



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

## **ADVISORY OPINION 2017-12 (TAKE BACK ACTION FUND)**

### **CONCURRING STATEMENT OF VICE CHAIR CAROLINE C. HUNTER AND COMMISSIONERS LEE E. GOODMAN AND MATTHEW S. PETERSEN**

Today we supported Draft B, which sets forth our reasoning for concluding that Take Back Action Fund (“TBAF”) would have to include the information required to be disclosed by 52 U.S.C. § 30120 in the text, image, or video portions of paid advertisements that it plans to place on Facebook’s website, because the time and/or space dimensions of the proposed ads can conveniently and practicably accommodate that information and TBAF represents that it can incorporate the information into its ads while effectively communicating its planned political messages. This is not a new or remarkable legal conclusion. The Commission determined that disclaimer information must be included in paid Internet advertisements more than ten years ago in the 2006 Internet Communications rulemaking, and disclaimers already appear on most paid advertisements we see disseminated on the Internet.

The novelty in this request arises from the most recent developments in Facebook advertising products. Facebook has modified the dimensions and capabilities of Facebook Video and Image ads from older ad formats previously considered by the Commission.<sup>1</sup> As observed in Draft B, the functionality and capabilities of today’s Facebook Video and Image ads can accommodate the information without the same constrictions imposed by the character-limited ads that Facebook presented to the Commission in 2011. Facebook Video ads now allow up to 240 minutes of communication time, including audio and video captioning, plus a recommended total of up to 125 characters of text, while Image ads can accommodate a recommended total of up to 180 characters of text around the image (including the headline and website link description), with additional text overlaying the image. And Facebook ads today, on computer and cell phone screens, measure several inches in height and width.

This expansion of the functionality and space in Facebook ads represents a positive technological evolution. And it is critical to our conclusion that TBAF’s proposed ads can effectively communicate TBAF’s political message while concomitantly providing the public with important information about TBAF’s sponsorship of the ads.

As both Draft A and Draft B note, Facebook affords advertisers several options for including sponsorship information, which can be presented together as a single message or appear in a combination of spaces within a single ad. Recognizing the unique characteristics of

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<sup>1</sup> See Advisory Opinion Request 2011-09 (Facebook) (limiting standard ads to 160 text characters, including headline, and sponsored ads to between zero and 100 text characters); *see also* Facebook, Comment on REG 2011-02 (Internet Communication Disclaimers) at 3 (Nov. 13, 2017) (“When Facebook submitted its request for an advisory opinion in 2011, ads on Facebook were small and had limited space for text. Ad formats available on Facebook have expanded dramatically since that time.”) (footnotes omitted), <http://sers.fec.gov/fosers/showpdf.htm?docid=358468>.

the Internet medium, the Commission has acknowledged that the strict requirements for disclaimers on traditional broadcast and print media do not apply to ads on the Internet, which is more flexible than the traditional media.<sup>2</sup>

For example, TBAF could display the required information in a Facebook Video ad in a number of spaces or manners:

- As a separate segment of the video (ads can run up to 240 minutes);
- As a textual overlay to all or part of the main political message in a video;
- As a voice over to the video;
- In the text appearing above or below the video screen; or
- In a combination of the above.

Likewise, Facebook Image ads can incorporate the required sponsorship information:

- As a textual overlay to the political image;
- As part of the image itself;
- In the text appearing above or below the image; or
- In a combination of the above.

In the past, these options were not available on the Facebook advertising platform. Old Facebook ads had room for no more than 160 characters of text, including the headline. The phrase “Not authorized by any candidate or candidate’s committee,” which is required to appear in disclaimers for advertisements not authorized by a candidate, is 56 characters long. Including the additional information required for a disclaimer could have used more characters than were allowed for the ad itself.

The Commission has previously recognized that some small digital ads qualified for the “small items exemption” to the disclaimer requirement of section 30120, or approved alternative ways to provide disclaimer information in small online ads.<sup>3</sup> In other cases, the Commission

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<sup>2</sup> See MUR 7245 (Shiva4Senate), Factual and Legal Analysis at n.16 (“The Complaint’s allegation that disclaimers on websites and emails need to be inside a printed box is unfounded because such materials are not considered to be ‘printed.’”); see also Statement of Reasons, Comm’rs. Weintraub, Walther, Lenhard, Mason, Toner & von Spakovsky at 3, MUR 5526 (Graf for Congress, *et al.*) (stating that “print” does not include communication on Internet pages and “neither the printing nor the existence of a printout transforms the Internet page itself into a printed communication” and “when FECA uses the words ‘Internet,’ ‘web,’ ‘website,’ or ‘electronic,’ or forms of these words, it does not mean something ordinarily understood as being in print or in printed form”); MUR 6662 (Heidi for Texas Campaign, Inc.), Factual and Legal Analysis at 4 (concluding that emails do not fall under definition of “public communications,” and thus were not required to include disclaimer where no available information suggested that sender was federal political committee); MUR 6591 (Tom Stilson), Factual and Legal Analysis at 2-3 (finding no reason to believe that committee’s website needed to meet “printed materials” requirements for its disclaimer); MUR 6406 (Lee Terry for Congress, *et al.*), Certification of Vote (Feb. 25, 2011) (finding no reason to believe that printed box was required around disclaimer on Internet campaign advertisement).

<sup>3</sup> See, e.g., Advisory Opinion 2002-09 (Target Wireless) (exempting small SMS text messages from disclaimer requirement); Advisory Opinion 2010-19 (Google) (concluding that certain online ads did not violate Act or Commission regulations, where ads did not include disclaimers but linked to landing pages that did). *But see*

disagreed over the applicability of those exemptions to small digital ads.<sup>4</sup> The conclusion reached by the Commission today does not alter or supersede those prior opinions in the case of small digital ads, character-limited ads, and small digital displays. Here, the Commission has answered the question presented by this requestor, based upon the unique facts and ad characteristics presented, and makes no broader policy or rule.<sup>5</sup>

Small digital ads that cannot conveniently or practicably accommodate the information required under section 30120 remain common, and the Commission continues to monitor evolutions in technology to ensure that our rules and regulatory interpretations stay current. Accordingly, this fall the Commission reopened the comment period on an Advance Notice of Proposed Rulemaking inviting public comments on this subject.<sup>6</sup> The Commission received thousands of public comments in response. More recently, the Commission initiated a process that is expected to address the applicability of the “small items exemption” and “impracticality exemption” to small digital ads and screens in a rulemaking. On November 16, 2017, Commissioners voted unanimously to direct the Office of General Counsel to draft a notice of proposed rulemaking that proposes revisions to Commission rules governing disclaimers on paid internet and digital communications, while leaving unchanged any other rules adopted by the Commission in the 2006 Internet Communications rulemaking.<sup>7</sup> A rule of broader application may result from this process.

New technologies have advanced and continue to advance the free speech of American citizens as well as their access to diverse information. Where, as here, technological innovations facilitate both free speech rights and regulatory compliance, without diminishing speech, we should find a way to embrace such innovations.

December 14, 2017

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Concurring Statement of Chairman Matthew S. Petersen, Advisory Opinion 2010-19 (Google) (Dec. 30, 2010) (indicating preference for Draft B and belief that ads were exempt from disclaimer requirement under impracticability exception); Statement for the Record by Commissioner Caroline C. Hunter, Advisory Opinion 2010-19 (Google) (Dec. 17, 2010) (same).

<sup>4</sup> See, e.g., Advisory Opinion Request 2013-18 (Revolution Messaging) (concerning disclaimers on small banner ads on cell phone screens); Advisory Opinion Request 2011-09 (Facebook) (concerning disclaimers on small character-limited ads on Internet).

<sup>5</sup> See generally Second Concurring Statement of Commissioner Ellen L. Weintraub, Advisory Opinion 2015-14 (Hillary for America) (observing that a minority of “commissioners on their own simply cannot supersede Commission opinions” and, moreover, that “[u]nder 52 U.S.C. § 30108(c)(1), any advisory opinion rendered by the Commission may be relied upon only by the requestor and ‘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 such advisory opinion is rendered.’ (emphasis added). This is a high bar.”).

<sup>6</sup> Internet Communication Disclaimers; Reopening of Comment Period, 82 Fed. Reg. 46,937 (Oct. 10, 2017); see also Internet Communication Disclaimers, 76 Fed. Reg. 63,567 (Oct. 13, 2011).

<sup>7</sup> See REG 2011-02 (Internet Communication Disclaimers), Certification of Vote (Nov. 16, 2017).