post.<sup>16</sup> It appears there were two articles labeled with the blue  
 11 “FactCheck” banner, one from FactCheck.org, the other from Lead Stories.<sup>17</sup> The  
 12 FactCheck.org article is titled: “Viral Image Does Not Show O’Rourke – FactCheck.org.” The  
 13 article, hosted on FactCheck.org, explains that the person in the photo is not O’Rourke.<sup>18</sup> It  
 14 states that the person does not resemble O’Rourke and “reverse image searches” trace the image

---

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

<sup>13</sup> Maarten Schenk, *Fake News: Ilhan Omar Did NOT Propose Tax on Pork Products ‘So Costly Nobody Will Buy Them,’* LEAD STORIES, May 27, 2019 (<https://hoax-alert.leadstories.com/3470532-fake-news-ilhan-omar-proposes-tax-on-pork-products-so-costly-nobody-will-buy-them-anymore.html>).

<sup>14</sup> Compl., Attach. 2 at 1 (August 4, 2019, post by Facebook user David Mills).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 4-7.

<sup>17</sup> *Id.* (showing Lead Stories article in partial screenshot of Related Articles section); *see id.* at 2-3 (original poster, David Mills, identifying FactCheck.org article in the comments section of his post in reaction to another user complaining that Facebook had appended a counterpost); Resp. at 5 (indicating that both FactCheck.org and Lead Stories published articles in response to the post).

<sup>18</sup> Angelo Fichera, *Viral Image Does Not Show O’Rourke*, FACTCHECK.ORG, Mar. 15, 2019 (<https://www.factcheck.org/2019/03/viral-image-does-not-show-orourke/>)

1 to a June 2016 gay pride parade in Greece.<sup>19</sup> The Lead Stories article similarly traces the photo  
2 to a gay pride parade in Greece.<sup>20</sup>

3 In its Response, Facebook asserts that the counterposts at issue “were made in response  
4 to two posts by Facebook users, which third-party organizations independently opted to fact  
5 check as part of Facebook’s broader and well-publicized program to combat misinformation on  
6 its platform.”<sup>21</sup> Facebook argues that the counterposts do not violate the Act because they do not  
7 satisfy the definition of “coordinated communications” under the Commission’s three-part test,  
8 and were not made for the purpose of influencing an election.<sup>22</sup> The Response attaches official  
9 materials that describe the fact-checking program, summarized below.

10 The program relies on a predictive computer algorithm to identify posts that may contain  
11 misinformation, based on a range of signals, including user comments questioning accuracy and  
12 whether the post was made by a source that has previously spread false news.<sup>23</sup> In addition, the  
13 human fact-checkers may identify potential misinformation themselves.<sup>24</sup> If a post is identified

---

<sup>19</sup> *Id.* According to the FactCheck.org article, O’Rourke wasn’t in Greece at the time, and it links to a video of O’Rourke speaking at a high school graduation. *Id.*

<sup>20</sup> Alan Duke, *Fake News: Young Beto O’Rourke NOT Photographed With “Feminist Atheist Vegan Naturalist Ecologist Queer Slut” Written On Body*, LEAD STORIES, Mar. 17, 2019 (<https://hoax-alert.leadstories.com/3470267-fake-news-70.html>).

<sup>21</sup> Resp. at 2 (Nov. 11, 2019); *see also id.* at 4 (noting that the fact-checking program is “not limited to political subjects” and covers “a broad range of topics,” and citing examples of dispelled misinformation such as a purported cure for a stroke, a fake war victim, and a fake money-making opportunity from NASA).

<sup>22</sup> *Id.* at 2.

<sup>23</sup> *See* Resp. at 3; *id.*, Ex. A at 2 (*Hard Questions: How is Facebook’s Fact-Checking Program Working?*, FACEBOOK NEWSROOM (June 14, 2018) (<https://about.fb.com/news/2018/06/hard-questions-fact-checking/>)), Ex. B. at 1 (*Fact-Checking on Facebook: What Publishers Should Know*, FACEBOOK BUSINESS: MEDIA AND PUBLISHER HELP (version from Oct. 24, 2019) (<https://www.facebook.com/help/publisher/182222309230722>)), Ex. F at 2 (*Expanding Fact-Checking to Photos and Videos*, FACEBOOK NEWSROOM (Sept. 13, 2018) (<https://about.fb.com/news/2018/09/expanding-fact-checking/>)).

<sup>24</sup> Resp., Ex. H at 2 (*The Hunt for False News*, FACEBOOK NEWSROOM (Oct. 19, 2018) (<https://about.fb.com/news/2018/10/inside-feed-hunt-false-news-october-2018/>)).

1 as potentially false, it is placed into a digital queue where it is available for review by the third-  
2 party fact-checkers.<sup>25</sup> The fact-checkers review the posts, rate their accuracy, and submit an  
3 explanation to dispel false content (either by drafting an article to explain why a given post  
4 contains misinformation or linking to a pre-existing article).<sup>26</sup> If a post is identified as false,  
5 Facebook appends a Related Articles section with a blue “FactCheck” banner and a link to the  
6 fact-checker’s explanatory article, as illustrated by the above examples.<sup>27</sup> In addition, the post is  
7 “demoted” by reducing its distribution and making it appear lower in other users’ news feeds.<sup>28</sup>  
8 Facebook provides an option for publishers to contact fact-checkers to dispute the rating or offer  
9 a correction.<sup>29</sup>

10 Facebook employs third-party fact-checkers from a variety of organizations that are  
11 independent from Facebook, including the Associated Press, Check Your Fact, FactCheck.org,  
12 Lead Stories, PolitiFact, and Science Feedback.<sup>30</sup> The Response describes these entities as  
13 “partners” with Facebook, and it is unclear from the available materials whether Facebook pays  
14 the fact-checkers to review posts that may contain misinformation or to write/host the articles

---

<sup>25</sup> Resp. at 3; *see id.*, Ex. A at 2, Ex. B at 1, Ex. H at 2.

<sup>26</sup> Resp. at 3; *id.*, Ex. H at 2, Ex. B at 2. Rating options for the accuracy of a post include: false, mixture, true, false headline, not eligible, satire, opinion, prank generator, and not rated. Resp., Ex. B at 2-3.

<sup>27</sup> Resp. at 3; *id.*, Ex. A at 2. At the time when the posts at issue were made, Facebook employed these procedures to label false content. The Response, however, noted Facebook’s plans to implement an alert system whereby “content across Facebook that has been rated false by a third-party fact-checker will start to be more prominently labeled,” and that the “news labels will be shown on top of false and partly false photos and videos, and will link out to the assessment from the fact-checker.” Resp. at 3 n.9; *id.*, Ex. E at 6-7 (*Helping to Protect the US Elections*, FACEBOOK NEWSROOM (Oct. 21, 2019) (<https://about.fb.com/news/2019/10/update-on-election-integrity-efforts/>)). A review of the Facebook platform confirms that Facebook has since adopted this method to identify false content.

<sup>28</sup> Resp., Ex. A at 2, Ex. B at 3.

<sup>29</sup> Resp., Ex. A at 3, Ex. B at 4-6.

<sup>30</sup> Resp. at 4.

1 that dispel misinformation.<sup>31</sup> In order to partner with Facebook, such organizations must be  
2 certified by the International Fact-Checking Network, a unit of the Poynter Institute, which is a  
3 non-profit journalism school and research organization.<sup>32</sup> The certification process evaluates  
4 applicants based on a set of criteria including non-partisanship and fairness, transparency of  
5 sources, transparency of funding and organization, transparency of methodology, and an open  
6 and honest corrections policy.<sup>33</sup> It appears that, from the certified organizations, Facebook has  
7 discretion in selecting which will serve as partners in the fact-checking program.<sup>34</sup>

### 8 **III. LEGAL ANALYSIS**

9 Based on the record before the Commission, it does not appear that the counterposts at  
10 issue generated by Facebook's fact-checking program were coordinated communications or  
11 coordinated expenditures and, as such, there is no basis from the given facts to conclude that  
12 Facebook made in-kind contributions to the candidates. Further, it does not appear that the  
13 counterposts were independent expenditures, and therefore Facebook had no reporting obligation

---

<sup>31</sup> *Id.* In 2017, the Poynter Institute reported that Facebook's fact-checking "partners" were "receiving about \$100,000 annually." Daniel Funke, *It's Been a Year Since Facebook Partnered With Fact-Checkers. How's it Going?* (Dec. 15, 2017), <https://www.poynter.org/fact-checking/2017/its-been-a-year-since-facebook-partnered-with-fact-checkers-hows-it-going/> (last accessed Feb. 13, 2020). FactCheck.org's website shows that it receives "funding" from Facebook on a regular basis "as part of Facebook's initiative to debunk viral deceptions circulating on the social media site." See FactCheck.org – Our Funding, <https://www.factcheck.org/our-funding/> (last accessed Feb. 13, 2020). We do not have information, however, tying any payments to specific activities in the fact-checking process.

<sup>32</sup> See About – Poynter, <https://www.poynter.org/about/> (last accessed Feb. 13, 2020).

<sup>33</sup> Resp. at 4; *id.*, Ex. A at 2, Ex. B at 1, Ex. D at 2 (*Hard Questions: What's Facebook's Strategy for Stopping False News?*, FACEBOOK NEWSROOM (May 23, 2018) (<https://about.fb.com/news/2018/05/hard-questions-false-news/>)). In addition, Facebook requires fact-checkers to agree to the International Fact-Checking Network's code of conduct. Resp. at 4; ICFN Code of Principles, <https://ifcncodeofprinciples.poynter.org>.

<sup>34</sup> Aaron Rugar, *Facebook's Controversial Fact-Checking Partnership With a Daily Caller-Funded Website, Explained*, VOX, May 6, 2019 (<https://www.vox.com/2019/5/2/18522758/facebook-fact-checking-partnership-daily-caller>); Ali Breland, *AOC Asked Mark Zuckerberg About Facebook's Fact-Checking Process. He Didn't Give Her the Whole Truth*, MOTHER JONES, Oct. 23, 2019 (<https://www.motherjones.com/politics/2019/10/aoc-zuckerberg-facebook-congress-daily-caller-fact-check-dodge>). The official materials attached to the Complaint do not fully explain the selection process.

1 to the Commission. For these reasons, there is no basis to conclude that Facebook violated the  
2 Act.

3 **A. There is No Basis to Conclude that Facebook Made In-Kind Contributions**

4 The Act prohibits corporations from making contributions to federal candidates, and  
5 likewise bars political committees, other than independent expenditure-only political committees  
6 and committees with hybrid accounts, from knowingly accepting corporate contributions.<sup>35</sup> The  
7 term “contribution” includes “all in-kind contributions.”<sup>36</sup> In-kind contributions include, *inter*  
8 *alia*, coordinated communications, subject to a three-part test codified at 11 C.F.R. § 109.21, and  
9 coordinated expenditures, defined at 11 C.F.R. § 109.20(a).<sup>37</sup>

10 Under the Commission’s coordinated communications regulation, the communication at  
11 issue must: (1) be paid for by a third party; (2) satisfy a “content” standard; and (3) satisfy a

---

<sup>35</sup> 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b), Note to Paragraph (b) (explaining that corporations and labor organizations may make contributions to nonconnected political committees that make only independent expenditures, or to separate accounts maintained by nonconnected political committees for making only independent expenditures).

<sup>36</sup> 11 C.F.R. § 100.52(d); *see also* 52 U.S.C. § 30101(8)(A) (defining contribution as including “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office”).

<sup>37</sup> In-kind contributions also 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.” 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). To the extent that the Complaint can be construed as alleging that Facebook provided services to O’Rourke and Omar, Facebook contends that the fact-checking program was an “effort to combat misinformation on its platform for independent business reasons.” Resp. at 2. Facebook submitted documentation supporting this description, and there is no information that the program was otherwise intended to influence a federal election or was made in connection with a federal election. Accordingly, there is no basis to conclude that Facebook provided the candidates with any goods or services.



1 “conduct” standard.<sup>38</sup> All three prongs are required to be considered a coordinated  
2 communication and treated as an in-kind contribution.<sup>39</sup> Separately, an expenditure (for  
3 something other than a communication) is considered a coordinated expenditure and treated as  
4 an in-kind contribution if it is “made in cooperation, consultation or concert with, or at the  
5 request or suggestion of, a candidate, a candidate’s authorized committee, or a political party  
6 committee.”<sup>40</sup>

7 The Complaint asserts that Facebook’s counterposts resulted in prohibited in-kind  
8 contributions. However, it does not appear that the counterposts were coordinated  
9 communications or coordinated expenditures.

10 Applying the three-prong test for coordinated communications, it appears that the  
11 payment prong may be satisfied if Facebook paid the fact-checkers to write the articles that  
12 dispelled the misinformation contained in the Omar and O’Rourke posts. However, as noted  
13 above, the facts supplied by Facebook and our review of Facebook’s description of the program  
14 on the public record leave unclear whether Facebook paid the fact-checkers.<sup>41</sup>

---

<sup>38</sup> 11 C.F.R. § 109.21. The content standards include: (1) a communication that is an electioneering communication; (2) a public communication that disseminates, distributes, or republishes campaign materials; (3) a public communication containing express advocacy; (4) a public communication that, in relevant part, refers to a clearly identified House or Senate candidate, and is publicly distributed or disseminated 90 days or fewer before a primary, general, or special election, and is directed to voters in the jurisdiction of the clearly identified candidate; and (5) a public communication that is the functional equivalent of express advocacy. *Id.* § 109.21(c).

The conduct standards include: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; and (5) former employee or independent contractor. *Id.* § 109.21(d)(1)-(5). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

<sup>39</sup> *Id.* § 109.21(a).

<sup>40</sup> *Id.* § 109.20(a); *see also* 52 U.S.C. § 30116(a)(7)(B)(i). Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (clarifying that section 109.20(b) applies to “expenditures that are not made for communications”); *see* Advisory Op. 2011-14 at 4 (Utah Bankers Ass’n).

<sup>41</sup> The Response cites to the entities as “partners” but does not elaborate on their relationship. Resp. at 4.

1           The content prong does not appear to be satisfied. The content standards in the regulation  
2 all require a communication to be either an “electioneering communication” or a “public  
3 communication,” neither of which clearly applies to Facebook’s activities or communications  
4 here.<sup>42</sup> An electioneering communication is “any broadcast, cable, or satellite communication”  
5 that refers to a “clearly identified candidate for Federal office,” is publicly distributed within a  
6 certain time before the election, depending on the office, and meets certain requirements  
7 regarding the audience, depending on the office.<sup>43</sup> The Facebook Related Articles feature, which  
8 identified the original posts as false with a blue “fact-check” banner, as well as the articles on  
9 FactCheck.org and Lead Stories, were published on the internet, not on broadcast, cable, or  
10 satellite, and did not occur in proximity to an election, and thus were not electioneering  
11 communications.

12           A public communication is “a communication by means of any broadcast, cable, or  
13 satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or  
14 telephone bank to the general public, or any other form of general public political advertising.”<sup>44</sup>  
15 The Commission’s implementing regulation provides that public communications “shall not  
16 include communications over the Internet, except for communications placed for a fee on another  
17 person’s Web site.”<sup>45</sup> While Facebook’s counterposts are internet communications, the available  
18 information reveals that Facebook did not place them for a fee on another person’s website, it

---

<sup>42</sup> See 11 C.F.R. § 109.21(c) (content standards).

<sup>43</sup> 52 U.S.C. § 30104(f)(3) (definition of electioneering communication); 11 C.F.R. § 109.29 (same).

<sup>44</sup> 52 U.S.C. § 30101(22) (definition of public communication); 11 C.F.R. § 100.26 (same).

<sup>45</sup> 11 C.F.R. § 100.26.

1 placed them on its own website. As such, these posts do not appear to be public  
2 communications.<sup>46</sup>

3         Regardless of whether the first two prongs of the regulation are satisfied, it is clear that  
4 the conduct prong is not. Each of the conduct standards require some interaction with the  
5 candidate or campaign regarding the communication, such as a request or suggestion, substantial  
6 discussions, or use of a common vendor.<sup>47</sup> Based on the record before the Commission, there is  
7 no basis to conclude that Facebook interacted with Omar or O'Rourke about the counterposts at  
8 issue. The Complaint does not allege that Facebook had any contact with the candidates  
9 regarding the counterposts, and we are unaware of any information suggesting such contact.<sup>48</sup>  
10 Moreover, the counterposts were made in connection with an official fact-checking program.  
11 The descriptions of the program do not mention any involvement by political candidates.<sup>49</sup>

12         Separately, the available information does not satisfy the definition of coordinated  
13 expenditure — the analysis here focuses on any payments by Facebook that were “not made for  
14 communications.”<sup>50</sup> As a threshold matter, just as it is unclear whether Facebook paid the fact-

---

<sup>46</sup> To the extent that the FactCheck.org and Lead Stories articles are considered part of Facebook's own communications, it is unclear whether such articles were placed by Facebook on those other websites for a fee. As noted above, there is limited information as to whether and for what Facebook paid the fact-checkers. And even if Facebook paid the fact-checkers to review posts with potential misinformation to correct, this does not necessarily mean that Facebook paid them to write or host the specific articles. The articles in question do not indicate that they were paid for or sponsored by Facebook.

<sup>47</sup> *See id.* § 109.21(d) (content standards); *see also id.* 109.21(e) (stating that an agreement or formal collaboration “is not required for a communication to be a coordinated communication”).

<sup>48</sup> Because the Complaint does not name the candidates or their committees as respondents, and does not allege any action on their part, we did not notify them as respondents.

<sup>49</sup> Relatedly, the materials do explain that Facebook has a policy of *not* fact-checking the posts of political candidates. This decision, according to Facebook, arises out of a “fundamental belief in free expression, respect for the democratic process.” Resp., Ex. B at 2.

<sup>50</sup> Coordinated and Independent Expenditures, 68 Fed. Reg. at 425; *see* Advisory Op. 2011-14 at 4 (Utah Bankers Ass'n).

1 checkers to write the articles posted on their websites, it is unclear whether Facebook paid fact-  
2 checkers to initially review posts placed in the digital queue by Facebook's algorithm or  
3 otherwise participate in the program. However, even assuming that the fact-checkers were paid  
4 by Facebook to do something, there is nothing to suggest that Facebook made the payments "in  
5 cooperation, consultation or concert with, or at the request or suggestion of" the candidates."<sup>51</sup>  
6 Again, there are no facts from which to infer that Facebook had contact with Omar or O'Rourke  
7 or their committees, and Facebook maintains that the counterposts were made in accordance with  
8 neutral procedures that govern its fact-checking program. Accordingly, there is no basis to infer  
9 that any payments by Facebook were coordinated expenditures.

10 Therefore, because the counterposts at issue do not appear to have resulted in coordinated  
11 communications or coordinated expenditures, we recommend that the Commission find no  
12 reason to believe that Facebook violated 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(b) by  
13 making prohibited in-kind corporate contributions.

14 **B. There is No Basis to Conclude that Facebook Failed to Report Independent**  
15 **Expenditures**

16 An "independent expenditure" is an expenditure "for a communication expressly  
17 advocating the election or defeat of a clearly identified candidate" that is not coordinated with  
18 the candidate or the candidate's committee.<sup>52</sup> The term "expressly advocating" means any  
19 communication that: (1) Uses phrases or words such as "vote for," "elect," "defeat," etc., "which  
20 in context can have no other reasonable meaning than to urge the election or defeat of one or  
21 more clearly identified candidate(s)"; or (2) "When taken as a whole and with limited reference

---

<sup>51</sup> 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20(a).

<sup>52</sup> 11 C.F.R. § 100.16(a) (definition of independent expenditure); *see also* 52 U.S.C. § 30101(17) (same).

1 to external events, such as the proximity to the election, could only be interpreted by a  
2 reasonable person as containing advocacy of the election or defeat of one or more clearly  
3 identified candidate(s).”<sup>53</sup> Every person (other than a political committee) who makes  
4 independent expenditures in an aggregate amount or value in excess of \$250 during a calendar  
5 year shall file a statement with the Commission.<sup>54</sup>

6 Regarding the Omar counterpost, the linked Lead Stories article contains language  
7 critical of Trump supporters and Republicans but does so in the context of describing the  
8 BustaTroll satirical website, which originally posted the story about Omar as a satire piece. The  
9 Lead Stories article calls BustaTroll a “liberal satire website that tries to educate gullible Trump  
10 supporters and Republicans about the need to actually click and read links before sharing or  
11 liking them.”<sup>55</sup> The focus of the article, however, is to dispel misinformation by explaining that  
12 the original post about Omar was satirical and not true. There is no express advocacy.

13 As to the O’Rourke counterposts, the linked FactCheck.org article is a straightforward,  
14 factual rebuttal citing sources to correct the claim that O’Rourke is the person in the photo.<sup>56</sup>  
15 Likewise, the linked Lead Stories article seeks to dispel misinformation and does not contain any  
16 words expressly advocating for O’Rourke’s candidacy.<sup>57</sup> Finally, the “Related Articles” sections  
17 that Facebook appended to the original posts to alert users that they contained misinformation

---

<sup>53</sup> 11 C.F.R. § 100.22(a)-(b).

<sup>54</sup> 52 U.S.C. § 30104(c)(1); *see also* 11 C.F.R. § 114.10(b) (independent expenditure reporting requirements for corporations and labor organizations).

<sup>55</sup> Schenk, LEAD STORIES, May 27, 2019.

<sup>56</sup> Fichera, FACTCHECK.ORG, Mar. 15, 2019.

<sup>57</sup> Duke, LEAD STORIES, Mar. 17, 2019.

1 simply link to the FactCheck.org and Lead Stories articles along with displaying a blue “Fact-  
2 check” banner to indicate misinformation.<sup>58</sup> Again, there is no express advocacy.

3 Therefore, we recommend that the Commission find no reason to believe that Facebook  
4 violated 52 U.S.C. § 30104(c)(1) and 11 C.F.R. § 114.10(b)(1) by failing to report independent  
5 expenditures.

#### 6 **IV. RECOMMENDATIONS**

- 7 1. Find no reason to believe that Facebook, Inc., violated 52 U.S.C. § 30118(a) and  
8 11 C.F.R. § 114.2(b) by making prohibited in-kind corporate contributions;  
9
- 10 2. Find no reason to believe that Facebook, Inc., violated 52 U.S.C. § 30104(c)(1)  
11 and 11 C.F.R. § 114.10(b)(1) by failing to report independent expenditures;  
12
- 13 3. Approve the attached Factual and Legal Analysis.
- 14 4. Approve the appropriate letters; and  
15

---

<sup>58</sup> Resp., Ex. A at 1 (Related Articles section appended to Omar post), Ex. B. at 4 (Related Articles section appended to O'Rourke post).

1           5.     Close the file.  
2  
3

Lisa J. Stevenson  
Acting General Counsel

Charles Kitcher  
Acting Associate General Counsel  
for Enforcement

10  
11     2/14/2020  
12

13     Date

BY:

*Stephen Gura* <sup>CTP</sup>

Stephen Gura  
Deputy Associate General Counsel  
for Enforcement

*Claudio Pavia*

Claudio J. Pavia  
Acting Assistant General Counsel

*Elena Paoli*

Elena Paoli  
Attorney

26  
27  
28  
29