



FEDERAL ELECTION COMMISSION
Washington, DC 20463

February 4, 2022

By electronic mail to:
Christopher.babbitt@wilmerhale.com

Christopher E. Babbitt, Esq.
WilmerHale
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

RE: MUR 7641
Facebook, Inc.

Dear Mr. Babbitt:

On September 9, 2019, the Federal Election Commission notified your client, Facebook, Inc., of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On January 27, 2022, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe Facebook, Inc. violated 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(b) by making prohibited in-kind corporate contributions or violated 52 U.S.C. § 30104(c)(1) and 11 C.F.R. § 114.10(b)(1) by failing to report independent expenditures. 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 Elena Paoli, the attorney assigned to this matter, at (202) 694-1548.

Sincerely,

Ana J. Peña-Wallace

Ana J. Peña-Wallace
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Facebook, Inc. MUR 7641

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission (the “Commission”) by Darin Knepper.¹ 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.² The Complaint argues that the counterposts were prohibited in-kind corporate contributions by Facebook to the candidates because Facebook “attempt[ed] to assist a political candidate in his or her campaign.”³ Facebook responds that the counterposts were part of an official fact-checking program and followed standard, neutral procedures.⁴ According to Facebook, the program is non-partisan and was developed for business reasons to create a better user experience.⁵ Facebook asserts that the counterposts contained no election-related content and were not made for the purpose of influencing an election.⁶

As explained below, based on the available information concerning the counterposts at issue, Facebook’s conduct does not appear to constitute a contribution under the Act because Facebook has credibly explained that it has a commercial, rather than electoral, motivation

¹ See 52 U.S.C. § 30109(a)(1).

² Compl. at 1 (Sept. 6, 2019).

³ *Id.*

⁴ Resp. at 2-5 (Nov. 4, 2019).

⁵ *Id.* at 4, 11.

⁶ *Id.* at 7-12.

1 underlying the counterpost program. Moreover, there is no basis to reasonably conclude that
2 Facebook coordinated with the candidates. In addition, the counterposts do not appear to satisfy
3 the meaning of independent expenditure because they do not expressly advocate for the election
4 or defeat of any candidate. Therefore, the Commission finds no reason to believe that Facebook
5 violated 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(b) by making prohibited in-kind corporate
6 contributions. In addition, the Commission finds no reason to believe that Facebook violated
7 52 U.S.C. § 30104(c)(1) and 11 C.F.R. § 114.10(b)(1) by failing to report independent
8 expenditures.

9 **II. FACTS**

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

⁷ Compl. at 1.

⁸ *Id.*

⁹ *Id.*

1 The first example involves Ilhan Omar, a 2020 candidate for Minnesota’s 5th
2 Congressional District. The original post contains a photo of Omar alongside another photo of a
3 piece of meat with a slash mark over it.¹⁰ The caption reads: “Ilhan Omar Proposes Tax on Pork
4 Products, ‘So Costly Nobody Will Buy them Anymore.’”¹¹ Facebook appended a “Related
5 Articles” section below the original post with a link to an article by LeadStories.com (with a blue
6 “FactCheck” banner appearing directly above the link).¹² The title of the article is “Fake News:
7 Ilhan Omar Did NOT Propose Tax on Pork Products ‘So Costly Nobody Will Buy Them
8 Anymore.’”¹³ The article, hosted on the Lead Stories website, explains that the information in
9 the original post was not real and originally published by BustaTroll.org, a liberal satire
10 website.¹⁴

11 The second example involves Beto O’Rourke, former presidential candidate. The
12 original post contains a purported photo of O’Rourke, naked, with large, provocative phrases
13 written on his body.¹⁵ Above the photo is written: “REMIND EVERYONE OF THIS PIC
14 WHEN THIS FOOL SAYS HE IS GONNA RUN FOR PRESIDENT. THIS IS ROBERT
15 O’ROURKE (beto).”¹⁶ As it did with the Omar post, Facebook appended a Related Articles
16 section directly below the original post.¹⁷ It appears there were two articles labeled with the blue

¹⁰ *Id.*, Attach. 1 at 1 (undated post by Facebook user Deb Watson).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ 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>).

¹⁵ Compl., Attach. 2 at 1 (August 4, 2019, post by Facebook user David Mills).

¹⁶ *Id.*

¹⁷ *Id.* at 4-7.

1 “FactCheck” banner, one from FactCheck.org, the other from Lead Stories.¹⁸ The
2 FactCheck.org article is titled: “Viral Image Does Not Show O’Rourke – FactCheck.org.” The
3 article, hosted on FactCheck.org, explains that the person in the photo is not O’Rourke.¹⁹ It
4 states that the person does not resemble O’Rourke and “reverse image searches” trace the image
5 to a June 2016 gay pride parade in Greece.²⁰ The Lead Stories article similarly traces the photo
6 to a gay pride parade in Greece.²¹

7 In its Response, Facebook asserts that the counterposts at issue “were made in response
8 to two posts by Facebook users, which third-party organizations independently opted to fact
9 check as part of Facebook’s broader and well-publicized program to combat misinformation on
10 its platform.”²² Facebook states that it has “independent business reasons for seeking to
11 minimize misinformation on its platform” and that misinformation is “bad for our business.”²³
12 Facebook further represents that the counterpost program extends to non-political posts. To the
13 extent that posts from the “political arena” are selected for third-party fact-checking, those posts
14 span the political spectrum and Facebook operates the program on a non-partisan basis.²⁴

¹⁸ *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).

¹⁹ 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/>).

²⁰ *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.*

²¹ Alan Duke, *Fake News: Young Beto O’Rourke NOT Photographed With “Feminist Atheist Vegan Naturist Ecologist Queer Slut” Written On Body*, LEAD STORIES, Mar. 17, 2019 (<https://hoax-alert.leadstories.com/3470267-fake-news-70.html>).

²² 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).

²³ *Id.* at 11.

²⁴ *Id.* at 5, 11.

1 Facebook also contends that the counterposts do not violate the Act because they do not satisfy
2 the definition of “coordinated communications” under the Commission’s three-part test, and
3 were not made for the purpose of influencing an election.²⁵ The Response attaches official
4 materials that describe the fact-checking program, summarized below.

5 The program relies on a predictive computer algorithm to identify posts that may contain
6 misinformation, based on a range of signals, including user comments questioning accuracy and
7 whether the post was made by a source that has previously spread false news.²⁶ In addition, the
8 human fact-checkers may identify potential misinformation themselves.²⁷ If a post is identified
9 as potentially false, it is placed into a digital queue where it is available for review by the third-
10 party fact-checkers.²⁸ The fact-checkers review the posts, rate their accuracy, and submit an
11 explanation to dispel false content (either by drafting an article to explain why a given post
12 contains misinformation or linking to a pre-existing article).²⁹ If a post is identified as false,
13 Facebook appends a Related Articles section with a blue “FactCheck” banner and a link to the
14 fact-checker’s explanatory article, as illustrated by the above examples.³⁰ In addition, the post is

²⁵ *Id.* at 2.

²⁶ 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/>)).

²⁷ 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/>)).

²⁸ Resp. at 3; see *id.*, Ex. A at 2, Ex. B at 1, Ex. H at 2.

²⁹ 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.

³⁰ 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

1 “demoted” by reducing its distribution and making it appear lower in other users’ news feeds.³¹
2 Facebook provides an option for publishers to contact fact-checkers to dispute the rating or offer
3 a correction.³²

4 Facebook employs third-party fact-checkers from a variety of organizations that are
5 independent from Facebook, including the Associated Press, Check Your Fact, FactCheck.org,
6 Lead Stories, PolitiFact, and Science Feedback.³³ The Response describes these entities as
7 “partners” with Facebook, and it is unclear from the available materials whether Facebook pays
8 the fact-checkers to review posts that may contain misinformation or to write/host the articles
9 that dispel misinformation.³⁴ In order to partner with Facebook, such organizations must be
10 certified by the International Fact-Checking Network, a unit of the Poynter Institute, which is a
11 non-profit journalism school and research organization.³⁵ The certification process evaluates
12 applicants based on a set of criteria including non-partisanship and fairness, transparency of
13 sources, transparency of funding and organization, transparency of methodology, and an open
14 and honest corrections policy.³⁶

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.

³¹ Resp., Ex. A at 2, Ex. B at 3.

³² Resp., Ex. A at 3, Ex. B at 4-6.

³³ Resp. at 4.

³⁴ *Id.*

³⁵ See About – Poynter, <https://www.poynter.org/about/> (last accessed Feb. 13, 2020).

³⁶ 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://ifncodeofprinciples.poynter.org>.

1 **III. LEGAL ANALYSIS**

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

3 The Act and Commission regulations prohibit any corporation from making contributions
4 to a candidate's principal campaign committee.³⁷ Further, no person shall make contributions to
5 any candidate, his or her authorized committee, or their agents with respect to any election for
6 federal office which, in the aggregate, exceed \$2,800 during the 2020 election cycle.³⁸

7 A “[c]ontribution” is defined to include any gift of money or “anything of value” for the
8 purpose of influencing a federal election.³⁹ The Commission has previously concluded that a
9 commercial vendor providing services to political committees does not make a contribution for
10 the purpose of influencing an election when its business activity “reflects commercial
11 considerations and does not reflect considerations outside the business relationship.”⁴⁰ A
12 commercial vendor need not make its services available to committees representing all political
13 ideologies, but rather may establish objective business criteria to protect commercial viability of
14 its business without making contributions to the committees that meet those criteria.⁴¹

³⁷ 52 U.S.C. § 30118(a).

³⁸ *Id.* § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1).

³⁹ 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).

⁴⁰ Advisory Op. 2012-31 (AT&T) at 4.

⁴¹ Advisory Op. 2017-06 (Stein and Gottlieb) at 6; *see also* Advisory Op. 2012-28 (CTIA — The Wireless Association) at 3, 8-9 (no contribution to committee where “wireless service providers may decide, due to commercial considerations, to accept proposals from some political committees and not others”); Advisory Op. 2012-26 (Cooper for Congress, *et al.*) at 10 (no contribution to committee where its participation was subject to “objective and commercially reasonable” criteria); Advisory Op. 2004-06 (Meetup) at 1 (explaining that a corporation may provide goods and services to political committees without being considered to have made an in-kind contribution so long as it does so “on the same terms and conditions available to all similarly situated persons in the general public”).

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).⁴² This is true even if a candidate benefitted from the
4 commercial activity.⁴³

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.⁴⁴ 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.”⁴⁵

10 As explained below, the record before the Commission does not provide a reasonable
11 basis to conclude Facebook’s alleged actions undertaken in connection with the counterposts
12 were made for the purpose of influencing a federal election. Neither the Complaint nor other

⁴² See, e.g., 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”) (Commission voted to approve no reason to believe recommendations); 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).

⁴³ 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.*) (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).

⁴⁴ 11 C.F.R. § 109.20(b).

⁴⁵ *Id.* § 109.20(a).

1 available information indicate that Facebook’s application of its counterpost program, as alleged,
2 was motivated by something other than a commercial interest.

3 As an initial matter, Facebook’s actions appear consistent with its fact-checking program
4 and its asserted commercial purposes. Facebook asserts that misinformation “is bad for our
5 community and bad for our business,” and that it implemented counterpost procedures to
6 “minimize misinformation,” not “for the purpose of influencing any election for Federal
7 office.”⁴⁶ The Complaint argues that the counterposts were attempts to “assist” candidates.
8 However, Facebook asserts that the program was applied on a non-partisan basis, and there is no
9 information in the record to dispute that claim.

10 In addition, there is no indication that Facebook coordinated its activities with the
11 candidates. The Complaint does not allege that Facebook had any contact with the candidates
12 regarding the counterposts, and the Commission is unaware of any information suggesting such
13 contact. Moreover, the counterposts were made in connection with an official fact-checking
14 program. The descriptions of the program do not mention any involvement by political
15 candidates.⁴⁷

16 In light of the above, the available information indicates that the actions taken by
17 Facebook to apply counterposts to certain posts appear to reflect commercial considerations,
18 rather than an effort to influence a federal election. Moreover, there is no basis to reasonably
19 conclude that Facebook coordinated its activities with the candidates. The Commission therefore

⁴⁶ Resp. at 10-11.

⁴⁷ 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.” *Id.*, Ex. B at 2.

1 finds no reason to believe that Facebook violated 52 U.S.C. § 30118(a) and 11 C.F.R. § 114.2(b)
2 by making prohibited in-kind corporate contributions.

3 **B. There is No Basis to Conclude that Facebook Failed to Report Independent**
4 **Expenditures**

5 An “independent expenditure” is an expenditure “for a communication expressly
6 advocating the election or defeat of a clearly identified candidate” that is not coordinated with
7 the candidate or the candidate’s committee.⁴⁸ The term “expressly advocating” means any
8 communication that: (1) Uses phrases or words such as “vote for,” “elect,” “defeat,” etc., “which
9 in context can have no other reasonable meaning than to urge the election or defeat of one or
10 more clearly identified candidate(s)”; or (2) “When taken as a whole and with limited reference
11 to external events, such as the proximity to the election, could only be interpreted by a
12 reasonable person as containing advocacy of the election or defeat of one or more clearly
13 identified candidate(s).”⁴⁹ Every person (other than a political committee) who makes
14 independent expenditures in an aggregate amount or value in excess of \$250 during a calendar
15 year shall file a statement with the Commission.⁵⁰

16 Regarding the Omar counterpost, the linked Lead Stories article contains language
17 critical of Trump supporters and Republicans but does so in the context of describing the
18 BustaTroll satirical website, which originally posted the story about Omar as a satire piece. The
19 Lead Stories article calls BustaTroll a “liberal satire website that tries to educate gullible Trump
20 supporters and Republicans about the need to actually click and read links before sharing or

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

⁴⁹ 11 C.F.R. § 100.22(a)-(b).

⁵⁰ 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).

1 liking them.”⁵¹ The focus of the article, however, is to dispel misinformation by explaining that
2 the original post about Omar was satirical and not true. There is no express advocacy.

3 As to the O’Rourke counterposts, the linked FactCheck.org article is a straightforward,
4 factual rebuttal citing sources to correct the claim that O’Rourke is the person in the photo.⁵²
5 Likewise, the linked Lead Stories article seeks to dispel misinformation and does not contain any
6 words expressly advocating for O’Rourke’s candidacy.⁵³ Finally, the “Related Articles” sections
7 that Facebook appended to the original posts to alert users that they contained misinformation
8 simply link to the FactCheck.org and Lead Stories articles along with displaying a blue “Fact-
9 check” banner to indicate misinformation.⁵⁴ Again, there is no express advocacy.

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

⁵¹ Schenk, LEAD STORIES, May 27, 2019.

⁵² Fichera, FACTCHECK.ORG, Mar. 15, 2019.

⁵³ Duke, LEAD STORIES, Mar. 17, 2019.

⁵⁴ Resp., Ex. A at 1 (Related Articles section appended to Omar post), Ex. B. at 4 (Related Articles section appended to O’Rourke post).