



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** *(Signature)*

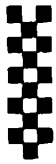
**DATE: June 14, 2011**

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

**Transmitted herewith is a timely submitted comment from the Democratic National Committee, the Democratic Congressional Campaign Committee and the Democratic Senatorial Campaign Committee by Brian G. Svoboda regarding the above-captioned matter.**

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

**Attachment**



**FACSIMILE COVER SHEET**

**CONFIDENTIAL AND PRIVILEGED**

If there are any problems with this transmission, please call 202.654.6200

2011 JUN 14 P 1:54

**Perkins  
Coie**

700 Thirteenth Street, N.W., Suite 600

Washington, D.C. 20005-3960

PHONE: 202.654.6200

FAX: 202.654.6211

www.perkinscoie.com

DATE: June 14, 2011

COVER SHEET & \_\_\_\_\_ PAGES

SENDER:	TELEPHONE:	FACSIMILE:
<i>Brian G. Svoboda</i>	<i>(202) 434-1654</i>	<i>(202) 434-1690</i>

RECIPIENT:	COMPANY:	TELEPHONE:	FACSIMILE:
<i>Shawn Woodhead Werth</i>	<i>Federal Election Commission</i>		<i>(202) 208-3333</i>

Please see attached re: Comments on Draft Advisory Opinion 2011-09.

The information contained in this Fax is confidential, privileged information and is intended only for the recipient named above. If you are not the intended recipient, please understand that any dissemination, distribution, copying or any other use of this Fax is prohibited. If you have received this Fax in error, please immediately notify us by telephone and either destroy the original Fax or return it to Perkins Coie LLP, 700 Thirteenth Street, N.W., Suite 600, Washington, D.C. 20005-3960. Thank you.



700 Thirteenth Street, N.W., Suite 600  
Washington, D.C. 20005-3960  
PHONE: 202.654.6200  
FAX: 202.654.6211  
www.perkinscoie.com

Brian G Svoboda  
PHONE (202) 434-1634  
FAX (202) 434-1690  
EMAIL: BSvoboda@perkinscoie.com

June 14, 2011

**BY FACSIMILE – (202) 208-3333**

Ms. Shawn Woodhead Werth  
Secretary and Clerk  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

**Re: Draft Advisory Opinion 2011-09  
Comments by the Democratic National Committee, Democratic Congressional  
Campaign Committee and Democratic Senatorial Campaign Committee**

Dear Ms. Werth:

I write on behalf of the Democratic National Committee, the Democratic Congressional Campaign Committee and the Democratic Senatorial Campaign Committee, regarding Draft Advisory Opinion 2011-09.

The Internet and social networking are powerful engines to mobilize support for political parties and candidates. But Draft A would effectively close the door to an entire class of party and candidate Internet advertising, even while leaving that same door open to outside groups. Moreover, by interpreting the disclaimer requirements so rigidly as to bar an entire class of party and candidate communications, the Commission would risk inviting a challenge to the entire statute.

To preserve a vibrant disclaimer statute, and to keep candidates and parties on a level playing field with outside groups, the Commission should use the safety valves that already exist in the disclaimer rules – the "small items" and "impracticable" exemptions – to permit Facebook ads without disclaimers. The Commission should adopt Draft B, which sensibly holds that a Facebook ad cannot be required to carry a disclaimer that, in many cases, would even swallow the ad itself.

04031-0001/LEGAL21092156 1

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DALLAS · DENVER · LOS ANGELES · MADISON · PALO ALTO  
PHOENIX · PORTLAND · SAN DIEGO · SAN FRANCISCO · SEATTLE · SHANGHAI · WASHINGTON, D.C.

Perkins Coie LLP

Ms. Shawn Woodhead Werth  
June 14, 2011  
Page 2

## DISCUSSION

Unless exempt, every Internet advertisement paid for by a national party committee or candidate must have a disclaimer. See 11 C.F.R. § 110.11(a)(1) (2011). Groups not registered with the Commission do not face so heavy a burden: only those advertisements that expressly advocate a candidate's election or defeat, or that solicit contributions, need disclaimers. See *id.* §§ 110.11(a)(2)-(3).<sup>1</sup> The disclaimers used by national party committees are usually quite long. For example, while this request involves ads with as few as 100 characters, a disclaimer used by the Democratic Congressional Campaign Committee might be 133 characters long, with spaces: "Paid for by the Democratic Congressional Campaign Committee, [www.dccc.org](http://www.dccc.org). Not authorized by any candidate or candidate's committee."<sup>2</sup>

Finally, political parties do not simply use Internet advertisements to drive people to their own web sites. They use Facebook and similar ads to drive people to their supported candidates' web sites, or to other party committee web sites. The same is true of candidates. Many Democratic candidates maintain fundraising pages through PACs like ActBlue, where the disclaimers differ from those on the candidates' own home pages.

Thus, if the Commission adopts Draft A, party committees and candidates would be effectively unable to purchase many Facebook ads. They would have to include a full disclaimer, which may take up all of the available space in the ad itself. Draft A's default rule is that the entire, normal disclaimer is required. See Draft A, at 2-3, 9. The disclaimer requirement would only be suspended when the ad links to the sponsor's own web or Facebook page, and only when the disclaimer on that page is the same as the disclaimer on the Facebook ad would be. See Draft A at 9. As Draft B correctly observes, this limited, quasi-exception has no source in the statute or regulations. See Draft B at 6-7.

As a practical matter, political parties would not be able to buy Facebook ads that drive viewers to their candidates' web pages, or to other party committees' web pages. In many cases, candidates themselves would be practically unable to purchase ads driving viewers to their own fundraising pages, on third party sites like ActBlue. See Draft A at 10 ("the disclaimer information ... on the linked website must be the same information that would be included by the payor in a disclaimer in a Facebook ad").

---

<sup>1</sup> The disclaimer requirements also apply to "electioneering communications." 11 C.F.R. § 110.11(a)(4). But these do not include "communications over the Internet ..." *Id.* § 100.29(c)(1).

<sup>2</sup> In the case of party communications not authorized by a candidate, the disclaimer must contain the party committee's "full name." See 11 C.F.R. § 110.11(b)(3).

Ms. Shawn Woodhead Werth  
June 14, 2011  
Page 3

But unregistered groups, by and large, would face no such burden. Because they are not subject to the disclaimer requirements in the first place, Draft A would let them purchase these very same Facebook ads, so long as they avoided express advocacy or solicitations in the ad itself. See 11 C.F.R. § 110.11(a). See also *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 473 (2007) ("Any express advocacy on the website, already one step removed from the text of the ads themselves, certainly does not render an interpretation of the ads as genuine issue ads unreasonable."). The result would be perverse. Party committees and candidates that register and report under FEC rules, and that raise all of their funds under FECA limits and restrictions, would be barred from sponsoring certain types of Facebook ads. But unregistered outside groups could freely sponsor the very same ads.

Draft A does not just widen the already-existing gap between the law's treatment of parties and other politically active groups. It applies the disclaimer requirement in a way that effectively bars certain types of party and candidate speech, thus inviting a challenge to section 441d generally. To stop a relatively small amount of anonymous speech, it unwisely risks a world in which the bulk of political advertising would be anonymous.

Courts have found disclaimer requirements to be constitutional only when narrowly tailored to serve an overriding state interest. See *FEC v. Public Citizen*, 268 F.3d 1283, 1287 (11<sup>th</sup> Cir. 2001); accord *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 297 (2d Cir. 1995). But Draft A shows no such careful tailoring. To reach an illiberal result, it ignores clear, existing exceptions. Just as the "small item" and "impracticable" exceptions ensure that parties and candidates can lawfully distribute buttons, pens and T-shirts, they also serve to ensure that parties can sponsor 100-character Facebook ads supporting their candidates, and that candidates can drive supporters to their ActBlue pages, without having the disclaimers swallow the ads.

We respectfully urge the Commission to adopt Draft B. We appreciate the opportunity to comment on these matters.

Very truly yours,



Brian G. Svoboda  
Counsel to the Democratic National Committee, Democratic Congressional Campaign Committee, and Democratic Senatorial Campaign Committee

cc: Rosemary C. Smith, Associate General Counsel, fax (202) 219-3923