

**AGENDA DOCUMENT NO. 11-32-B**



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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**AGENDA ITEM**

For the Meeting of 6-15-11

**MEMORANDUM**

TO: The Commission  
FROM: Ellen L. Weintraub *ELW*  
Commissioner  
DATE: June 15, 2011  
SUBJECT: Advisory Opinion 2011-09  
(Facebook)

**SUBMITTED LATE**

I request that the attached draft be placed on the agenda for June 15, 2011.

Attachment

1 ADVISORY OPINION 2011-09

2

3 Marc E. Elias, Esq.

**DRAFT C**

4 Jonathan S. Berkon, Esq.

5 Rebecca H. Gordon, Esq.

6 Perkins Coie LLP

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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 ads on its website qualify for the “small items” 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 ads but that the Act’s disclaimer  
20 requirement may be satisfied by technological means. *See* Advisory Opinion 2010-19  
21 (Google).

22 ***Background***

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

25 Facebook is an online free social networking service. Facebook is used by both  
26 individuals (who have “Profiles”) and public persons and entities, such as political  
27 committees, (who have “Pages”). Facebook sells ads that appear on the Facebook

1 platform to its users. There are two categories of Facebook ads: “Standard Ads” and  
2 “Sponsored Stories.” Both categories of ads are character-limited.

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

### 13 ***Question Presented***

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

### 17 ***Legal Analysis and Conclusions***

18 No, Facebook’s ads do not qualify for either the “small items” exception or the  
19 “impracticable” exception from the disclaimer requirements under the Act and  
20 Commission regulations. Nevertheless, in accordance with Advisory Opinion 2010-19  
21 (Google), Facebook’s ads may satisfy the disclaimer requirements of the Act and  
22 Commission regulations by providing the required information through technological

1 means, e.g., if the ads contain a rollover display or link to a website or Facebook page  
2 containing a full disclaimer as required by 11 CFR 110.11.

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

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

1 candidate's committee." 11 CFR 110.11(b)(3); *see also* 2 U.S.C. 441d(a)(3). Every  
2 disclaimer "must be presented in a clear and conspicuous manner, to give the reader,  
3 observer, or listener adequate notice of the identity" of the ad's sponsor. 11 CFR  
4 110.11(c)(1).

5 Commission regulations contain several exceptions to these general disclaimer  
6 requirements. A disclaimer is not required if the communication is placed on "[b]umper  
7 stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be  
8 conveniently printed." 11 CFR 110.11(f)(1)(i) (the "small items exception").

9 Additionally, the disclaimer is not required for "[s]kywriting, water towers, wearing  
10 apparel, or other means of displaying an advertisement of such a nature that the inclusion  
11 of a disclaimer would be impracticable." 11 CFR 110.11(f)(1)(ii) (the "impracticable  
12 exception").

13 When the Commission explained the small items exception and impracticable exception  
14 in 1995, it indicated that Internet communications that constitute general public political  
15 advertising would still require disclaimers. *See* Final Rules on Communications  
16 Disclaimer Requirements, 60 FR 52069, 52071 (Oct. 5, 1995) ("1995 Disclaimer E&J").

17 When the Commission later engaged in a rulemaking on Internet communications, the  
18 Commission left unregulated most Internet activities, recognizing that the Internet is a  
19 "unique and evolving mode of mass communication and political speech that is distinct  
20 from other media in a manner that warrants a restrained regulatory approach." Final  
21 Rules on Internet Communications, 71 FR 18589, 18589 (Apr. 12, 2006). However, the  
22 Commission singled out paid advertising on another person's website as one of the few

1 instances of Internet communications that require a disclaimer because “the expense of  
2 that advertising sets it apart from other uses of the Internet.” *Id.* at 18590. The  
3 Commission, in so regulating paid Internet advertising as a “public communication,”  
4 subjected such paid Internet ads to the disclaimer rules.

5 *Small Items Exception*

6 The Commission has applied the small items exception to the general disclaimer  
7 requirements in situations where a disclaimer simply would not fit in the space provided  
8 based on the physical limitations of the item or a technological constraint. *See* Advisory  
9 Opinions 1980-42 (Hart) (applying the exception to concert tickets) and 2002-09 (Target  
10 Wireless) (applying the exception to “short message service” communications distributed  
11 through a wireless telecommunications network). Despite its name, the Commission has  
12 previously indicated that “size is not dispositive” when applying the small items  
13 exception; rather “practicality (or “convenience,” in the regulatory vernacular) is the  
14 critical factor in determining the exception’s applicability.”<sup>1</sup>

15 In Advisory Opinion 2002-09 (Target Wireless), the requestor asked whether  
16 disclaimers were required on content, where that content bore a sponsorship message  
17 from a political committee. Nationwide “short message service” (“SMS”) technology,  
18 which was not set by Target Wireless, limited the content to 160 characters per page and  
19 Target Wireless could not guarantee that two pages sent consecutively would be received  
20 consecutively. The Commission determined that the small items exception applied,

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<sup>1</sup> *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](http://www.eqs.nictusa.com/eqsdocsMUR/00003CCC.pdf).

1 emphasizing the limits on the information that could be conveyed. Specifically, the  
2 requestor, Target Wireless, emphasized the nature of the external limitations in a  
3 comment, explaining that “the 160 character limitation is set by current technology” and  
4 that “Target Wireless has no influence” regarding the portion of the characters available  
5 for political advertising. Advisory Opinion 2002-09 (Target Wireless) (August 21, 2002  
6 Comment of Target Wireless). Indeed, the Commission concluded “that the SMS  
7 technology places similar limits on the length of a political advertisement as those that  
8 exist with bumper stickers.” Advisory Opinion 2002-09 (Target Wireless).

9 In contrast to the technological limitations faced by Target Wireless, Facebook’s  
10 proposal is more similar to the facts the Commission considered in Advisory Opinion  
11 2007-33 (Club for Growth PAC). In Advisory Opinion 2007-33, Club for Growth PAC  
12 proposed to purchase short 10- and 15-second television ads and asked the Commission  
13 whether they could “dispense with” or “truncate” the required disclaimers given the short  
14 length of the proposed ads. In response, the Commission indicated that the short length  
15 of Club for Growth PAC’s proposed ads was not driven by any physical or technological  
16 limitations intrinsic to television advertising and concluded that Club for Growth PAC’s  
17 ten- and fifteen-second television ads did not qualify for the “small items exception.”

18 The limitation on the size or the number of characters that Facebook allows to be  
19 included in a Facebook ad is not mandated by the physical limitations of the display  
20 medium or Internet technology. It remains physically and technologically possible for  
21 Facebook to increase both the size of its ads and the number of characters that may be  
22 included in its ads. Moreover, the number of available characters does not limit

1 information delivery over the Internet in the same way as it might in other media. As  
2 noted above, under the small items exception, a disclaimer is not required if the  
3 communication is placed on “[b]umper stickers, pins, buttons, pens, and *similar* small  
4 items upon which the disclaimer cannot be conveniently *printed*.” 11 CFR  
5 110.11(f)(1)(i) (emphasis added). Because of the technological capabilities of the  
6 Internet, Internet ads are not similar to bumper stickers, pins, buttons, or pens, nor do  
7 they involve “printed” disclaimers. Unlike all of the small items referenced in the  
8 regulation, Internet ads may include rollover displays, links, or other technological means  
9 of providing additional information, such as statutorily mandated disclaimers.

10 Accordingly, the Commission concludes that the small items exception does not  
11 apply to Facebook’s ads.

#### 12 *Impracticable Exception*

13 The Commission has not, through advisory opinions, applied the impracticable  
14 exception to the general disclaimer requirements to situations beyond those listed in the  
15 rule at 11 CFR 110.11(f)(1)(ii). *See* Advisory Opinions 2007-33 (Club for Growth PAC)  
16 (determining that ten- and fifteen-second ads do not qualify for the impracticable  
17 exception) and 2004-10 (Metro Networks) (determining that a “live read” sponsorship  
18 message did not qualify for the impracticable exception). The impracticable exception  
19 provides that, in addition to skywriting, water towers, and wearing apparel, the exception  
20 applies to “other means of displaying *an advertisement of such a nature* that the inclusion  
21 of a disclaimer would be impracticable.” 11 CFR 110.11(f)(1)(ii) (emphasis added).  
22 Although the list of communications in the rule is not exhaustive, the relevant concern in

1 determining that a disclaimer would be impracticable turns on the nature of the means of  
2 advertising.

3 In the case of Facebook’s ads, the means, or medium, of advertising is the  
4 Internet. As discussed above, there are not physical or technological limitations of either  
5 the display medium or Internet technology that would make it impracticable to include a  
6 disclaimer on Facebook’s ads.

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

9 *The Internet’s Capacity to Deliver Disclaimers*

10 Because neither exception applies, Facebook’s ads require disclaimers.<sup>2</sup>  
11 Nonetheless, in situations where delivery of a required disclaimer would be unwieldy or  
12 unfeasible, the Commission has, while not eliminating the disclaimer requirement,  
13 allowed the disclaimer to be delivered in an alternate fashion. *See* Advisory Opinions  
14 2010-19 (Google), 2004-01 (Bush/Kerr), 2004-10 (Metro Networks), and 2004-37  
15 (Waters).

Although Facebook’s advisory opinion request does not include any proposals to  
find other means to deliver required disclaimers, 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

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<sup>2</sup> 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* 2 U.S.C. 441d(a); 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.

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.* § 18450.4(b)(3)(G)(i). The Commission is similarly open to the development and use of other technological means of providing required disclaimer information in a format consistent with the way information is delivered over the Internet.

1           The Commission notes that, as in Advisory Opinion 2010-19 (Google), some  
2 Facebook ads will link to a website or Facebook page that contains a disclaimer that  
3 complies with the Act and Commission regulations. For Facebook’s ads that provide a  
4 link to a website or Facebook page with a complete and accurate disclaimer, the  
5 disclaimer requirement of 11 CFR 110.11 would be satisfied. Nor is this the only way to  
6 satisfy the disclaimer requirement. A rollover display that contains the information  
7 required by 11 CFR 110.11 may also comply. Other technological means of providing  
8 the required information may also be available or developed. The essential requirement  
9 is that identifying information about the source of the advertisement, as required by  
10 2 U.S.C. 441d(a), be provided to the public. This conclusion conforms to the  
11 Commission’s policy and practice of “interpret[ing] the Act and its regulations in a  
12 manner consistent with contemporary technological innovations . . . where the use of the

1 technology would not compromise the intent of the Act or regulations.” Advisory  
2 Opinion 1999-09 (Bradley for President).

3           This response constitutes an advisory opinion concerning the application of the  
4 Act and Commission regulations to the specific transaction or activity set forth in your  
5 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
6 of the facts or assumptions presented, and such facts or assumptions are material to a  
7 conclusion presented in this advisory opinion, then the requestor may not rely on that  
8 conclusion as support for its proposed activity. Any person involved in any specific  
9 transaction or activity which is indistinguishable in all its material aspects from the  
10 transaction or activity with respect to which this advisory opinion is rendered may rely on  
11 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or  
12 conclusions in this advisory opinion may be affected by subsequent developments in the  
13 law including, but not limited to, statutes, regulations, advisory opinions, and case law.  
14 All cited advisory opinions are available on the Commission’s website, [www.fec.gov](http://www.fec.gov), or  
15 directly from the Commission’s Advisory Opinion searchable database at  
16 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Cynthia L. Bauerly  
Chair