

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

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

DRAFT B of ADVISORY OPINION 2011-09 is now available for comment. It was requested by Mark Elias, Esq., Jonathan Berkon, Esq., and Rebecca Gardon, 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 B of 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
(202) 694-1040

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
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999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Rosemary C. Smith, Esq.
Federal Election Commission
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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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June 10, 2011

AGENDA ITEM

MEMORANDUM

For the Meeting of 6-15-11

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

SUBMITTED LATE

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK (RCS)*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

Subject: Draft B of AO 2011-09 (Facebook)

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

1 ADVISORY OPINION 2011-09

2

3 Marc E. Elias, Esq.

DRAFT B

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 requiring any disclaimer to be appended to these
19 Facebook ads would be impracticable pursuant to 11 CFR 110.11(f)(1)(ii) and, thus, no
20 disclaimer is required.

21 ***Background***

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

24 Facebook is an online free social networking service. Facebook is used by both
25 individuals (who have "Profiles") and public persons and entities, such as political
26 committees, (who have "Pages"). Facebook sells ads that appear on the Facebook
27 platform to its users. There are two categories of Facebook ads: "Standard Ads" and
28 "Sponsored Stories." Both categories of ads are character-limited.

1 Standard Ads provide for up to 25 text characters in the title and 135 text
2 characters in the body of the ad. Sponsored Stories provide for zero to 100 text
3 characters. However, Sponsored Stories do not contain any additional communicative
4 content chosen by the ad payor; instead, any text characters displayed in Sponsored
5 Stories merely: (1) inform Facebook users of the fact that their Friends either “like” the
6 ad payor’s Facebook Page (“Page Like” ad) or have frequented a physical offsite location
7 operated by the ad payor (e.g., a campaign rally or phone bank) (“Place Check-In” ad); or
8 2) republish a post (up to 100 characters) that currently appears on the ad payor’s
9 Facebook Page (“Page Post” ad). Both Standard Ads and Sponsored Stories also include
10 a miniature image. Standard Ads use an image similar in size to the thumbnail image that
11 appears next to each Facebook user’s name when he or she posts on a Facebook Profile
12 or Page. Sponsored Stories use images that are smaller. A Standard Ad may link to
13 either a Facebook Page or an external website. This link may lead to a Facebook Page or
14 website containing a disclaimer, but may also lead to a Facebook page or website that
15 does not contain a disclaimer. A Facebook ad link may lead to a third party’s website or
16 Facebook page, that is, to a website that is not owned, operated, or controlled by the
17 person paying for the Facebook ad.

18 Facebook states that it chose the size and format of its ads to avoid disrupting the
19 “social networking experience” for Facebook users, and because the miniature photo or
20 logo that appears in ads resembles the “thumbnail sketch” that Facebook users see in
21 other users’ posts.

1 ***Question Presented***

2 *Do Facebook's small, character-limited ads qualify for the "small item" or*
3 *"impracticable" exception to the disclaimer requirements under the Act and Commission*
4 *regulations?*

5 ***Legal Analysis and Conclusions***

6 Yes, the Commission concludes that Facebook's small, character-limited ads
7 qualify for the "impracticable" exception to the disclaimer requirements at 11 CFR
8 110.11(f)(1)(ii).

9 With some exceptions, public communications made by a political committee
10 must include certain disclaimers. *See* 2 U.S.C. 441d(a)(1); 11 CFR 110.11(a)(1). Under
11 the Act and Commission regulations, a "public communication" is a communication "by
12 means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor
13 advertising facility, mass mailing, or telephone bank to the general public, or any other
14 form of general public political advertising." 2 U.S.C. 431(22); 11 CFR 100.26.
15 "General public political advertising" includes "communications over the Internet" if
16 they are "placed for a fee on another person's Web site." *Id.*

17 If a candidate, an authorized committee of a candidate, or an agent of either pays
18 for and authorizes the public communication, the disclaimer must state that the
19 communication "has been paid for by the authorized political committee." 11 CFR
20 110.11(b)(1); *see also* 2 U.S.C. 441d(a)(1). If a public communication is paid for by
21 someone else, but is authorized by a candidate, an authorized committee of a candidate,
22 or an agent of either, the disclaimer must state who paid for the communication and that
23 the communication is authorized by the candidate, authorized committee of the candidate,

1 or the agent of either. 11 CFR 110.11(b)(2); *see also* 2 U.S.C. 441d(a)(2). If the
2 communication is not authorized by a candidate, an authorized committee of a candidate,
3 or an agent of either, the disclaimer must “clearly state the full name and permanent street
4 address, telephone number, or World Wide Web address of the person who paid for the
5 communication, and that the communication is not authorized by any candidate or
6 candidate’s committee.” 11 CFR 110.11(b)(3); *see also* 2 U.S.C. 441d(a)(3). Every
7 disclaimer “must be presented in a clear and conspicuous manner, to give the reader,
8 observer, or listener adequate notice of the identity” of the ad’s sponsor. 11 CFR
9 110.11(c)(1).

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

18 The largest Facebook ads – the Standard Ads – are limited to 160 characters,
19 including the headline. For these ads, the text characters required to display a disclaimer
20 would consume much to most of the text characters available to the ad payor. For
21 example, in a disclaimer for a communication not authorized by a candidate, the
22 disclaimer must clearly state, among other things, that the communication “is not
23 authorized by any candidate or candidate’s committee.” 2 U.S.C. 441d(a); 11 CFR

1 110.11(b)(3). The phrase “Not authorized by any candidate or candidate’s committee” is
2 57 characters long. Including the full name of the political committee could require more
3 characters for the disclaimer than are allowed for the text ad itself. Similarly, a
4 communication paid for by an authorized congressional candidate’s committee must
5 include a disclaimer that reads, “Paid for by X for Congress.” 2 U.S.C. 441d(a)(1). Even
6 if the candidate’s name were very short, the disclaimer would take up almost a quarter of
7 a Standard Ad’s content.

8 The smallest Facebook ads – the Sponsored Stories – do not permit the ad payor
9 to display in the ad any additional communicative text content of the payor’s own
10 choosing. Thus, these ads would not accommodate any type of additional disclaimer,
11 regardless of length. Accordingly, the Commission concludes that requiring a disclaimer
12 to be appended either to Facebook’s Standard Ads or Sponsored Stories would be
13 impracticable pursuant to 11 CFR 110.11(f)(1)(ii).

14 Although, in theory, it may be technologically possible for Facebook to modify
15 the character limitations available in its advertising program to accommodate the
16 Commission’s standard disclaimers applicable to political advertising, the Commission’s
17 disclaimer exceptions at 11 CFR 110.11(f)(1) take an entity’s existing advertising model
18 as it is. For this reason, Commission rules do not require that bumper stickers, pins,
19 buttons, or pens be made bigger, or that additional text be included with skywriting,
20 water towers, or apparel, in order to accommodate disclaimers. The Commission’s
21 creation of these categorical regulatory exceptions, as well as its practical application
22 thereof, evidences its rejection of the disclaimer burden for these media. *See* Advisory
23 Opinion 2002-09 (Target Wireless) (rejecting “Draft A,” which would not have applied

1 the exceptions because the requestor “impose[d] on itself” the “true limitation” for
2 displaying disclaimers on political advertising through SMS messaging); *see also* 1980-
3 42 (Hart) (exempting fundraising concert tickets from displaying disclaimers, where the
4 “conclusion is based on the [small items exception] . . . and assumes that the tickets
5 would be comparable in size to those generally used for entertainment events.”).
6 Moreover, to require a business to alter its product or service especially for political
7 advertisers would run contrary to the Commission’s general requirement that commercial
8 transactions be conducted “on the same terms and conditions available to all similarly
9 situated persons in the general public.” *See* Advisory Opinion 2004-06 (Meetup)
10 (concluding the requestor could provide its free and fee-based website services to Federal
11 candidates, political committees, and their supporters “so long as it does so on the same
12 terms and conditions available to all similarly situated persons in the general public.”).

13 Additionally, the Commission declines to endorse a modified disclaimer
14 requirement here by concluding that the disclaimer requirement is satisfied if the
15 webpage that is linked to in a Facebook ad (the “landing page”) contains a complete
16 disclaimer. This answers a question not asked by the requestor (who asked, specifically,
17 whether or not the Facebook ads qualify for the small items or impracticable exceptions to
18 the Act’s disclaimer requirement).¹ Moreover, as explained above, there is no legal basis
19 for a modified disclaimer requirement here because the impracticability exception at 11

¹ This request is distinguishable from other requests seeking to modify the phrasing of the required disclaimer. *See* Advisory Opinion 1998-17 (Daniels Cablevision) (where the Commission provided three examples of acceptable disclaimer statements, two of which provided additional elaborating language specifying that free airtime was being provided by Daniels Cablevision). In this case, the requestor is asking whether a disclaimer is required at all.

1 CFR 110.11(f)(1)(ii) is categorical; if the advertising medium qualifies for the exception
2 (as Facebook's does), no disclaimer of any form is required.

3 Under the circumstances presented here, the Commission's conclusion in
4 Advisory Opinion 2007-33 (Club for Growth) also does not support a conclusion to the
5 contrary. In Advisory Opinion 2007-33 (Club for Growth), the requestor asked whether
6 it could dispense with or truncate the statutorily prescribed "stand-by-your-ad"
7 disclaimer requirements under 2 U.S.C. 441d(d)(2) for ten- and fifteen-second television
8 ads. The Commission concluded there were no grounds upon which it could apply the
9 "small items" or "impracticable" exceptions to Club for Growth's television ads. As the
10 Commission explained:

11 [W]hen Congress amended the Act to add the spoken stand-by-your-ad
12 disclaimer requirement for television and radio advertisements, it did not
13 create an exception for television communications of ten or fifteen
14 seconds or any other duration, even though it was aware of the
15 Commission's already-existing regulatory exceptions for
16 "impracticability" and "small items."

17
18 Advisory Opinion 2007-33 (Club for Growth) at 4.

19 Here, unlike in Advisory Opinion 2007-33 (Club for Growth), the statutorily
20 prescribed "stand-by-your-ad" disclaimer requirement does not apply to the Internet, and
21 thus the same rationale for denying the "impracticable" exception also does not apply.

22 Lastly, even assuming there were a legal basis to require Facebook's ad sponsors
23 to adhere to a modified disclaimer requirement, it would not always be possible for them
24 to do so as a practical matter, and thus this would not represent a viable alternative. As
25 discussed above, a sponsor of political advertising on Facebook may choose a landing
26 page that belongs to a third party over whom the sponsor has no control, thus leaving the

