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April 26, 2011

BY HAND DELIVERY

Christopher Hughey, Esq.
Acting General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request

Dear Mr. Hughey:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of Facebook. Facebook seeks confirmation that its small, character-limited ads qualify for the "small items" and "impracticable" exceptions, and do not require a disclaimer under the Federal Election Campaign Act (the "Act") or Commission regulations.

I. BACKGROUND

A. Commission's vital role in allowing campaigns and political committees to utilize new technologies.

On several occasions in the last decade, the Commission has been asked to decide whether – and on what terms – political committees can utilize new technologies to communicate with voters. To its credit, the Commission has consistently interpreted the Act and its regulations to permit the free and robust use of these technologies.

The Commission's approach began in Advisory Opinion 2002-9 (Target Wireless), where it held that political committees could send text messages to supporters without including a disclaimer. The text messages at issue were limited to 160 characters apiece. The requester asked the Commission to apply an existing exception – the "small items" exception – to this new medium of communication. By a bipartisan 4 to 1 margin, the Commission agreed with the requester, noting that this new medium "places similar limits on the length of a political advertisement as

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those that exist with bumper stickers." *Id.* The Commission's opinion led to an explosion in the use of text messaging by political campaigns to communicate with voters.¹

Several years later, the Commission promulgated a rule governing Internet use by political committees and volunteers. In its explanation and justification for the new rule, the Commission recognized "the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach." Internet Communications, 71 F.R. 18589, 18589 (Apr. 12, 2006). In reaching this conclusion, the Commission made two key findings. *First*, the Commission found that, unlike other forms of communication, "there [was] no record that Internet activities present any significant danger of corruption or the appearance of corruption" 71 F.R. at 18593. *Second*, the Commission went on to note that "[u]nlike other forms of mass communication, the Internet has minimal barriers to entry, including its low cost and widespread accessibility. Whereas the general public can communicate through television or radio broadcasts and most other forms of mass communication only by paying substantial advertising fees, the vast majority of the general public who choose to communicate through the Internet can afford to do so." 71 F.R. at 18589-90.

Finally, last October, the Commission concluded that political committees that purchased Google search ads would not violate the Act or section 110.11 of the Commission's regulations by failing to include a disclaimer within the ad. *See* Advisory Opinion 2010-19 (Google). The Commission correctly recognized that "[i]ncluding the full name of the political committee" in a character-limited ad "could require more characters for the disclaimer than are allowed for the text ad itself." Draft A, Advisory Opinion 2010-19. And rather than force political committees to forego this medium altogether, the Commission permitted them to utilize it – without a disclaimer – to communicate with voters.

The Commission's foresight has been rewarded. For political committees, the Internet has become "the most accessible marketplace of ideas in history." 71 F.R. at 18590. The ability of political committees – particularly those with limited funds – to maintain a voice on the Internet is even more important in a world where unregulated, soft-money groups are increasingly dominating the conversation. Five years ago, the Commission noted the "dramatic shift in the scope and manner in which Americans used websites, blogs, listservs, and other Internet

¹ During the 2008 campaign, 11 percent of text messaging users reported having received text messages from a candidate or political party. *See* The Internet's Role in Campaign 2008, available at http://www.pewinternet.org/~media/Files/Reports/2009/The_Internets_Role_in_Campaign_2008.pdf (accessed on April 26, 2011), at 26. President Obama also announced the selection of Vice President Biden via text message. *See* <http://blogs.wsj.com/washwire/2008/08/11/check-your-inbox-obama-to-announce-vice-president-biden/> (accessed on April 26, 2011).

communications to obtain information on a wide range of campaign issues and candidates." 71 F.R. at 18591. Due, in part, to the Commission's progressive approach on these issues, that dramatic shift has accelerated. Between 2004 and 2008, the percentage of adults receiving most of their political news from the Internet increased from 18 percent to 26 percent; between 2006 and 2010, the number increased from 15 percent to 24 percent.²

The increased use of the Internet for these purposes has been driven, in part, by the growth of social networking sites, such as Facebook. During the 2008 election, more than half (52 percent) of online social network users (representing 14 percent of all adults) used social networking sites, such as Facebook, for political information or to take part in a campaign.³ During the 2010 cycle, social networking sites "emerged as a key part of the political landscape," with more than one in five (22 percent) of online adults using a social networking site for political purposes.⁴ In fact, Facebook itself has become a "gathering point for the American electorate."⁵ During the 2010 election, roughly one out of every seven voters (more than 12 million in total) clicked the "I voted" button on their Facebook Profiles, making Facebook the "virtual polling place" in American elections.⁶

Furthermore, although voters of all ages use the Internet and social networking sites to engage in political activities, "young adults tend to be the most intense of the online political user cohort."⁷ In 2008, more than half of all adults (55 percent) used the Internet for some political purpose, while that number rose to 72 percent among adults between the ages of 18 to 29.⁸ Young voters are also far more likely to use social networking sites (such as Facebook) for political purposes. Nearly half (49 percent) of online political users between the ages of 18 and 29 "engage[d]

² See Pew Research Center, *The Internet and Campaign 2010*, available at <http://pewinternet.org/~media/Files/Reports/2011/Internet%20and%20Campaign%202010.pdf> (accessed on April 26, 2011), at 31.

³ *The Internet's Role in Campaign 2008*, at 43.

⁴ See *The Internet and Campaign 2010*, at 2; See also Pew Research Center, *22% of Online Americans Used Social Networking or Twitter for Politics in 2010 Campaign*, available at <http://pewinternet.org/~media/Files/Reports/2011/PIP-Social-Media-and-2010-Election.pdf> (accessed on April 26, 2011).

⁵ See <http://techpresident.com/blog-entry/facebook-virtual-polling-place> (accessed on April 26, 2011).

⁶ See http://www.facebook.com/note.php?note_id=448930025881; http://elections.gmu.edu/Turnout_2010G.html; <http://techpresident.com/blog-entry/facebook-virtual-polling-place> (accessed on April 26, 2011).

⁷ See *The Internet's Role in Campaign 2008*, at 15.

⁸ See *id.*, at 17.

politically on a social networking site" and 40 percent of online political users between the ages of 18 and 29 "post[ed] original content related to the campaign" during the 2008 election, whereas those percentages were lower among the rest of the population.⁹ In that election, "voters 18 to 24 were the only age group to show a statistically significant increase in turnout"¹⁰ The popularity of the Internet and social networking sites among this voting group likely contributed to the turnout spike. Various studies have shown that people who are contacted by campaigns and political parties are significantly more likely to vote.¹¹ By making it easier and more cost-effective to contact these voters – who have historically been harder to reach, due to the fact that they do not reside at the same address for extended periods of time – social networking sites have helped empower young voters in the political process.

B. How political committees use Facebook.

Facebook is a free social networking service used by nearly 50 percent of Americans.¹² The Facebook network consists of "Profiles" and "Pages," which are provided free of charge. Each individual Facebook user has a "Profile." On their Profiles, Facebook users can post photographs, upload videos, link to websites or other Facebook Profiles, update their current activities, indicate their sports, entertainment, and political preferences, and identify the groups with which they are associated. Individuals with a significant public presence (including entertainers, athletes, and elected officials) and entities (including corporations, government agencies, and political committees) have their own "Pages." On these Pages, the administering entity can update users on recent events, post photographs, upload videos, and link to relevant materials. Facebook users publicly associate with each other by becoming "Friends"; Facebook users publicly associate themselves with elected officials, political committees, etc. by "liking" their Page. The average Facebook user has 130 Friends.¹³

Each user's Facebook home page has a "News Feed." The News Feed allows Facebook users to see when their Friends have engaged in certain activities on the Facebook Platform.¹⁴ For

⁹ See *id.*, at 17.

¹⁰ See U.S. Census Bureau, *Voter Turnout Increases by 5 Million in 2008 Presidential Election*, U.S. Census Bureau Reports (July 20, 2009), available at <http://www.census.gov/newsroom/releases/archives/voting/cb09-110.html> (accessed on April 26, 2011).

¹¹ See, e.g., Mary Fitzgerald, *The Triggering Effects of Election Day Registration on Partisan Mobilization Activities in U.S. Elections* (2005), at 6-8.

¹² See <http://www.facebook.com/press/info.php?statistics>; <http://www.census.gov/main/www/popclock.html> (estimating the U.S. population at 311,238,240) (accessed on April 26, 2011).

¹³ See <http://www.facebook.com/press/info.php?statistics>.

¹⁴ A user's Friends can view certain content and activity, subject to privacy settings.

example, if a user uploads new photographs or updates her status, her Friends can see these updates on their News Feeds. In addition, when a user "likes" a Page or "shares" information from the Page, those actions are broadcast to the user's Friends via the News Feed. Furthermore, when a user "likes" a Page, new content from the Page will automatically appear in the user's News Feed. These updates increase the likelihood that the user's Friends will interact with the Page as well.

Political committees – including candidate committees, party committees, and PACs – utilize Facebook for several purposes. Political committees use their Page to update voters on recent news and upcoming events, post commentaries by candidates, upload photographs and videos, and link to speeches and news stories. Political committees also use their Page to receive feedback from voters. When a political committee posts a comment, photograph, or news story, for example, Facebook users can reply with their own comments, thereby allowing campaigns to interact with voters, for free and in real-time. In addition, because Facebook has a feature allowing any user to organize an offline event, political committees can use Facebook to publicize campaign rallies, phone banks, and canvasses.

Most significantly, Facebook allows campaigns to leverage the social networks that already exist. See *The Internet's Role in Campaign 2008*, at 43 ("The most common political activities on these sites (of the six evaluated) tend to be primarily 'social' in nature, even if they do each have an informational component."). For example, in order to publicize the candidate's position on health care, an upstart congressional campaign might decide to post on the campaign's Facebook Page a link to a speech given by the candidate. A Facebook user who already "likes" the campaign would see this post in her News Feed. This Facebook user could then "share" the speech, which would cause the speech to appear in the News Feed of the user's Friends. If, in response to this action, three of the user's Friends read the speech and like it, these Friends could "share" the speech as well, causing it to appear in the News Feed of all of *their* Friends. Through this iterative process, supporters serve as the campaign's ambassadors within their social networks and campaigns are able to communicate with people with whom they had no pre-existing relationship. The cost to the campaign, meanwhile, is nothing.

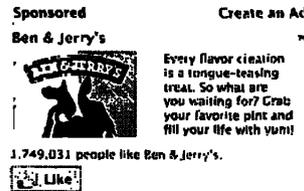
This social networking dynamic played an important role during the 2008 presidential election. During that election, 26 percent of online social network users revealed on a social networking site which Presidential candidate that they voted for. As a result, more than four in ten (41 percent) online social network users discovered which candidate their friends voted for on a social networking site. This percentage skyrocketed to 51 percent among users between the ages of 25 and 34, and 54 percent among users between the ages of 18 and 24. In total, nearly two in three social networking users (65 percent) between the ages of 18 and 24 engaged in some political activity on a social networking site during the 2008 election.¹⁵

¹⁵ See *The Internet's Role in Campaign 2008*, at 43-45.

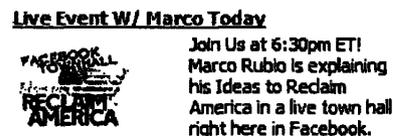
C. The role of Facebook ads within the social network.

Facebook's ads are designed to enhance the ability of Facebook users to communicate with each other and with entities that they support. As the New York Times reported in 2008, Facebook "search[es] for forms of advertising that fit quietly into the fabric of its community, rather than trying to interrupt or distract users, as most ads do."¹⁶

All Facebook ads are character-limited. In Facebook's standard ad, the sponsor is provided with 25 characters to utilize in the ad's title and 135 characters in the ad's body. The standard ad also includes a miniature image, 110 by 80 pixels (roughly 1.15 by 0.83 inches on a typical laptop), which is intended to resemble the "thumbnail sketch" that appears next to each Facebook user's name when she or he posts on a Profile or Page. The purchaser of a standard ad has the option to link the ad to its Facebook Page (see below for an example), where users can view updates, photos, and any other information that the Page sponsor wishes to convey. In addition, these ads permit Facebook users to "like" the ad purchaser's Page and to have that endorsement broadcast to the user's Friends via the News Feed. The fact that the ad is paid for is made clear by the use of the word "Sponsored" in the top left-hand corner of the ad.



The purchaser of the ad can also choose to direct users to an external website (see below for examples).

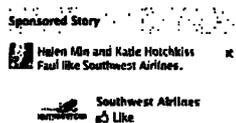


The size and format of Facebook ads serve a crucial purpose. Facebook opted for smaller ads

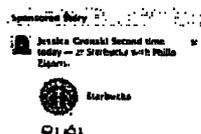
¹⁶ See Saul Hansell, Why Facebook Likes Small Ads, Despite the Small Dollars, NEW YORK TIMES (Nov. 13, 2008), available at <http://bits.blogs.nytimes.com/2008/11/13/why-facebook-likes-small-ads-despite-the-small-dollars/> (accessed on April 26, 2011).

because it determined that larger ads could disrupt the social networking experience for Facebook users and discourage people from visiting the website. Likewise, Facebook chose this particular format for its ads, because the miniature photo or logo resembles the "thumbnail sketch" that appears when a Facebook user posts on a Profile or Page. Changing the size or format of these ads would cause a significant disruption to Facebook's basic advertising model.

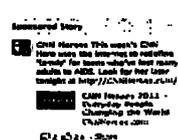
In addition to the standard ad, Facebook sells "Sponsored Stories." A Sponsored Story takes "free" content from the sponsor's Facebook Page ("sponsor-authored content") and displays it to selected Facebook users as an ad. For example, when a sponsor purchases a "Page Like" ad (see bottom left), Facebook users will see a Sponsored Story indicating that their Friends "like" a Facebook Page. Similarly, when a sponsor purchases a "Place Check-In" Sponsored Story, Facebook users will see a Sponsored Story indicating that their Friends have frequented an offsite location operated by the ads sponsor (e.g. a campaign rally or phone bank). Likewise, when a sponsor purchases a "Page Post" Sponsored Story, Facebook users will be shown a Sponsored Story containing a post that currently appears on the sponsor's Facebook Page (e.g. a link to a speech or news story). Users can also "like" the sponsor's page or post a comment, by clicking on the "like" and comments buttons at the bottom of the Story.



Page Likes



Place Check-Ins



Page Posts

Sponsored Stories are even smaller than standard ads. The thumbnail image in the left-hand corner of the ad is only 50 pixels by 50 pixels (roughly 0.52 by 0.52 inches on a typical laptop). Sponsored Stories are also character-limited. When they appear, the ads will display between 0 and 100 characters of sponsor-authored content (0 characters in the case of "Page Likes," and up to 100 characters in the case of "Place Check-Ins" and "Page Posts"). The fact that the ad is paid for is made clear by the use of the word "Sponsored Story" in the top left-hand corner of the ad.

Facebook ads must abide by certain guidelines.¹⁷ Ads may not be false, misleading, fraudulent, or deceptive, and must comply with all applicable laws. In addition, ads that contain a URL in the body must actually link to that URL; ads must directly relate to the content on the landing page; and ads must send all users to the same landing page when the ad is clicked. Finally, ads that receive a significant amount of negative user feedback, or are otherwise deemed in violation of community standards are not permitted.

¹⁷ See http://www.facebook.com/ad_guidelines.php.

II. LEGAL DISCUSSION

When it adopted Advisory Opinion 2010-19, the Commission invited other online ad providers to seek advisory opinions confirming that purchasers of their ads, like Google's, do not have to include a disclaimer in order to comply with the Act and Commission regulations. *See* Commission Open Meeting Audio Recording (Sept. 23, 2010) (Statement of Commissioner Weintraub) (starting at 06:25) ("those other entities may have slightly different concerns and they may have slightly different business models, and if they have questions, we would be happy to hear from them ... and [they] are able to submit their requests."). Facebook now comes before the Commission to make such a request.

The Commission does not require political committees to include disclaimers on "[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed." *Id.*, § 110.11(f)(1)(i). In addition, the Commission recognizes an exception for "[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable." *Id.*, § 110.11(f)(1)(ii). Because Facebook's ads are small and character-limited – much like the text messages exempted from the disclaimer requirement in Advisory Opinion 2002-9 and the search ads considered in Advisory Opinion 2010-19 – and because the inclusion of a disclaimer in the ads would be inconvenient and impracticable, Facebook ads qualify for these exceptions.¹⁸ Granting Facebook's request would be consistent with the Internet rulemaking and would preserve the ability of campaigns to use Facebook ads to communicate effectively with voters, especially the younger voters who rely on social networking sites to engage in politics.

A. **Because the inclusion of a disclaimer on Facebook ads would be inconvenient and impracticable, Facebook ads are exempt under the "small items" and "impracticable" exceptions.**

An item does not require a disclaimer if it would be inconvenient to print one due to the item's small size. *See* 11 C.F.R. § 110.11(f)(1)(i) (exempting from disclaimer requirement "[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed."). Likewise, if the inclusion of a disclaimer on the item would be impracticable, FEC regulations do not require that the item include a disclaimer. *See id.* § 110.11(f)(1)(ii) (exempting from disclaimer requirement any "[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable."). The FEC has reiterated these standards in its written guidance. *See, e.g.* FEC Guide for Congressional Candidates and Committees (April 2008), 67 ("A disclaimer is not required when: [i]t cannot be conveniently printed ... [or] [i]ts

¹⁸ Facebook ads qualify for both the "small items" and "impracticable" exceptions and the request, for the most part, analyzes the two exceptions in tandem. However, even if the Commission determines that Facebook ads qualify for only one of the two exceptions, they still would not require a disclaimer.

display is not practicable"). The FEC has also suggested that the "impracticable" exception applies where the inclusion of a disclaimer would be impracticable in most, but not all, instances. *See Express Advocacy; Independent Expenditures; Corporation and Labor Organization Expenditures*, 60 F.R. 52069, 52071 (Oct. 5, 1995) (emphasis added) ("Since in many instances it is impracticable to include disclaimers on wearing apparel, the Commission believes this further exception is appropriate.").

The standard, therefore, is clear: A disclaimer is not required where its inclusion is inconvenient or impracticable. There is no need to prove that its inclusion is outright impossible; indeed, printing disclaimers on bumper stickers, pins, and wearing apparel is typically not impossible, and many campaigns include disclaimers on such items. Advisory Opinion 2007-33 (Club for Growth) does not support a contrary conclusion. In that instance, the Commission denied a request to truncate the spoken "stand by your ad" disclaimer required by the Bipartisan Campaign Reform Act ("BCRA"). But as the Commission made clear in that opinion, spoken disclaimers are subject to a more stringent standard than written disclaimers. *See Advisory Opinion 2007-33* (emphasis in original) ("Because the 'small items' exception applies only to 'bumper stickers, pens, and similar items upon which the disclaimer cannot be conveniently printed,' it does not justify dispensing with, or truncating, the spoken stand-by-your-ad disclaimer"). The heightened requirement for spoken disclaimers makes sense in light of the fact that the "stand by your ad" disclaimer was specifically mandated by Congress in BCRA. In rejecting Club for Growth's request, the Commission emphasized that Congress had chosen not to "create an exception for television communications of ... any ... duration, even though it was aware of the Commission's already-existing regulatory exceptions" *Id.* In contrast, Congress has never spoken directly to the question posed by Facebook in this request. And to the extent that Members of Congress, including ardent supporters of BCRA, have expressed their views on this general topic, they have shown a clear preference for less regulation of Internet activity. *See Letter from Honorable Harry Reid to Commissioner Scott Thomas* (Mar. 16, 2005) ("... Congress did not intend to regulate this new and growing medium in the Bipartisan Campaign Reform Act."); *Comments on Internet Rulemaking by John Kerry for President and Kerry-Edwards 2004* (June 3, 2005) (noting that "Congress did not intend to create new barriers to Internet use when it passed the Bipartisan Campaign Reform Act of 2002.").

In Advisory Opinion 2002-9 (Target Wireless), the Commission determined that it would be inconvenient for a political committee to include a disclaimer in a text message subject to a 160 character limit. The practical limitations faced by political committees who wanted to send text messages in 2002 are the same as those encountered by political committees who want to purchase Facebook ads today. Disclaimers typically run from 30 to 100 characters, though they may be even longer for some committees. For example, if the hypothetical Fisherman's PAC were required to include a disclaimer on its Facebook ads – Paid for by Fisherman's PAC, www.fishermanspac.com; and not authorized by any candidate or candidate's committee – it would only have 23 characters remaining in the body of a standard Facebook ad to communicate a message (with 25 additional characters in the headline). Meanwhile, the disclaimer alone

would exceed the number of characters of sponsor-authored content made available for display in a Sponsored Story. See Draft A, Advisory Opinion 2010-19 (for some committees, "[i]ncluding the full name of the political committee could require more characters for the disclaimer than are allowed for the ... ad itself.").¹⁹ Just as these limitations made it inconvenient to include a disclaimer on a text message, they make it inconvenient and impracticable to include a disclaimer on Facebook ads. There is simply no basis to treat character-limited Internet communications any differently than other character-limited communications. See 71 F.R. at 18593 ("[T]here is no record that Internet activities present any significant danger of corruption or the appearance of corruption").

The Commission would reach the same conclusion by comparing Facebook ads to the items specifically enumerated in the "small items" exception. In Advisory Opinion 2002-9, the Commission explained that "[b]y virtue of their size, the 'small' items listed in 11 CFR 110.11(a)(6)(i), such as bumper stickers, pins, buttons, and pens are limited in the size and length of the messages that they are able to contain." *Id.* The Commission then compared the text messages to one of the items specifically exempted by section 110.11 – bumper stickers – and found that "similar limits [exist] on the length of a political advertisement [featured in a text message] as those that exist with bumper stickers." *Id.* The same is true with Facebook ads. For example, the standard Facebook ad, which appears as 2.97 square inches on a typical laptop, is smaller than both the standard campaign button (3.98 square inches) and the standard campaign bumper sticker, neither of which includes a disclaimer.²⁰

B. The "small items" and "impracticable" exceptions apply to items whose size is determined by consumer demand, rather than technological limits.

The premise underlying the "small items" and "impracticable" exceptions is that political committees speak through communication mediums that have been established for the benefit of non-political speakers. In the vast majority of these mediums – e.g. television, radio, billboards, magazines, newspapers, and e-mail – it is not inconvenient or impracticable to include a disclaimer. And where that is the case, section 110.11 requires that a disclaimer be included. With some mediums, however – e.g. bumper stickers, buttons, pens, t-shirts, concert tickets, and text messages – it is inconvenient or impracticable to include a disclaimer. By adopting the "small items" and "impracticable" exceptions, the Commission determined that it is better to allow political committees to speak through these mediums than to foreclose their use altogether.

Significantly, many of the items specifically enumerated in the "small items" exemption are

¹⁹ In contrast, in Advisory Opinion 2007-33, the spoken disclaimer comprised, at most, 36.9 percent of the audio portion of the ad. See Club for Growth Request, Advisory Opinion 2007-33, at 5.

²⁰ See http://www.onlineconversion.com/shape_area_circle.htm. The standard political button is 2.25 inches in diameter, though buttons of 3.5 inches in diameter are regularly sold as well.

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small because of consumer demand, rather than technological limits. The size of bumper stickers and buttons, for example, are not limited by technology. The technological means are available to create a bumper sticker that stretches across a car's bumper or to manufacture larger buttons. The problem, of course, is that very few people would purchase these super-sized bumper stickers or buttons. Recognizing that it could not force private businesses to manufacture products that they could not sell, the Commission chose to exempt small items from the disclaimer requirement, regardless of *why* they were small.

The distinction between consumer demand and technological limits also finds no support in the Commission's precedents. In response to Target Wireless' request, the Office of General Counsel initially offered two draft opinions. The first draft concluded that SMS messages were *not* "small items." Draft A reasoned that "Target's messages are not comparable to the items exempted from the disclaimer requirements ... because these items display political advertisements only, whereas Target's proposed messages would include content as well as political advertising. Thus, unlike the exempted items which do not have space for disclaimers, Target's messages have space that is taken up with content." Draft A, Advisory Opinion 2002-9 (concluding "[t]he true limitation, which Target imposes on itself, is that it seeks to display content and the political advertisement on the same screen."). In response to Draft A, the requester pointed out that "[w]hile it may be possible to offer political advertising exclusive of content ... the realistic opt-in subscription rate for a *political advertising only* SMS service will be so insignificant that this medium will be rendered useless to any Federal candidate wishing to reach more than a handful of voters." Comment by Target Wireless (Aug. 21, 2002) (emphasis in original). Draft B, on the other hand, did not ask *why* the text messages were character-limited. It simply analyzed whether the inclusion of a disclaimer on the item as it was sold in the market would be inconvenient or impracticable. See Draft B, Advisory Opinion 2002-9. On a bipartisan 4 to 1 vote (Commissioner Mason was not present), the Commission wisely rejected Draft A and adopted Draft B.

Similarly, in Advisory Opinion 1980-42 (Hart), the Commission did not require the requester to include a disclaimer on tickets to fundraising concerts, even though it was technologically possible to print larger tickets. Instead, the Commission concluded that concert tickets, as they were then sold in the marketplace, qualified as "small items" under its regulations. See Advisory Opinion 1980-42 (emphasis added) ("This conclusion is based on the small item exemption in 110.11(a)(2) and *assumes that the tickets would be comparable in size to those generally used for entertainment events.*"). As discussed earlier in the request, the Club for Growth opinion does not suggest otherwise. In that opinion, the Commission required a political committee to include a full spoken disclaimer in its television ads, because the "small items" exception does not cover spoken disclaimers. See Advisory Opinion 2007-33. It did not direct a medium provider, such as a television station or Facebook, to fundamentally change its business model. The former is well within the Commission's authority; the latter is not.

Just as manufacturers of bumper stickers, buttons, and concert tickets made a business decision

to sell these items in a small size, Facebook has made a business decision to sell small ads. As was described earlier in this request, Facebook opted for smaller ads because larger ads could disrupt the social networking experience for Facebook users and discourage users from visiting the website. The purpose of the "small items" exception is to allow political committees to speak through mediums, like Facebook ads, that consumers actually use.

C. Once the Commission determines that the "small items" exception applies, it would be inappropriate to require an "alternative" disclaimer.

Because Facebook ads qualify for the "small items" exception, they are not required to include an "alternative" disclaimer. Section 110.11 of the regulations, which implements section 441d of the Act, is the only provision in the regulations requiring the use of a disclaimer. Section 110.11 reflects a careful balance between the government's interest in "providing the electorate with information about the sources of election-related spending," on the one hand, and the fact that, under some circumstances, "[d]isclaimer and disclosure requirements may burden the ability to speak." *Citizens United v. F.E.C.*, 130 S.Ct. 876, 914 (2010) (quotations and citations omitted). As a result, if a communication is exempt from the disclaimer requirement under section 110.11 – as Facebook's ads are – there is no basis in the Act or the regulations to require the communication to include any disclaimer. *See* 11 C.F.R. § 110.11(f).

This is the approach that the Commission has historically followed. In Target Wireless, for example, the requester proposed an alternative disclaimer to satisfy the requirement. Once the Commission concluded that the "small items" exception applied, however, it did not require Target Wireless to adopt this alternative disclaimer. *See* Advisory Opinion 2002-9, n. 3.²¹ The Commission has required an alternative disclaimer only in those circumstances where it found that the "small items" and "impracticable" exceptions did *not* apply. *See* Advisory Opinion 2004-10 (Metro Network) (requiring alternative disclaimer after finding that "limitations ... do not make it impracticable to include a disclaimer at all"). *See also* Advisory Opinions 1994-13 (Voter Education Project), 2004-1 (Bush/Kerr), 2004-37 (Waters).

D. Granting Facebook's request would be consistent with the Internet rulemaking.

The Internet rulemaking set forth a general rule that "communications placed for a fee on another person's website" are "public communications" subject to the disclaimer requirements in section 110.11. The Commission promulgated the Internet rule in response to the D.C. district court's

²¹ In Advisory Opinion 1980-42, the Commission required that the requester provide notice of the political purpose of the concert in places where concert tickets would be sold. The purpose of this notice, however, was "to assure that purchases are not made by persons who are prohibited by the Act from making political contributions," such as foreign nationals. *Id.* It had nothing to do with satisfying the disclaimer requirement, which the Commission had already determined did not apply because of the "small items" exception.

decision in *Shays v. F.E.C.*, 337 F. Supp. 2d 28 (D.D.C. 2004). In *Shays*, the district court found that the Commission's decision to exclude *all* Internet communications from the definition of "public communication" violated BCRA, because it permitted parties and outside groups to make unlimited expenditures on Internet communications in coordination with Federal candidates. *See Shays*, 337 F. Supp. at 70 ("The Commission's exclusion of Internet communications from the coordinated communications regulation severely undermines FECA's purposes and therefore violates the second prong of *Chevron*."). Neither the district court opinion nor the D.C. Court of Appeals opinion affirming the district court made reference to section 110.11 or to disclaimers. *See id.*; *Shays v. F.E.C.*, 414 F.3d 76 (D.C. Cir. 2005).

Granting Facebook's request would be consistent with the Internet rulemaking. First, Facebook ads would continue to be "public communications" subject to the rules governing coordinated communications, party coordinated communications, and Federal Election Activity. *See* 11 C.F.R. §§ 100.24, 109.21, 109.37. This addresses the principal concern that animated the district court in *Shays* – that parties and outside groups could make unlimited expenditures on Internet communications in coordination with Federal candidates or, even worse, that state parties could raise and spend soft money promoting or opposing Federal candidates in such ads. Second, political committees would still be required to include disclaimers on online ads, unless the inclusion of the disclaimer would be inconvenient or impracticable. Facebook is not asking the Commission to carve out an exemption for all online ads; it is simply asking the Commission to apply the "small items" and "impracticability" exceptions to its ads in the same way that it might with any other type of "public communication" that happens to qualify for the exceptions.²²

III. CONCLUSION

As it has done consistently throughout the last decade, the Commission should once again allow political committees to utilize new online technologies to communicate with voters, especially the younger voters who rely on social networking sites to engage in politics. Please do not hesitate to contact us should you have any additional questions.

²² The fact that the Commission recently amended section 100.26 to include certain online ads is immaterial. In BCRA, Congress "expand[ed] the scope of the disclaimer requirement for political committees beyond communications constituting express advocacy and communications soliciting contributions." *Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds*, 67 F.R. 76962, 76964 (Dec. 13, 2002). Yet the "small items" and "impracticability" exceptions can still be applied to communications that would otherwise be required by BCRA to include a disclaimer.

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Very truly yours,



Marc E. Elias
Rebecca H. Gordon
Jonathan S. Berkon
Counsel to Facebook

cc: Chair Cynthia L. Bauerly
Vice Chair Caroline C. Hunter
Commissioner Ellen L. Weintraub
Commissioner Steven T. Walther
Commissioner Donald F. McGhan II
Commissioner Matthew S. Petersen

AOR 2011-09

RECEIVED
FEDERAL ELECTION
COMMISSION



"Berkon, Jonathan (Perkins
Coie)"
<JBerkon@perkinscoie.com>

05/06/2011 10:59 AM

To "rknop@fec.gov" <rknop@fec.gov>

cc "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>,
"Gordon, Rebecca (Perkins Coie)"
<RGordon@perkinscoie.com>, "JSelinkoff@fec.gov"

bcc

Subject RE: Facebook

2011 MAY -6 PM 12: 33

OFFICE OF GENERAL
COUNSEL

Mr. Knop:

Thank you for your e-mail. Facebook represents that:

1) Hyperlinks in Facebook ads may lead to Facebook pages or websites containing disclaimers. Hyperlinks in Facebook ads may also lead to Facebook pages or websites that do not contain disclaimers.

2) It is possible for an advertiser to purchase a Facebook ad that includes a hyperlink to a third party's website (e.g., a website not owned, operated, or controlled by the advertiser).

Finally, just to be clear, Facebook is asking the Commission to confirm that Facebook's small-character limited ads qualify for the "small items" exception or the "impracticable" exception. As FN 18 indicates, if the Commission determines that one of the two exceptions applies, no disclaimer is required.

From: rknop@fec.gov [mailto:rknop@fec.gov]

Sent: Thursday, May 05, 2011 6:59 PM

To: Berkon, Jonathan (Perkins Coie)

Cc: Elias, Marc (Perkins Coie); Gordon, Rebecca (Perkins Coie); JSelinkoff@fec.gov

Subject: Facebook

Dear Mr. Berkon:

In our telephone conversation earlier today, you provided us with additional information regarding Facebook's request for an advisory opinion. We have set out below our understanding of certain points that you made during the conversation. Please review the statements below and either confirm their accuracy or correct any misperceptions.

(1) URLs in Facebook ads may lead to Facebook pages or websites containing disclaimers. URLs in Facebook ads may also lead to Facebook pages or websites that do not contain disclaimers.

(2) A Facebook ad payor may include a URL that "relates to the content" of a Facebook ad but directs to a third party's website (e.g., a website not owned, operated, or controlled by the payor).

We would appreciate your response by email. Thank you very much for your cooperation.

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any transaction or matter addressed herein (or any attachments).

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