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 Facebook by Marc E. Elias, Rebecca H. Gordon and Jonathan S. Berkon regarding the above-captioned matter.

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

Attachment

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June 14, 2011

BY HAND DELIVERY

Shawn Woodhead Werth
Commission Secretary
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request 2011-09

Dear Ms. Werth:

We are writing on behalf of Facebook in response to Draft A and Draft B of Advisory Opinions 2011-09. Because Draft B is consistent with the text of the regulations and the Commission's longstanding approach toward Internet communications, the Commission should adopt Draft B. Because Draft A is inconsistent with the text of the regulations and represents a significant departure from the Commission's longstanding approach, the Commission should not adopt Draft A.

I. Draft B is consistent with the Commission's longstanding approach with respect to Internet communications; Draft A is a significant departure from that approach.

As Facebook described in its request, the Commission has consistently interpreted the Act and its regulations to permit the free and robust use of Internet technologies to communicate with voters. Draft A represents a significant, and unnecessary, departure from this tradition.

Even Draft A concedes that the inclusion of a disclaimer *within* the Facebook ad would be "unfeasible." *See* Draft A at 9. But the "alternative disclaimer" that Draft A proposes could be read to only permit political committees to purchase Facebook ads that link to a website owned, operated, or controlled by the political committee. *See id.* at 10. Such a restriction would severely limit the range of speech in which political committees could engage. For example, a

principal campaign committee could not purchase a Facebook ad that links to a third-party study of the candidate's health care plan or to an endorsement from a local newspaper. In fact, a principal campaign committee could not even purchase a Facebook ad linking to her or his own ActBlue fundraising page, because the disclaimer on ActBlue pages say, "Paid for by ActBlue." This could have devastating consequences for upstart challengers. For example, the candidate running against Congressman Paul Ryan, Rob Zerban, currently does his online fundraising *exclusively* through his ActBlue page.[1] With the restriction contemplated by Draft A in place, Mr. Zerban could not purchase a Facebook ad that says "Contribute to Rob Zerban's campaign for change" and links to his ActBlue page, simply because the disclaimer on his page says, "Paid for by ActBlue."[2] Such a restriction would hinder other types of political committees as well. A national or state party committee could not use its 441a(d) authority to pay for a Facebook ad that links to the website of a candidate that it supports, because the disclaimer on the candidate website would not match the disclaimer that party committees must include for "coordinated" communications under section 110.11.

Because such a disclaimer requirement would effectively bar certain types of online speech, thereby imposing a "ceiling on campaign-related activities," courts would likely view it differently from other disclaimer requirements that they have upheld in the past. *See Citizens United v. FEC*, 130 S.Ct. 876, 914 (2010) (citations and quotation marks omitted) (noting that the standard of review that applies to disclaimer requirements is premised on an assumption that they "impose no ceiling on campaign-related activities"). Significantly, Draft A is not limited to Facebook ads. The restriction it appears to impose would apply to *all* small character-limited Internet ads. Eschewing the case-by-case approach that this Commission announced in Advisory Opinion 2010-19 (Google), Draft A sets forth a general rule that Internet ads can *never* qualify for the "small items" or "impracticable" exceptions. *See* Draft A at 4-5, 8 (concluding that the failure of the Commission to amend section 110.11 to include "Internet communications" within the list of enumerated examples permanently bars Commission from recognizing an exemption for *any* character-limited Internet communications).

This approach is wholly inconsistent with that taken by the Commission in its 2006 Internet rulemaking. In that rulemaking – which proceeded on a bipartisan basis and the results of which received praise from across the political spectrum – the Commission made a factual finding that "there is no record that Internet activities present any significant danger of corruption or the appearance of corruption ...." Internet Communications, 71 F.R. 18589, 18589 (Apr. 12, 2006). The Commission also found the Internet had become "the most accessible marketplace of ideas

[1] *See* http://www.robzerban.com/ (accessed on June 14, 2011).

[2] *See* https://secure.actblue.com/contribute/page/zerban (accessed on June 14, 2011).

in history." *Id.*, 71 F.R. at 18590.[3] After making these factual findings, the Commission decided to exempt from the definition of "public communication" all Internet communications except those "placed for a fee on another person's Web site." 11 C.F.R. § 100.26.

When a political committee purchases a Facebook ad, it is making a "public communication." The Internet rulemaking settled that question.[4] But, contrary to Draft A, the fact that a Facebook ad is a "public communication" does not end the analysis. The key question is whether such ads qualify for an exception to the general requirement that "public communications" include a disclaimer. For Facebook ads limited to 160 characters or fewer, the answer to that question is clearly "yes." In Advisory Opinion 2002-9 (Target Wireless), the Commission concluded that it was inconvenient for a political committee to include a disclaimer in a text message limited to 160 characters or fewer. Setting aside for a moment the question of *why* these text messages were so limited and whether that is legally significant, the Commission made a clear factual determination that, when a political committee is provided with 160 characters to convey a message, it is inconvenient to include a disclaimer. *See also* Draft A, Advisory Opinion 2010-19 (for some committees, "[i]ncluding the full name of the political committee could require more characters for the disclaimer than are allowed for the ... ad itself.").[5]

The fact that Internet communications are not specifically enumerated is not a basis to conclude that Facebook ads are ineligible for the exemption. Neither the text messages exempted in Advisory Opinion 2002-9 nor the concert tickets exempted in Advisory Opinion 1980-42 (Hart) are specifically enumerated in section 110.11. And, again, even if one accepts Draft A's

[3] The Commission's finding with respect to the Internet is in stark contrast to Congress' findings with respect to television advertisements during the debate over the Bipartisan Campaign Reform Act. For that reason, this request is wholly different from Club for Growth's request in Advisory Opinion 2007-33. As Facebook explains in its request, *see* Facebook Request at 9, 11, the Commission's conclusion that a *spoken* "stand by your ad" disclaimer in a *television* ad could not be eliminated or truncated is wholly inapposite to Facebook's small, character-limited ads.

[4] The context of the Internet rulemaking is also important here. As Draft A describes in more detail, *see* Facebook Request at 12-13, the Commission took up the rulemaking in response to the *Shays* opinions. These opinions were not concerned with disclaimers; in fact, neither opinion even refers to disclaimers. They were concerned with ensuring that paid Internet ads were treated as "public communications" subject to the rules governing coordinated communications and Federal Election Activity. Adopting Draft B would be perfectly consistent with what the *Shays* courts required.

[5] The Statement of Reasons in MUR 4791 is inapposite here. In that MUR, the political committee argued that the "small items" exception applied to a pocketsize football schedule. However, the schedule at issue in MUR 4791 – the content of which was controlled entirely by the political committee – was not character-limited. In fact, the committee had already included on the schedule messages of similar length and type to the section 110.11 disclaimer and, thus, the committee could "not argue that it would have been difficult or impossible for him to place a disclaimer on the schedule in a similar typeface, in a similar location." *See* Statement of Reasons of Vice Chairman Daryl R. Weld, and Commissioners Lee Ann Elliott, David M. Mason, Danny L. McDonald and Karl J. Sandstrom in Matter Under Review 4791, Ryan for Congress (Apr. 13, 1999).

conclusion that the text messages at issue in Advisory Opinion 2002-9 were limited by technology,[6] no such argument can be made about concert tickets, bumper stickers, or buttons. Concert tickets, after all, are pieces of paper the size of which can be increased by making a call to the printer. As Draft B properly concluded, "the Commission's disclaimer exceptions at 11 CFR 110.11(f)(1) take an entity's existing advertising model as it is." Draft B at 5.

Draft A, therefore, treats Internet communications differently from text messages or printed communications. This result does not follow from the Commission's factual findings in the Internet rulemaking, and it departs from this Commission's tradition of applying its rules equally to different technologies. *See, e.g.*, Advisory Opinion 1999-09 (Bradley). If adopted, Draft A could limit the ability of political committees to use the Internet to engage in political speech at exactly the time where the Internet – due to its low cost and accessibility – has become the committees' best hope for competing on equal terms with unregulated, soft money groups.

II. Draft A leaves several important questions unanswered.

In addition to treating Internet communications differently from any other communications, Draft A leaves several questions unanswered. Specifically:

- Draft A would require political committees to place on their Facebook Pages a disclaimer stating that the committee "paid for" the Page. But, as a matter of fact, this is not true. Facebook provides its Pages and Profiles free of charge to the public. Therefore, a political committee's Page is not "paid for" by the political committee. If it adopts Draft A, Facebook requests that the Commission clarify how political committees can comply with its disclaimer requirement without making untrue representations to the public.

- Draft A states that the disclaimer included on the "landing page" must be identical to the disclaimer that the political committee would have included in the ad itself if it were convenient or practical to include such a disclaimer. If it adopts Draft A, Facebook requests that the Commission clarify whether there are any situations in which a political committee can purchase a Facebook ad that links to a website other than its own, or whether this disclaimer requirement does, in fact, restrict which pages political committees can link to.

- Draft A suggests that its conclusion is driven, in large part, by the fact that the requester also designs the ad format. *See* Draft A at 7 ("Neither is the limitation on the size of the ad set by a third party who established the technological medium and its use ... it remains physically and technologically possible for Facebook to increase both the size of its ads and the number of characters that may be included in its ads."). If it adopts Draft A,

[6] For a more in-depth discussion of why this distinction is legally irrelevant, *see* Facebook Request at 10-12.

Facebook would like the Commission to clarify whether the Commission's answer would be different if a political committee – or another third party – made the request.

For these reasons, the Commission should adopt Draft B and not adopt Draft A. If it does adopt Draft A, Facebook respectfully requests clarity on the three issues described above.

Very truly yours,

Marc E. Elias
Rebecca H. Gordon
Jonathan S. Berkon
Counsel for Facebook

cc: Christopher Hughey, Acting General Counsel