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

DATE: June 14, 2011

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

Transmitted herewith is a timely submitted comment from Campaign Legal Center and Democracy 21 by Fred Wertheimer, J. Gerald Hebert and Paul S. Ryan regarding the above-captioned matter.

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

Attachment

"Paul Ryan" <PRyan@campaignlegalcenter.org>
06/14/2011 11:49 AM

To <secretary@fec.gov>, <chughey@fec.gov>, <CBauerly@fec.gov>, <CHunter@foo.gov>, <DMcGahn@fec.gov>, <CommissionerPetersen@fec.gov>,
cc
bcc
Subject CLC & D21 Comments on Draft AOs 2011-9 A and B

Dear Ms. Werth, Mr. Hughey and Commissioners,

Attached is an electronic copy of the comments I faxed to Ms. Werth's office, moments ago, on behalf of the Campaign Legal Center and Democracy 21 regarding Draft Advisory Opinions 2011-9 A and B (Facebook). Thank you for your consideration. Sincerely,

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CLC & D21 Comments on Draft Ad. Ops. 2011-9_Facebook_6.14.11.pdf

June 14, 2011

Via Facsimile and Email

Ms. Shawn Woodhead Werth
Secretary & Clerk
Federal Election Commission
999 E Street NW
Washington, DC 20463
Fax: (202) 208-3333

Re: Comments on Draft Advisory Opinions 2011-9 A and B (Facebook)

Dear Ms. Werth:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Draft Advisory Opinions 2011-9 A and B, which have been issued in response to a request for an advisory opinion by Facebook (AOR 2011-9). The two draft opinions are on the agenda for the Commission's meeting on June 15, 2011.

Facebook "seeks confirmation 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 (the "Act") or Commission regulations."

The Office of General Counsel prepared two draft advisory opinions. Agenda Document No. 11-32 (Draft A) concludes that:

> [N]either the "small items" exception nor the "impracticable" exception applies to Facebook's ads but that the Act's disclaimer requirement is satisfied if a Facebook ad links to a website or a Facebook page containing a full disclaimer that is clear and conspicuous as required by 11 C.F.R. 110.11, and both the disclaimer and the Facebook ad are paid for by and authorized by the same person or persons.

Draft A at 1.

By contrast, Agenda Document 11-32-A (Draft B) 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." Draft B at 1.

We strongly oppose the adoption of Draft B, which represents an even further weakening of the law from the advice given to Google last year in AO 2010-19, which itself was a departure

from the standards previously in place. There is no showing that a further weakening of the Google advisory opinion is warranted, *i.e.*, no indication that the regulated community has been unduly hampered in advertising on Facebook under the requirements of the Google AO, and thus no basis for adopting Draft B at this point.[1] We urge the Commission to conduct a rulemaking to determine whether modified disclaimers are appropriate in the context of character-limited Internet communications and, if so, to establish specifications for such modified disclaimers.

1. **FECA's disclaimer requirements serve the important government interests of providing the electorate with information and insuring that voters are fully informed, and must not be discarded when practical means of implementing them are available.**

The Supreme Court has consistently upheld the Act's disclaimer requirements because they "provid[e] the electorate with information" and "'insure that the voters are fully informed' about the person or group who is speaking." *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010) (citing *McConnell v. FEC*, 540 U.S. 93, 196 (2003) and *Buckley v. Valeo*, 424 U.S. 1, 76 (1976)).

Facebook correctly notes that "the Commission has consistently interpreted the Act and its regulations to permit the free and robust use of [new] technologies," AOR 2011-9 at 1, and that, "[f]or political committees, the Internet has become 'the most accessible marketplace of ideas in history.'" *Id.* at 2 (quoting FEC, Internet Communication, Final Rules and Explanation and Justification, 71 Fed. Reg. 18589, 18590 (Apr. 12, 2006)).

However, contrary to Facebook's assertions, the Commission has not permitted the free and robust use of new technologies to come at the expense of the public's right to know who is paying for a political advertisement on the Internet. Instead, "[w]hen the Commission explained the small items exception and impracticable exception in 1995, it indicated that Internet communications that constitute general public political advertising would still require disclaimers." Draft A at 4. And "when Congress later amended the Act to add new specificity to the requirements for disclaimers, . . . Congress did not expand either exception to include Internet ads . . . ." *Id.* (citing the Bipartisan Campaign Reform Act of 2002). In 2005-06, when the Commission engaged in a rulemaking on Internet communications, "the Commission singled out paid advertising on another person's website as one of the few instances of Internet communications that require a disclaimer because 'the expense of that advertising sets it apart from other uses of the Internet.'" *Id.* at 5.

Most recently, in the Google advisory opinion proceeding last year, the Commission deadlocked on two draft opinions similar to Drafts A and B in this matter, but ultimately did issue an opinion that "under the circumstances described in the request, the conduct is not in violation of the Act or Commission regulations." AO 2010-19 at 2. Now-Chair Bauerly joined Commissioners Walther and Weintraub in a concurring statement explaining that their votes on

[1] For example, the Campaign Legal Center's Paul S. Ryan, a regular user of Facebook, has had an ad by "Garamendi for Congress" appear in the sidebar of his Facebook profile page, incorporating the www.garamendi.org URL into the ad and clicking through to a page on the "Garamendi for Congress" Web site containing the Act's required "paid for by" disclaimer. This conforms to the modified disclaimer requirement set forth in the Google advisory opinion.

the opinion, crucial to the four-vote majority, depended on Google's use of a modified disclaimer—*i.e.*, inclusion of the URL of the committee sponsor's website in the ad and a landing page that contains a full disclaimer meeting the requirements of 11 C.F.R. § 110.11. *See* AO 2010-19, Concurring Statement of Bauerly, Walther and Weintraub at 1-2.

Facebook mischaracterizes the Google AO, stating that "rather than forc[ing] political committees to forego [Google's character-limited advertising] medium altogether, the Commission permitted them to utilize it—without a disclaimer—to communicate with voters." AOR 2011-9 at 2. But this is wrong: the Commission's permission to Google did not authorize it to proceed "without a disclaimer." Instead, the reason the Commission advised Google that its conduct would not violate the Act was precisely because of the inclusion of certain identifying information within the ad (*i.e.*, the sponsor committee's URL) and the inclusion of the required disclaimer on the landing page linked to from the ad. Thus, the Commission's opinion to Google did not permit the regulated community to use Google's character-limited ads without a disclaimer.

Since the Commission's opinion to Google, use of Google's character-limited ads by candidates and other political advertisers has become commonplace and their use of Facebook's character-limited ads is becoming increasingly common. At the very least, this demonstrates that the modified disclaimer required by the controlling opinion in AO 2010-19 is not impracticable.

The Internet's ability to facilitate communication—including not only political advertising, but also communication about who is paying for political advertising—is among its principle virtues. The Internet suffers none of the limitations of skywriting and water towers. *See* 11 C.F.R. 110.11(f)(1)(ii).

Draft B ignores not only the importance of the governmental interests recognized by the Supreme Court to "provid[e] the electorate with information" and "'insure that the voters are fully informed' about the person or group who is speaking," *Citizens United*, 130 S. Ct. at 915, but also ignores the limitless potential of the Internet to provide this information to voters in a practical way. Draft B should be rejected.

2. Adoption of Draft B would have far reaching consequences on voters' access to information about who is paying for political ads in 2012 and beyond.

Facebook correctly describes the rapidly increasing importance of the Internet generally, and Facebook in particular, in political campaigns. *See* AOR 2011-9 at 2-7. With more and more voters accessing political information via the Internet in every successive election, the importance of the Commission's implementation and enforcement of the Act's disclaimer requirements with respect to Internet communication cannot be overstated. Character-limited Internet advertising is an important part of the future of political campaigning. If the Commission were to discard the disclaimer requirement for this kind of advertising, it would be unilaterally repealing the disclaimer law for a growing segment of all political ads—an act that would be arbitrary, capricious and contrary to law.

The Act's disclaimer requirements apply not only to candidates and political committees, but also to any person who makes a disbursement to finance communications that expressly advocate the election or defeat of a candidate. *See* 2 U.S.C. § 441d(a).

Draft B would permit any and all political spenders—including business corporations, labor unions, section 501(c)(4) groups and other nonprofit entities—to buy millions of dollars of advertising on Facebook and, presumably, in other similar character-limited Internet environments, expressly advocating the election or defeat of candidates without voters targeted by the ads having any idea who is paying for those expenditures.

Draft B would deny the electorate information and insure that the voters are uninformed about the person or group who is speaking—the opposite of the outcome intended by Congress and the Supreme Court. *See Citizens United*, 130 S. Ct. at 915. Doing so under the pretense that providing voters with information is "impracticable" in the limitless context of the Internet would be, quite literally, incredible.

3. **The Commission should conduct a rulemaking to determine whether modified disclaimers are appropriate in the context of character-limited Internet communications and, if so, to establish specifications for such modified disclaimers.**

Draft A correctly concludes that "neither the 'small items' exception nor the 'impracticable' exception applies to Facebook's ads . . . ." Draft A at 1. However, Draft A goes on to advise that the Act's disclaimer requirements would be met through use of a modified disclaimer of the sort recommended by the controlling opinion in the Google proceeding last year.

While the language of the statutory disclaimer requirement at 2 U.S.C. § 441d might be satisfied by the disclaimer proposed in Draft A, that kind of limited disclaimer seems to differ from that which was contemplated in the promulgation of the disclaimer specifications at 11 C.F.R. § 110.11.

Given that 11 C.F.R. § 110.11 does not explicitly address the disclaimer requirements in the context of character-limited Internet ads, that the Commission is now addressing this issue through an advisory opinion proceeding for the second time in less than a year, and that this is likely to be a major growth area in political advertising and thus, an issue likely to recur, we urge the Commission to conduct a rulemaking to consider the matter more fully. Specifically, we urge the Commission to conduct a rulemaking to determine whether some modifications of the disclaimer specifications at 11 C.F.R. § 110.11 are appropriate in the context of character-limited Internet communications and, if so, to establish specifications for such disclaimers.

A rulemaking on this matter would give all interested parties the opportunity to fully consider and comment on the importance of disclaimers on paid political advertising, as well as viable, practical options for implementing the Act's disclaimer requirements in character-limited Internet communication environments.

We appreciate the opportunity to provide these comments to you.

Sincerely,

/s/ Fred Wertheimer

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Each Commissioner