

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2011-09 is now available for comment. It was requested by Mark Elias, Esq., Jonathan Berkon, Esq., and Rebecca Gordon, Esq., on behalf of Facebook, and is scheduled to be considered by the Commission at its public meeting on June 15, 2011.

If you wish to comment on DRAFT ADVISORY OPINION 2011-09, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on June 14, 2011.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).**
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.**
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.**
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.**

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
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Comment Submission Procedure: Rosemary C. Smith
Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2011-09, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Rosemary C. Smith, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

AGENDA DOCUMENT NO. 11-32



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION COMMISSION

SECRET

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June 9, 2011

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *ch*
Acting General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

Subject: Draft AO 2011-09 (Facebook)

For Meeting of 6-15-11

SUBMITTED LATE

Attached is a proposed draft of the subject advisory opinion. We have been asked that this draft be placed on the agenda for June 15, 2011.

Attachment

2
3 Marc E. Elias, Esq.
4 Jonathan S. Berkon, Esq.
5 Rebecca H. Gordon, Esq.
6 Perkins Coie LLP
7 700 Thirteenth Street, N.W., Suite 600
8 Washington, D.C. 20005-3960
9

10 Dear Messrs. Elias and Berkon and Ms. Gordon:

11 We are responding to your advisory opinion request on behalf of Facebook
12 concerning the application of the Federal Election Campaign Act of 1971, as amended
13 (the "Act"), and Commission regulations to Facebook's proposal to sell small, character-
14 limited ads to candidate's authorized committees, party committees, and other political
15 committees. Facebook asks whether its ads qualify for the "small item" or
16 "impracticable" exception and thus do not require disclaimers under the Act or
17 Commission regulations.

18 The Commission concludes that neither the "small items" exception nor the
19 "impracticable" exception applies to Facebook's ads but that the Act's disclaimer
20 requirement is satisfied if a Facebook ad links to a website or a Facebook page containing
21 a full disclaimer that is clear and conspicuous as required by 11 CFR 110.11, and both the
22 disclaimer and Facebook ad are paid for by and authorized by the same person or
23 persons. *See* Advisory Opinion 20010-19 (Google).

24 ***Background***

25 The facts presented in this advisory opinion are based on your letter received on
26 April 26, 2011 and your email received on May 6, 2011.

27 Facebook is an online free social networking service. Facebook is used by both
28 individuals (who have "Profiles") and public persons and entities, such as political

1 committees, (who have “Pages”). Facebook sells ads that appear on the Facebook
2 platform to its users. There are two categories of Facebook ads: “Standard Ads” and
3 “Sponsored Stories.” Both categories of ads are character-limited.

4 Standard Ads provide for up to 25 text characters in the title and 135 text
5 characters in the body of the ad. Sponsored Stories provide for zero to 100 text
6 characters. Both types of ads also include a miniature image. Standard Ads use an image
7 similar in size to the thumbnail image that appears next to each Facebook user’s name
8 when he or she posts on a Facebook Profile or Page. Sponsored Stories use images that
9 are smaller. A Standard Ad may link to either a Facebook Page or an external website.
10 This link may lead to a Facebook Page or website containing a disclaimer, but may also
11 lead to a Facebook page or website that does not contain a disclaimer. A Facebook ad
12 link may lead to a third party’s website or Facebook page, that is, to a website that is not
13 owned, operated, or controlled by person paying for the Facebook ad.

14 ***Question Presented***

15 *Do Facebook’s small, character-limited ads qualify for the “small item” or*
16 *“impracticable” exception to the disclaimer requirements under the Act and Commission*
17 *regulations?*

18 ***Legal Analysis and Conclusions***

19 No, Facebook’s ads do not qualify for either the “small items” exception or the
20 “impracticable” exception from the disclaimer requirements under the Act and
21 Commission regulations. Nevertheless, pursuant to Advisory Opinion 2010-19 (Google),
22 Facebook’s ads satisfy the disclaimer requirements of the Act and Commission

1 regulations provided the ads link to a website or Facebook page containing a full
2 disclaimer as required by 11 CFR 110.11 and provided both the disclaimer and Facebook
3 ad are paid for by and authorized by the same person or persons.

4 With some exceptions, public communications made by a political committee
5 must include certain disclaimers. *See* 2 U.S.C. 441d(a)(1); 11 CFR 110.11(a)(1). Under
6 the Act and Commission regulations, a “public communication” is a communication “by
7 means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor
8 advertising facility, mass mailing, or telephone bank to the general public, or any other
9 form of general public political advertising.” 2 U.S.C. 431(22); 11 CFR 100.26.

10 “General public political advertising” includes “communications over the Internet” if
11 they are “placed for a fee on another person’s Web site.” *Id.*

12 If a candidate, an authorized committee of a candidate, or an agent of either pays
13 for and authorizes the public communication, the disclaimer must state that the
14 communication “has been paid for by the authorized political committee.” 11 CFR
15 110.11(b)(1); *see also* 2 U.S.C. 441d(a)(1). If a public communication is paid for by
16 someone else, but is authorized by a candidate, an authorized committee of a candidate,
17 or an agent of either, the disclaimer must state who paid for the communication and that
18 the communication is authorized by the candidate, authorized committee of the candidate,
19 or the agent of either. 11 CFR 110.11(b)(2); *see also* 2 U.S.C. 441d(a)(2). If the
20 communication is not authorized by a candidate, an authorized committee of a candidate,
21 or an agent of either, the disclaimer must “clearly state the full name and permanent street
22 address, telephone number, or World Wide Web address of the person who paid for the

1 communication, and that the communication is not authorized by any candidate or
2 candidate's committee." 11 CFR 110.11(b)(3); *see also* 2 U.S.C. 441d(a)(3). Every
3 disclaimer "must be presented in a clear and conspicuous manner, to give the reader,
4 observer, or listener adequate notice of the identity" of the ad's sponsor. 11 CFR
5 110.11(c)(1).

6 Commission regulations contain several exceptions to these general disclaimer
7 requirements. A disclaimer is not required if the communication is placed on "[b]umper
8 stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be
9 conveniently printed." 11 CFR 110.11(f)(1)(i) (the "small items exception").
10 Additionally, the disclaimer is not required for "[s]kywriting, water towers, wearing
11 apparel, or other means of displaying an advertisement of such a nature that the inclusion
12 of a disclaimer would be impracticable." 11 CFR 110.11(f)(1)(ii) (the "impracticable
13 exception").

14 When the Commission explained the small items exception and impracticable
15 exception in 1995, it indicated that Internet communications that constitute general public
16 political advertising would still require disclaimers. *See* Final Rules on Communications
17 Disclaimer Requirements, 60 FR 52069, 52071 (Oct. 5, 1995) ("1995 Disclaimer E&J").
18 Additionally, when Congress later amended the Act to add new specificity to the
19 requirements for disclaimers, including disclaimers on written materials, as well as to
20 expand the reach of the disclaimer requirements, Congress did not expand either
21 exception to include Internet ads, even though Congress was aware of the Commission's
22 already-existing regulatory exceptions for "small items" and "impracticability." *See*

1 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

2 When the Commission later engaged in a rulemaking on Internet
3 communications, the Commission left unregulated most Internet activities, recognizing
4 that the Internet is a “unique and evolving mode of mass communication and political
5 speech that is distinct from other media in a manner that warrants a restrained regulatory
6 approach.” *Final Rules on Internet Communications*, 71 FR 18589, 18589 (Apr. 12,
7 2006). However, the Commission singled out paid advertising on another person’s
8 website as one of the few instances of Internet communications that require a disclaimer
9 because “the expense of that advertising sets it apart from other uses of the Internet.” *Id.*
10 at 18590. The Commission, in so regulating paid Internet advertising as a “public
11 communication,” subjected such paid Internet ads to the disclaimer rules but made no
12 additional exceptions (or adjustments to the existing exceptions) for smaller versions of
13 these Internet ads.

14 *Small Items Exception*

15 The Commission has applied the small items exception to the general disclaimer
16 requirements in situations where a disclaimer simply would not fit in the space provided
17 based on the physical limitations of the item or a technological constraint. *See Advisory*
18 *Opinions 1980-42 (Hart) (applying the exception to concert tickets) and 2002-09 (Target*
19 *Wireless) (applying the exception to “short message service” communications distributed*
20 *through a wireless telecommunications network). Despite its name, the Commission has*
21 *previously indicated that “size is not dispositive” when applying the small items*
22 *exception; rather “practicality (or “convenience,” in the regulatory vernacular) is the*

1 critical factor in determining the exception's applicability."¹

2 In Advisory Opinion 2002-09 (Target Wireless), the requestor asked whether
3 disclaimers were required on content, where that content bore a sponsorship message
4 from a political committee. Nationwide "short message service" ("SMS") technology,
5 which was not set by Target Wireless, limited the content to 160 characters per page and
6 Target Wireless could not guarantee that two pages sent consecutively would be received
7 consecutively. The Commission determined that the small items exception applied,
8 emphasizing the limits on the information that could be conveyed. Specifically, the
9 requestor, Target Wireless, emphasized the nature of the external limitations in a
10 comment, explaining that "the 160 character limitation is set by current technology" and
11 that "Target Wireless has no influence" regarding the portion of the characters available
12 for political advertising. Advisory Opinion 2002-09 (Target Wireless) (August 21, 2002
13 Comment of Target Wireless). Indeed, the Commission concluded "that the SMS
14 technology places similar limits on the length of a political advertisement as those that
15 exist with bumper stickers." Advisory Opinion 2002-09 (Target Wireless).

16 In contrast to the technological limitations faced by Target Wireless, Facebook's
17 proposal is more similar to the facts the Commission considered in Advisory Opinion
18 2007-33 (Club for Growth PAC). In Advisory Opinion 2007-33, Club for Growth PAC
19 proposed to purchase short 10- and 15-second television ads and asked the Commission
20 whether they could "dispense with" or "truncate" the required disclaimers given the short

¹ See Statement of Reasons of Vice Chairman Darryl R. Wold, and Commissioners Lee Ann Elliott, David M. Mason, Danny L. McDonald and Karl J. Sandstrom in Matter Under Review 4791, Ryan for Congress (Apr. 13, 1999) (pocketsize football schedule found not to be eligible for the small items exception despite being smaller than a bumper sticker), available at www.eqs.nictusa.com/eqsdocsMUR/00003CCC.pdf.

1 length of the proposed ads. In response, the Commission indicated that the short length
2 of Club for Growth PAC's proposed ads was not driven by any physical or technological
3 limitations intrinsic to television advertising and concluded that Club for Growth PAC's
4 ten- and fifteen-second television ads did not qualify for the "small items exception."

5 The limitation on the size or the number of characters that Facebook allows to be
6 included in a Facebook ad is not mandated by the physical limitations of the display
7 medium or Internet technology. Neither is the limitation on the size of the ad set by a
8 third party who established the technological medium and its use. Rather, Facebook
9 indicates that it has set the small sizes for its ads because of Facebook's business decision
10 that "larger ads would disrupt the social networking experience for Facebook users."
11 Facebook's business decision in favor of small ads does not justify elimination of the
12 statutory disclaimer requirement given that it remains physically and technologically
13 possible for Facebook to increase both the size of its ads and the number of characters
14 that may be included in its ads.

15 Accordingly, the Commission concludes that the small item exception does not
16 apply to Facebook's ads.

17 *Impracticable Exception*

18 The Commission has not, through advisory opinions, applied the impracticable
19 exception to the general disclaimer requirements to situations beyond those listed in the
20 rule at 11 CFR 110.11(f)(1)(ii). *See* Advisory Opinions 2007-33 (Club for Growth PAC)
21 (determining that ten- and fifteen-second ads do not qualify for the impracticable
22 exception) and 2004-10 (Metro Networks) (determining that a "live read" sponsorship

1 message did not qualify for the impracticable exception). The impracticable exception
2 provides that, in addition to skywriting, water towers, and wearing apparel, the exception
3 applies to “other means of displaying *an advertisement of such a nature* that the inclusion
4 of a disclaimer would be impracticable.” 11 CFR 110.11(f)(1)(ii) (emphasis added).
5 Although the list of communications in the rule is not exhaustive, the relevant concern in
6 determining that a disclaimer would be impracticable turns on the nature of the means of
7 advertising.

8 In the case of Facebook’s ads, the means, or medium, of advertising is the
9 Internet. As discussed above, there are not physical or technological limitations of either
10 the display medium or Internet technology that would make it impracticable to include a
11 disclaimer on Facebook’s ads. Rather, Facebook indicates that it has set the small sizes
12 for its ads as a business decision. Facebook’s business decision to make smaller ads
13 within a medium that could, and regularly does, practically support ads that can contain
14 disclaimers does not alter the nature of the means of communication such that a
15 disclaimer becomes “impracticable.”

16 As discussed above, when the Commission has previously revised its disclaimer
17 rules, it has not considered the Internet a “means of displaying an advertisement of such a
18 nature that the inclusion of a disclaimer would be impracticable.” 1995 Disclaimer E&J,
19 60 FR at 52071. Rather, it has specifically determined that disclaimers should be
20 required for paid political advertising.

21 Accordingly, the Commission concludes that impracticable exception does not
22 apply to Facebook’s ads.

1 *Alternative Disclaimers*

2 Because neither exception applies, Facebook's ads require disclaimers.

3 Nonetheless, in situations where delivery of a required disclaimer would be unwieldy or
4 unfeasible, the Commission has, while not eliminating the disclaimer requirement,
5 allowed the disclaimer to be delivered in an alternate fashion. *See* Advisory Opinions
6 2010-19 (Google), 2004-01 (Bush/Kerr), 2004-10 (Metro Networks), and 2004-37
7 (Waters).

8 The Commission notes that, as in Advisory Opinion 2010-19 (Google), some
9 Facebook ads will link to a website or Facebook page that contains a disclaimer that
10 complies with the Act and Commission regulations. For Facebook's ads that do link to a
11 website or Facebook page with a complete and accurate disclaimer, the disclaimer
12 requirement of 11 CFR 110.11 would be satisfied.² In this context, a disclaimer is
13 complete and accurate when it meets the requirements of 11 CFR 110.11 so long as both
14 the website containing the disclaimer and the Facebook ad are paid for by and authorized
15 by the same person or persons.³ This conclusion conforms to the Commission's practice

² Although Facebook's advisory opinion request does include any proposals to deliver the required disclaimer in an alternate fashion, the Commission notes that the Act and Commission regulations need not be barriers to technological innovation; rather, technological innovation may promote compliance with campaign finance laws. For example, the California Fair Practices Commission ("CFFPC") recently amended its regulations regarding paid campaign advertisements and squarely addressed the issue of disclaimers in electronic media advertisements that are limited in size. *See* Cal. Code Regs. tit. 2, § 18450.4 (effective December 2010). Instead of granting a blanket exemption from complying with disclaimer requirements for small advertisements, CFFPC's regulation provides that small advertisements may use technological features such as rollover displays, links to a webpage, or "other technological means" to meet disclosure requirements. *See id.* at § 18450.4(b)(3)(G)(i).

³ The Commission notes that the Act's disclaimer requirements do not apply to the requestor, but rather to the persons purchasing Facebook's ads. *See* 11 CFR 110.11(a). While the Commission is providing an answer to the question raised by the requestor, the Advisory Opinion itself provides limited protection in the absence of some arrangement between Facebook and its political advertisers to comply with its substance.

1 of “interpret[ing] the Act and its regulations in a manner consistent with contemporary
2 technological innovations . . . where the use of the technology would not compromise the
3 intent of the Act or regulations.” Advisory Opinion 1999-09 (Bradley for President).
4 This conclusion is, however, limited to those Facebook ads that link to a website owned,
5 operated, or controlled by the Facebook ad payor. In other words, the disclaimer
6 information – “paid for by,” “authorized by,” committee name and address, if required –
7 on the linked website must be the same information that would be included by the payor
8 in a disclaimer in a Facebook ad, if otherwise required.

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
12 of the facts or assumptions presented, and such facts or assumptions are material to a
13 conclusion presented in this advisory opinion, then the requestor may not rely on that
14 conclusion as support for its proposed activity. Any person involved in any specific
15 transaction or activity which is indistinguishable in all its material aspects from the
16 transaction or activity with respect to which this advisory opinion is rendered may rely on
17 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis and
18 conclusions in this advisory opinion may be affected by subsequent developments in the
19 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

1 All cited advisory opinions are available on the Commission's website, www.fec.gov, or
2 directly from the Commission's Advisory Opinion searchable database at
3 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Cynthia L. Bauerly
Chair