



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
ACTING STAFF DIRECTOR
ACTING GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE

FROM: OFFICE OF THE COMMISSION SECRETARY *sw*

DATE: June 14, 2011

SUBJECT: Comment on Draft AO 2011-09
(Facebook)

Transmitted herewith is a timely submitted comment from Well & Lighthouse by Robert Lenhard regarding the above-captioned matter.

Draft Advisory Opinion 2011-09 is on the agenda for Wednesday, June 15, 2011.

Attachment

COVINGTON & BURLING

INDEPENDENT
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2011 JUN 14 A 11: 54

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June 14, 2011

VIA COURIER

Shawn Woodhead Werth
Office of the Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington D.C., 20463

Re: FEC AO 2011-09 (Facebook)

Dear Ms. Werth:

On behalf of our client, Well & Lighthouse, we are submitting comments on the above captioned advisory opinion request. We recommend the Commission adopt Draft B for the reasons stated below.

Well & Lighthouse is a consulting firm that specializes in communicating political messages using digital media, including Facebook. The firm works for Democratic candidates and elected officials, including United States Senators Harry Reid and Al Franken, numerous other United States Senators, as well as political advocacy groups. The very field of social media and digital media is in its infancy, and how political and social messages are conveyed is evolving rapidly. While a candidate having a website was viewed as innovative ten years ago, the influence of online video, Facebook, Twitter, and more recently mobile applications and SMS messaging, are a sign of how quickly and completely this change is occurring. Nor is it simply an evolution of technological tools, designed by engineers. Which technologies survive and which disappear has largely been driven by how users of these technological tools choose to connect with each other and with information. This makes it hard to predict what means and methods of communication will thrive, and which will be abandoned. Well & Lighthouse is actively involved in experimenting with and using a great many of these technologies.

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We believe that Draft A takes an overly rigid reading of the law, in part because it is based on two false assumptions, false at least for the types of transactions in which Well & Lighthouse regularly engages in for its clients.

The first assumption is that Facebook's potential ability to adjust the size of its advertising to accommodate the disclaimers required for communications regulated by 11 C.F.R. 110.11 has an effect on those facing disclaimer requirements. Draft A is correct that Facebook, as the seller of digital political advertisements, will make a business decision as to whether the political market is sufficiently large to undertake the cost and redesign complexities of creating a new ad format that could accommodate space for a disclaimer, as well as a reasonable amount of content. However, for the purchasers of political ads on Facebook and other social media, the choice will be a "take it or leave it" decision. Facebook currently only offers ad space that makes it impractical to include a disclaimer. Thus, those seeking to communicate political messages will have only the choice to use Facebook ads, or not.

Secondly, and more importantly, Draft A offers as a solution to this problem, that the required disclaimer can be supplied through use of a hypertext link in the ad that takes viewers to the sponsor's webpage. We greatly appreciate the Commission considering practical alternatives that would accommodate all interests. The problem with this solution is that it assumes that the only place a Facebook ad's link should take the viewer is to the sponsor's webpage (where the requisite disclaimer would be). In previous election cycles, candidates have used Facebook ads that linked to sites other than the candidate's homepage. As an example, we have produced ads for federal campaigns, and linked not to the campaign's website, but to news reports about the campaign. As a strategic matter, we believe undecided voters view news reports as a more credible source of information about the campaign, and consequently there were practical advantages for the campaign to link to these sites, rather than the campaign's own website. Similarly, we can imagine situations where a candidate or group would want their Facebook ad to link to YouTube or a similar online video that may have content that viewers see as more credible, entertaining or topical than material on a campaign's own website. If Draft A were

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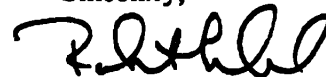
adopted, we would be prevented from purchasing such ads on Facebook (or similar media) in the future, because as a practical matter, we could not comply with the disclaimer rules.

The use of a small ad format is more the trend than the exception on social media such as Facebook. If Draft A is adopted, types of communications that are being experimented with now, such as small ads that link to sources of information other than the sponsor's own site, such as newspaper articles, mobile application APIs, video clips hosted on external sites, would be prohibited because only the sponsor's own site will contain an appropriate disclaimer.

Draft B provides an alternative that is consistent with existing regulations, and also allows for the continued evolution of the use of the Internet in politics, as well as in commerce and social communication. The scope of the decision is limited by its facts, *i.e.*, it involves only ads that have a maximum of 160 characters (a level previously deemed warranting an exception in AO 2002-09), and consequently, presents a limited response to a limited question.

The FEC has generally sought to interpret the statute and its regulations to permit the evolution of political communication on the Internet. Draft B is more consistent with that history, and will avoid the likelihood that the impracticality of complying with the disclaimer rules will prevent certain kinds of political communications.

Sincerely,



Robert D. Lenhard

**cc: Christopher Hughey, Acting General Counsel
FEC Commissioners**