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 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 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: (202) 694-1650

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
June 10, 2011

AGENDA ITEM
For the Meeting of 6-15-11

MEMORANDUM

TO: The Commission
FROM: Christopher Hughey, Acting General Counsel
      Rosemary C. Smith, Associate General Counsel
      Robert M. Knop, Assistant General Counsel
      Jessica Selinkoff, 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
Dear Messrs. Elias and Berkon and Ms. Gordon:

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

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

Background

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

Facebook is an online free social networking service. Facebook is used by both individuals (who have “Profiles”) and public persons and entities, such as political committees, (who have “Pages”). Facebook sells ads that appear on the Facebook platform to its users. There are two categories of Facebook ads: “Standard Ads” and “Sponsored Stories.” Both categories of ads are character-limited.
Standard Ads provide for up to 25 text characters in the title and 135 text characters in the body of the ad. Sponsored Stories provide for zero to 100 text characters. However, Sponsored Stories do not contain any additional communicative content chosen by the ad payor; instead, any text characters displayed in Sponsored Stories merely: (1) inform Facebook users of the fact that their Friends either “like” the ad payor’s Facebook Page (“Page Like” ad) or have frequented a physical offsite location operated by the ad payor (e.g., a campaign rally or phone bank) (“Place Check-In” ad); or 2) republish a post (up to 100 characters) that currently appears on the ad payor’s Facebook Page (“Page Post” ad). Both Standard Ads and Sponsored Stories also include a miniature image. Standard Ads use an image similar in size to the thumbnail image that appears next to each Facebook user’s name when he or she posts on a Facebook Profile or Page. Sponsored Stories use images that are smaller. A Standard Ad may link to either a Facebook Page or an external website. This link may lead to a Facebook Page or website containing a disclaimer, but may also lead to a Facebook page or website that does not contain a disclaimer. A Facebook ad link may lead to a third party’s website or Facebook page, that is, to a website that is not owned, operated, or controlled by the person paying for the Facebook ad.

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

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

Legal Analysis and Conclusions

Yes, the Commission concludes that Facebook’s small, character-limited ads qualify for the “impracticable” exception to the disclaimer requirements at 11 CFR 110.11(f)(1)(ii).

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

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

The Commission’s regulations contain several exceptions to these general disclaimer requirements. A disclaimer is not required if the communication is placed on “[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed.” 11 CFR 110.11(f)(1)(i) (the “small items exception”). Additionally, the disclaimer requirements may be eliminated for, among other things, “[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.” 11 CFR 110.11(f)(1)(ii) (the “impracticable exception”).

The largest Facebook ads – the Standard Ads – are limited to 160 characters, including the headline. For these ads, the text characters required to display a disclaimer would consume much to most of the text characters available to the ad payor. For example, in a disclaimer for a communication not authorized by a candidate, the disclaimer must clearly state, among other things, that the communication “is not authorized by any candidate or candidate’s committee.” 2 U.S.C. 441d(a); 11 CFR
The phrase "Not authorized by any candidate or candidate's committee" is 57 characters long. Including the full name of the political committee could require more characters for the disclaimer than are allowed for the text ad itself. Similarly, a communication paid for by an authorized congressional candidate’s committee must include a disclaimer that reads, “Paid for by X for Congress.” 2 U.S.C. 441d(a)(1). Even if the candidate’s name were very short, the disclaimer would take up almost a quarter of a Standard Ad’s content.

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

Although, in theory, it may be technologically possible for Facebook to modify the character limitations available in its advertising program to accommodate the Commission’s standard disclaimers applicable to political advertising, the Commission’s disclaimer exceptions at 11 CFR 110.11(f)(1) take an entity’s existing advertising model as it is. For this reason, Commission rules do not require that bumper stickers, pins, buttons, or pens be made bigger, or that additional text be included with skywriting, water towers, or apparel, in order to accommodate disclaimers. The Commission’s creation of these categorical regulatory exceptions, as well as its practical application thereof, evidences its rejection of the disclaimer burden for these media. See Advisory Opinion 2002-09 (Target Wireless) (rejecting “Draft A,” which would not have applied
the exceptions because the requestor “impose[d] on itself” the “true limitation” for
displaying disclaimers on political advertising through SMS messaging); see also 1980-
42 (Hart) (exempting fundraising concert tickets from displaying disclaimers, where the
“conclusion is based on the [small items exception] . . . and assumes that the tickets
would be comparable in size to those generally used for entertainment events.”).
Moreover, to require a business to alter its product or service especially for political
advertisers would run contrary to the Commission’s general requirement that commercial
transactions be conducted “on the same terms and conditions available to all similarly
situated persons in the general public.” See Advisory Opinion 2004-06 (Meetup)
(concluding the requestor could provide its free and fee-based website services to Federal
candidates, political committees, and their supporters “so long as it does so on the same
terms and conditions available to all similarly situated persons in the general public.”).
Additionally, the Commission declines to endorse a modified disclaimer
requirement here by concluding that the disclaimer requirement is satisfied if the
webpage that is linked to in a Facebook ad (the “landing page”) contains a complete
disclaimer. This answers a question not asked by the requestor (who asked, specifically,
whether or not the Facebook ads qualify for the small item or impracticable exceptions to
the Act’s disclaimer requirement). Moreover, as explained above, there is no legal basis
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
eamples 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.
CFR 110.11(f)(1)(ii) is categorical; if the advertising medium qualifies for the exception (as Facebook's does), no disclaimer of any form is required.

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

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

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

Lastly, even assuming there were a legal basis to require Facebook's ad sponsors to adhere to a modified disclaimer requirement, it would not always be possible for them to do so as a practical matter, and thus this would not represent a viable alternative. As discussed above, a sponsor of political advertising on Facebook may choose a landing page that belongs to a third party over whom the sponsor has no control, thus leaving the
This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. All cited advisory opinions are available on the Commission's website, www.fec.gov, or directly from the Commission's Advisory Opinion searchable database at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Cynthia L. Bauerly
Chair