



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)**

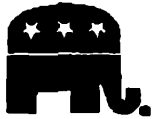
Transmitted herewith is a timely submitted comment from the Republican National Committee by John R. Phillippe, Jr. regarding the above-captioned matter.

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

Attachment

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**Republican
National
Committee**

Counsel's Office

June 14, 2011

VIA FACSIMILE

Christopher Hughey, Esq.
Acting General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: **Comments on Advisory Opinion Request 2011-09 (Facebook)**

Dear Mr. Hughey:

The Republican National Committee ("RNC") submits the following comments in support of Draft B of AO 2011-09 (Facebook). Draft B of AO 2011-09 correctly finds that requiring a disclaimer on Facebook ads would be impracticable pursuant to 11 CFR 110.11(f)(1)(ii), and therefore, a disclaimer is not required. We thank the Commission for the opportunity to comment in writing on this proposed Advisory Opinion. While we would prefer that Draft B also recognize that the ads in question qualify for the small items exception of 110.11(f)(1)(i), the RNC supports Draft B of the Facebook AO because it recognizes the realities of modern campaigning and is consistent with the intent of the disclaimer exceptions.

I. The small items and impracticability exceptions should include modern means of communication.

The small items exception to the general disclaimer requirements include "[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 impracticability exception includes, "[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 examples listed in this section are reflective of popular mediums of political communication at the time the regulations were adopted in 1976. They are no longer representative examples of

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campaign techniques in the age of the Internet. Indeed, were the regulations adopted today, we would venture to guess that character-limited web advertisements would be the prototypical examples of exempt items that the Commission would recognize.

Modern political campaigns are conducted through a myriad of communication mediums, and the Internet plays a key role in incorporating a broad range of voters. Just as the Commission continues to find that bumper stickers and t-shirts do not require a disclaimer because it cannot be "conveniently printed," the Commission should find that a disclaimer on a character limited online advertisement is not required. The disclaimer alone could potentially take up a quarter to a half of the available space for the ad. While it may be technically possible to alter the available space, Draft B correctly points out that 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, the Commission has not required disclaimers on bumper stickers, buttons, and pens nor required additional small items to display the only disclaimer and accompany the primary item. Similarly, the Commission did not require additional text in skywriting ads, on water towers, or apparel. Adding the disclaimer text is possible through each medium, but the Commission did not require the disclaimer requirement because of the burden it would impose.

While skywriting and water towers may have been used as a means of communication in the past, text messages and social media sites are now the channels by which political messages are communicated. The Commission should recognize that the era of emery boards and sound trucks is behind us. The AOR before the Commission provides the opportunity to do just that and to take at least a modest step in keeping up with technological advancement by finding that online character limited ads fall within the small items and impracticality exceptions.

II. Requiring a link to a disclaimer page is beyond the scope of Commission regulations and discourages voter participation in elections.

Mandating that online ads contain a link to a disclaimer page is beyond the scope of Commission regulations and a barrier to engaging in the political process. Draft A recognizes implicitly recognizes the impracticability of requiring a disclaimer on character limited ads, but fails to apply the applicable exception. Instead, Draft A creates a new regulation stipulating a link to a disclaimer. The Commission cannot proclaim a new regulation through an advisory opinion; it must apply current regulations. By attempting to provide an alternative to the disclaimer, Draft A admits the difficulty and impracticability of mandating a disclaimer on online character limited ads. After admitting the impracticability, requiring a link is akin to mandating a separate bumper sticker that only displays the disclaimer in addition to the primary bumper sticker. Just as the Commission does not require a separate disclaimer-only bumper sticker, the Commission cannot require a disclaimer link for online character limited ads. With Draft A's impracticability admission, the Commission must recognize the applicability of the impracticability exception.

Additionally, requiring a link is prohibitive for voters to participate in elections through social media advertising. An individual or a local political organization who desires to participate in an election through taking out an ad on a social networking site may not have a

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pre-existing Website to which to link. Requiring a link would force the individual or organization to build a Website for the sole purpose of displaying a disclaimer. More likely, such individual or organization would simply sit it out, and another voice will have been stifled.

III. Commercial vendors should treat political customers and non-political customers equally.

The Commission routinely discusses the importance of commercial vendors treating political customers in the same manner as its non-political customers. As a customer, the RNC does not decide the character limits for a particular communication medium. Those decisions are made by the vendor based on a variety of business and technological reasons related to offering the best product or service to its consumer. Draft A recognizes that impracticability is based on the nature of the means of the media, but fails to distinguish between the Internet as a whole and the unique nature of online social networking ads.

Forcing Facebook, or any social networking site, to change its basic interface to provide political advertising with a disclaimer will have the result of decreasing political communication in a forum that has increasingly played a key role in voter participation in elections. The Commission should encourage increased voter participation by finding that Facebook ads qualify for the small items and impracticable exceptions, and therefore, do not require a disclaimer.

IV. Conclusion

The RNC appreciates the opportunity to provide these written comments in support of Draft B of the Facebook AO. Although Draft B does not recognize the applicability of the small items exception, we encourage the Commission to keep pace with advancing technology and to adopt Draft B and uphold current Commission regulations by finding that character-limited ads are covered under the impracticability exceptions.

Sincerely,



John R. Phillippe Jr.
Chief Counsel