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MEMORANDUM

TO: The Commission

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Subject: AO 2017-12 (Take Back Action Fund) Draft A-1

Attached is a draft of the subject advisory opinion. We ask that it be made available on the Commission's website.

Attachment

1 ADVISORY OPINION 2017-12

2

3 John Pudner

4 President

5 Take Back Action Fund

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7 Auburn, AL 36830

8

9 Brendan Fischer, Esq.

10 Director, Federal and FEC Reform

11 Campaign Legal Center

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13 Washington, DC 20005

14

15

16 Dear Messrs. Pudner and Fischer:

17 We are responding to your request on behalf of Take Back Action Fund (“TBAF”).

18 TBAF asks whether the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 (the “Act”), and

19 Commission regulations require TBAF to include disclaimers on its proposed character-limited

20 Facebook Image and Video ads. The Commission concludes that neither the “small items”

21 exception nor the “impracticable” exception to the disclaimer rules applies to the proposed

22 Facebook Image and Video ads and that such paid internet content requires full disclaimers.

23 ***Background***¹

24 TBAF is incorporated in Virginia and is exempt from federal taxes under section

25 501(c)(4) of the Internal Revenue Code. Advisory Opinion Request at AOR001. TBAF plans to

26 purchase advertising on Facebook that will expressly advocate the election or defeat of

27 candidates, as that term is defined at 11 C.F.R. § 100.22.² While TBAF indicates that it intends

28 to purchase a variety of ads — which will differ in text, character, and pixel dimensions — it

¹ The facts presented in this advisory opinion are based on your letter dated October 31, 2017 and email received on November 7, 2017.

² TBAF, which has an online presence at <http://takebackactionfund.blogspot.com/>, does not yet have a Facebook presence but “intends to create a Facebook page in order to run the Facebook ads.” AOR009.

1 asks whether and how it must comply with the Act’s disclaimer requirements on two particular
2 types of Facebook ads: Image ads and Video ads. AOR002.

3 In its proposed Image ads, TBAF intends to use approximately 75 characters of text
4 content (exclusive of any required disclaimer), though each ad’s “text will be adjusted according
5 to the specific circumstances in a particular election campaign.” AOR009. The proposed Image
6 ads will be 400 x 150 pixels and, per Facebook ad guidelines, may contain text above and under
7 the image (accompanying a link to a website) in addition to text as part of the image.³ Although
8 Facebook does not restrict the total text characters above and below the image in an Image ad,
9 Facebook recommends no more than 125 text characters, warning that text “over 125 single byte
10 characters is allowed, but may be truncated.”⁴ In addition to the 125 text characters that
11 surround the image, a Facebook Image ad may contain text overlaying (or incorporated into) the
12 image, though images with more than 20% text overlay risk “reduced delivery” of the ad.⁵ That
13 is, “ads with higher amounts of image text will be shown to fewer people (unless the ad qualifies
14 for an exception).”⁶ The exceptions include “[l]egal text, like ‘terms and conditions’ . . . (as it
15 applies to the product in your ad).”⁷

³ AOR003 (citing Facebook, *Facebook Ad Guide: Image, Facebook Feed*, <https://www.facebook.com/business/ads-guide/image>).

⁴ *Id.* at n.3. For Image ads that include a link to a website, the Facebook ad specifications indicate that these 125 characters may include no more than 25 text characters in the “headline” above the image and 30 text characters in “link description” accompanying a link to a website without risk of truncated text. *Id.*

⁵ *Id.* at n.5 (citing Facebook, *Using Text in Ad Images*, <https://www.facebook.com/business/help/980593475366490>).

⁶ Facebook, *Using Text in Ad Images*, <https://www.facebook.com/business/help/980593475366490>.

⁷ *Id.*

1 For its Facebook Video ads, TBAF intends to use approximately 250 to 707 characters of
2 text as both audio and on-screen captioning (exclusive of any required disclaimer), with the text
3 “adjusted according to the specific circumstances in a particular election campaign.” AOR009.
4 TBAF has not yet determined the length of its videos, though it notes that Facebook Video ads
5 may be up to 240 minutes long. *Id.* Facebook Video ad guidelines do not limit the amount of
6 text characters in a video’s on-screen captions, but have the same text restrictions as Image ads
7 — truncation for more than 125 text characters, including 25 characters for a headline and 30
8 characters for a link description — for the ad text above and below the video.⁸

9 ***Question Presented***

10 *When TBAF purchases paid Facebook Image and Video advertising that expressly*
11 *advocates for or against a candidate, must that advertising include all, some, or none of the*
12 *disclaimer information specified by 52 U.S.C. § 30120(a)?*

13 ***Legal Analysis and Conclusion***

14 TBAF must include all of the disclaimer information specified by 52 U.S.C. § 30120(a)
15 on its proposed paid Facebook Image and Video advertising that expressly advocates for or
16 against a candidate.

17 A “disclaimer” is a statement that must appear on certain communications to identify
18 who paid for the communication and, where applicable, whether a communication was
19 authorized by a candidate. 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11. With some exceptions,
20 the Act and Commission regulations require disclaimers for “public communications” that
21 expressly advocate the election or defeat of a clearly identified federal candidate. 52 U.S.C.

⁸ AOR003 at n.4 (citing Facebook, *Facebook Ad Guide: Video, Facebook Feed*, <https://www.facebook.com/business/adsguide/video>).

1 § 30120(a); 11 C.F.R. § 110.11(a); *see also* 11 C.F.R. § 100.22 (defining “expressly
2 advocating”). The term “public communication” includes “communications placed for a fee on
3 another person’s Web site.” 11 C.F.R. § 100.26. Thus, the disclaimer requirements apply to “all
4 potential forms of advertising” placed for a fee online, including “banner advertisements,
5 streaming video, popup advertisements, and directed search results.” Internet Communications,
6 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006); *see also id.* at 18,608 n.52 (noting that the term
7 “website” is “meant to encompass a wide range of existing and developing technology”
8 including “social networking software”).

9 Every disclaimer “must be presented in a clear and conspicuous manner, to give the
10 reader, observer, or listener adequate notice of the identity” of the ad’s sponsor. 11 C.F.R.
11 § 110.11(c)(1). The information required in a disclaimer varies depending on whether the
12 communication is paid for or authorized by a candidate. For example, a communication that is
13 not paid for or authorized by a candidate must “clearly state the full name and permanent street
14 address, telephone number, or World Wide Web address of the person who paid for the
15 communication, and that the communication is not authorized by any candidate or candidate’s
16 committee.” 11 C.F.R. § 110.11(b)(3); *see also* 52 U.S.C. § 30120(a)(3).⁹

17 TBAF’s proposed Facebook Image and Video ads will be placed for a fee on another
18 person’s (Facebook’s) website and are, therefore, public communications. And, because
19 TBAF’s proposed Facebook ads will expressly advocate the election or defeat of clearly

⁹ A communication that is paid for or authorized by a candidate must state that the communication “has been paid for by the authorized political committee.” 11 C.F.R. § 110.11(b)(1); *see also* 52 U.S.C. § 30120(a)(1). A communication that is authorized by a candidate but paid for by someone else must state who paid for the communication and that the communication is authorized by the candidate. 11 C.F.R. § 110.11(b)(2); *see also* 52 U.S.C. § 30120(a)(2).

1 identified federal candidates, they must include disclaimers with the appropriate authorization
2 language, unless an exception to the disclaimer rules applies.

3 Commission regulations set forth several exceptions to the general disclaimer
4 requirements, two of which are potentially implicated by TBAF's proposal. First, disclaimers
5 are not required for communications placed on "[b]umper stickers, pins, buttons, pens, and
6 similar small items upon which the disclaimer cannot be conveniently printed." 11 C.F.R.
7 § 110.11(f)(1)(i) (the "small items exception"). Second, disclaimers are not required for
8 "[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of
9 such a nature that the inclusion of a disclaimer would be impracticable." 11 C.F.R.
10 § 110.11(f)(1)(ii) (the "impracticable exception").

11 *Small Items Exception*

12 The Commission has applied the small items exception to the general disclaimer
13 requirements in situations where a disclaimer simply would not fit in the space provided based
14 on the physical limitations of the item or an external technological constraint. *See* Advisory
15 Opinion 1980-42 (Hart) (applying the exception to concert tickets); Advisory Opinion 2002-09
16 (Target Wireless) (applying the exception to character-limited "short message service," or SMS,
17 communications distributed through a wireless telecommunications network).

18 In Advisory Opinion 2002-09 (Target Wireless), the Commission considered whether
19 disclaimers were required on paid SMS content. At the time the Commission issued that
20 advisory opinion, technology limited SMS content to 160 text-only characters per message; SMS
21 messages could not include images; wireless telephone carriers contractually limited the number
22 of "minutes" of SMS messages that consumers could receive; and content longer than 160 text

1 characters would be sent over multiple messages, which might not be received consecutively. *Id.*
2 at 2. The Commission concluded, in light of such technological constraints, that the small items
3 exception applied to paid SMS messages, emphasizing “that the SMS technology places similar
4 limits on the length of a political advertisement as those that exist with bumper stickers.”
5 Advisory Opinion 2002-09 (Target Wireless) at 4.¹⁰

6 Technological developments over the past 15 years have rendered the current internet
7 image and video ad technology materially distinguishable from the SMS ad technology that the
8 Commission considered in Advisory Opinion 2002-09 (Target Wireless). Unlike SMS
9 communications in 2002, TBAF’s proposed Facebook Image and Video ads are not subject to a
10 strict technological size or character limit akin to a bumper sticker, pin, button, pen, or similar
11 small item upon which a disclaimer cannot be conveniently printed. *See* 11 C.F.R.
12 § 110.11(f)(1)(i). In fact, not only is the SMS technology of 2002 effectively obsolete, but
13 Facebook’s own ad technology has similarly transformed since the Commission last considered
14 Facebook ads in 2011. As Facebook recently explained, “[w]hen Facebook submitted its request
15 for an advisory opinion in 2011, ads on Facebook were small and had limited space for text. Ad

¹⁰ In the 15 years since it issued the Target Wireless advisory opinion, the Commission has been asked to apply the small items exception to paid ads on various internet platforms but has not issued any subsequent advisory opinion approving of such an application of that exception by the required four affirmative votes. In Advisory Opinion 2010-19 (Google), the Commission concluded that a proposal regarding text ads generated by Google’s AdWords program “under the circumstances described . . . [was] not in violation of the Act or Commission regulations,” but the Commission did not approve by four affirmative votes a conclusion that Google AdWords ads qualified for the small items exception. In two other instances, the Commission considered requests that sought to apply the small items exception to certain internet ads. In AOR 2011-09 (Facebook), the Commission considered whether the small items exception applies to zero to 160 text character ads with thumbnail size images. In AOR 2013-18 (Revolution Messaging), the Commission considered whether the small items exception applies to mobile banner ads. In both instances, the Commission was unable to issue advisory opinions by the required four affirmative votes.

1 formats available on Facebook have expanded dramatically since that time.”¹¹ Indeed, today,
2 social media advertisements already capably comply with other federal regulatory regimes
3 requiring disclaimers.¹²

4 In contrast to the technological limitations faced by Target Wireless in 2002, TBAF’s
5 proposal is more similar to the facts the Commission considered in Advisory Opinion 2007-33
6 (Club for Growth PAC). In that advisory opinion, Club for Growth PAC proposed to purchase
7 short 10- and 15-second television ads and asked the Commission whether they could “dispense
8 with” or “truncate” the required disclaimers given the short length of the proposed ads. Because
9 the short length of Club for Growth PAC’s proposed ads was not driven by any physical or
10 technological limitations intrinsic to television advertising, the Commission concluded that the
11 ads did not qualify for the small items exception.

12 Like the 10- and 15-second television ads the Commission considered in the Club for
13 Growth PAC advisory opinion, the limitation on the size or the number of characters that
14 Facebook allows to be included above and below Facebook Image and Video ads is not
15 mandated by the physical limitations intrinsic to the display medium or internet technology.
16 Indeed, Facebook’s ad guidelines indicate that more characters are allowed, though not

¹¹ Facebook, Comment on REG 2011-02 (Internet Communication Disclaimers) at 3 (Nov. 13, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358468> (citing Facebook, *Facebook Ads Guide*, <https://www.facebook.com/business/ads-guide>); see also Fidji Simo, *An Update on Facebook Ads*, Facebook Newsroom (June 6, 2013), <https://newsroom.fb.com/news/2013/06/an-update-on-facebook-ads/> (announcing reconfiguration of ad products); Google, Comment on REG 2011-02 (Internet Communication Disclaimers) at 3 (Nov. 8, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358482> (noting that the “types and varieties of digital advertisements that political advertisers create and place throughout the web has grown exponentially since 2011.”).

¹² See, e.g., Federal Trade Comm’n, *.com Disclosures* at 6-7 (Mar. 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> (requiring clear and conspicuous disclaimer on any platform on which the advertisement runs, whether display or mobile).

1 recommended. Moreover, the number of available characters overlaying an image in a Facebook
2 Image ad, or on the screen in a Facebook Video ad, do not appear to restrict the provision of a
3 full disclaimer. Although Facebook ad guidelines warn that Image ads with text overlaying more
4 than 20% of the image “will be shown to fewer people,” Facebook excludes the overlay of “legal
5 text” from this restriction.¹³ Because the text characters of a disclaimer required by law under 52
6 U.S.C. § 30120(a) are “legal” text, it does not appear that Facebook imposes any restriction on
7 including the required disclaimer on the face of a Facebook Image ad. Similarly, it does not
8 appear that there are any text character, audio, or video restrictions that would limit the inclusion
9 of a full disclaimer in the video portion of a Facebook Video ad, which can be up to 240 minutes
10 in length, a period of time that is substantially longer than most video ads broadcast on television
11 and subject to the disclaimer rules.

12 Accordingly, because Facebook Image and Video ads are not subject to a strict
13 technological size or character limit akin to the small items upon which the Commission has
14 determined a disclaimer cannot be conveniently printed, the Commission concludes that the
15 small items exception does not apply to TBAF’s proposed Facebook ads.

16 *Impracticable Exception*

17 As described above, section 110.11(f)(1)(ii) of the Commission’s regulations exempts
18 from the disclaimer requirement advertisements displayed via skywriting, water towers, and
19 wearing apparel, as well as “other means of displaying an advertisement of such a nature that the
20 inclusion of a disclaimer would be impracticable.” The list of communications in the rule is not
21 exhaustive; the relevant question is whether the very nature of an advertising medium renders a

¹³ Facebook, *Using Text in Ad Images*, <https://www.facebook.com/business/help/980593475366490>.

1 disclaimer impracticable. The Commission has not, however, issued any advisory opinions in
2 which it applied the impracticable exception to a situation beyond those listed in section
3 110.11(f)(1)(ii). *See* Advisory Opinion 2007-33 (Club for Growth PAC) (determining that ten-
4 and fifteen-second ads do not qualify for impracticable exception); Advisory Opinion 2004-10
5 (Metro Networks) (determining that a traffic helicopter “live read” sponsorship message did not
6 qualify for impracticable exception). In particular, no Commission advisory opinion has applied
7 the impracticable exception to an advertisement similar to TBAF’s proposed Facebook ads at
8 issue here.¹⁴

9 TBAF’s proposed Facebook Image and Video ads would be displayed on the internet.
10 For the same reasons discussed above regarding the small items exception, the Commission
11 concludes that there are no physical or technological limitations of either the display medium or
12 internet technology that would make it inherently impracticable to include a disclaimer on the
13 proposed Facebook ads. Although Facebook ad guidelines recommend limiting text characters
14 above and below the images and videos in these ads, Facebook explicitly notes that the
15 technology allows expanded text to be viewed. Moreover, as discussed above, the full-size
16 images and up to 240-minute videos in the proposed Facebook ads can, themselves, contain full
17 disclaimers in addition to any disclaimers in the text surrounding those elements.

¹⁴ In Advisory Opinion 2010-19 (Google), the Commission concluded that a proposal regarding text ads generated by Google’s AdWords program “under the circumstances described . . . [was] not in violation of the Act or Commission regulations,” but the Commission did not approve by four affirmative votes a conclusion that Google AdWords ads qualified for the impracticable exception. *Id.* at 2. In two other instances, the Commission considered requests that sought to apply the impracticable exception to certain internet ads. In AOR 2011-09 (Facebook), the Commission considered whether the impracticable exception applies to zero to 160 text character ads with thumbnail size images. In AOR 2013-18 (Revolution Messaging), the Commission considered whether the impracticable exception applies to mobile banner ads. In both instances, the Commission was unable to issue advisory opinions by the required four affirmative votes.

1 Accordingly, the Commission concludes that the impracticable exception does not apply
2 to TBAF’s proposed Facebook ads.

3 *Clear and Conspicuous Internet Disclaimers*

4 Because no exception applies, TBAF’s communications placed for a fee on Facebook
5 require disclaimers. As noted above, a disclaimer “must be presented in a clear and conspicuous
6 manner, to give the reader, observer, or listener adequate notice of the identity” of the ad’s
7 sponsor. 11 C.F.R. § 110.11(c)(1). “A disclaimer is not clear and conspicuous if it is difficult to
8 read or hear, or if the placement is easily overlooked.” *Id.*

9 While Commission regulations impose specific additional requirements for
10 communications that are printed or that appear on radio or television, they do not specify how
11 disclaimers on social media (or other internet) ads satisfy the clear and conspicuous requirement.
12 *Compare* 11 C.F.R. § 110.11(c)(1) (general “clear and conspicuous” requirement for all
13 disclaimers), *with* 11 C.F.R. § 110.11(c)(2)-(4) (additional requirements for printed, radio, and
14 television disclaimers). Thus, the language of section 110.11(c)(1) describes the disclaimer
15 specifications applicable to TBAF’s proposed ads.¹⁵

16 The Commission recognizes several ways that TBAF may satisfy the disclaimer
17 requirement, though these options are not intended as an exclusive list. For example, the full
18 disclaimer required by 11 C.F.R. § 110.11(b) may appear (1) in the text field above the image or
19 video; (2) split between the text fields above and below the video, so long as the split does not
20 render the disclaimer unclear; (3) as text overlaying the image; or (4) as a caption or audio in the

¹⁵ In Advisory Opinion 2010-19 (Google), the Commission concluded that political committee purchasers of character-limited online ads that included a link to the committees’ own websites, on which viewers would find full disclaimers, did not violate the Act or Commission regulations. *Id.* TBAF, however, is not a political committee and its website does not contain the full disclaimer information required by 11 C.F.R. § 110.11(a)(1).

1 video. Moreover, a Facebook Image ad disclaimer that satisfies the “printed” ad disclaimer
2 requirements at 11 C.F.R. § 110.11(c)(2) — by, for example, being of sufficient type size to be
3 readable, in a box set off from other content, and with a reasonable degree of color contrast —
4 would satisfy the “clear and conspicuous” requirement of section 110.11(c)(1). *Cf.* Advisory
5 Opinion 1995-09 (NewtWatch PAC) at 2 (approving disclaimer on political committee’s website
6 that was “printed in the same size type as much of the body of the communication”). Similarly, a
7 Facebook Video ad disclaimer that satisfies the radio and television ad disclaimer requirements
8 at 11 C.F.R. § 110.11(c)(4) — by, for example, including an audio statement that “Take Back
9 Action Fund is responsible for the content of this ad” and a similar clearly readable statement
10 visible for four seconds on screen with a reasonable degree of color contrast — would satisfy the
11 “clear and conspicuous” requirement of section 110.11(c)(1).

12 The Commission expresses no opinion regarding the potential application of federal tax
13 law or other federal, state, or local laws to the proposed activity because those questions are not
14 within the Commission’s jurisdiction.

15 This response constitutes an advisory opinion concerning the application of the Act and
16 Commission regulations to the specific transaction or activity set forth in your request. *See* 52
17 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or
18 assumptions presented, and such facts or assumptions are material to a conclusion presented in
19 this advisory opinion, then the requestor may not rely on that conclusion as support for its
20 proposed activity. Any person involved in any specific transaction or activity which is
21 indistinguishable in all its material aspects from the transaction or activity with respect to which
22 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.

1 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
2 affected by subsequent developments in the law including, but not limited to, statutes,
3 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
4 on the Commission's website.

5
6 On behalf of the Commission,
7

8
9 Steven T. Walther
10 Chairman