

COMMENTS ON AO 2011-09

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May 16, 2011

VIA HAND DELIVERY

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FEDERAL ELECTION
COMMISSION
2011 MAY 17 AM 10:28
OFFICE OF GENERAL
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Re: Comments on AO 2011-09 (Facebook)

Dear Mr. Hughey:

AOL Inc., through its attorneys, submits these comments on the request for an advisory opinion filed recently by Facebook, Inc. The Commission released Facebook's request to the public on May 6, 2011, and designated it as AO 2011-9. In its request, Facebook asked the Commission to confirm 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 or the Commission regulations, even though these ads do not necessarily link to a "landing page" that can feature the required disclaimer. AOL supports this request. It is important, however, both that the Commission grant flexibility to reflect the reality of small online ads, and to do so in an evenhanded manner that does not advantage one competitor over another. Just as the Google ruling made by the Commission last year can be used by companies other than Google if the parameters of that decision are met, AOL requests that the Commission similarly take care to ensure that its ruling here does not skew the competitive arena.

AOL is an international internet services and media company that derives income from the sale of advertisements including political advertisements. We believe online media enables candidates for office to better communicate with their constituencies. Further, it allows candidates with fewer resources to educate and inform a wider array of potential voters which increases participation in our democracy. To this end, AOL agrees with Facebook that the Commission should extend the "small item" exception for small internet advertisements beyond the scope of last year's Google decision, AO 2010-19. In that decision, the Commission

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May 16, 2011
Page 2 of 2

STEPTOE & JOHNSON LLP

recognized that including the required disclaimer in a character limited text ad could leave little or no room for the text of the ad itself, and it permitted Google to run the ads without the required disclaimer, provided that the ads contained a URL that linked to a website where the full required disclaimer would appear. Facebook's advisory opinion request goes further. Facebook argues that the small ads exception to the disclaimer requirement should apply to any small ad, including an ad that contains a URL that links to a website where a disclaimer could appear.

The Commission has not previously addressed this exact issue, but in AO 2002-9 (Target Wireless) the Commission held that text messages limited by the existing technology to 160 characters qualified for the small item exception. Here the size of the ad is not limited by the technology, but by consumer demand for a particular kind and quality of online experience, which compels many online companies to make online ads placed on certain sites as small and unobtrusive as possible. Like Facebook, AOL, too, is compelled by the same necessity – consumer demand – to offer the same type of ad as the ones at issue here on many of the web sites (both its own and third-party sites) where it places online ads. In past applications of the “small item” exception, the Commission has taken the “small item” as presented to it. It has not required producers of pens or bumper stickers to increase the size of these items to accommodate the required disclaimer. It has simply decided whether the item can conveniently accommodate the disclaimer and if it cannot, it has exempted it from the disclaimer requirement altogether.

Moreover, AOL urges the Commission to recognize that web based platforms are being accessed increasingly from mobile and smart phones whose screen size places practical constraints on the information that can be viewed effectively. Smart phone applications, or “apps,” pose a particular challenge to traditional disclosure requirements in that they often appear exclusively in a small area of a user's mobile device. Failing to recognize these new technologies under the “small items” exemption could unfairly discourage their use for advertising by political campaigns. When viewed from the perspective of the mobile and smart phone user, the issue presented by Facebook's advisory opinion request more closely resembles the issue presented in AO 2002-9 and more strongly supports the application here of the decision reached in that opinion.

For these reasons we urge the Commission to confirm that all small, character-limited ads delivered online qualify for the “small items” and “impracticable” exceptions, and as such do not require a disclaimer under the Federal Election Campaign Act or the Commission regulations.

Respectfully submitted,

John J. Duffy

