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OFFICE OF GENERAL
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September 8, 2010

Comment on AOR 2010-19

BY HAND DELIVERY

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Re: Comment Concerning Advisory Opinion Request 2010-19 (Google)

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Dear Mr. Hughey:

Pursuant to 2 U.S.C. § 437f(d), I submit this comment on behalf of Facebook, Inc. ("Facebook") regarding Advisory Opinion Request 2010-19 being sought by Google. Facebook strongly urges the Commission to confirm that Google's advertisements are exempt from disclaimer requirements as "small items" under 11 C.F.R. § 110.11(f)(i). If the Commission does not conclude that the advertisements are exempt from disclaimer requirements as "small items," the Commission in the alternative should treat the advertisements as "advertisement[s] of such a nature that the inclusion...of a disclaimer would be impracticable" under 11 C.F.R. § 110.11(f)(ii). Finally, the Commission should not adopt Google's alternative disclaimer requirement because, as discussed below, such a requirement does not advance the information-disclosure objectives of the Commission's regulations.

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FACTUAL BACKGROUND

I. Facebook

Facebook is a leading online networking service. Its more than 500 million monthly active users use Facebook to connect and share information over the Internet—thoughts, photographs, news articles, videos—with their relatives, friends, colleagues, and the world around them, all free of charge.

Facebook was created and launched from a Harvard dorm room by CEO Mark Zuckerberg in 2004. Its network initially reached only four universities, but by the end of 2004, as Facebook expanded to other colleges, nearly one million active users had signed up. In 2005, Facebook expanded its networks to reach high schools and

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foreign institutions, and in 2006 Facebook's services were expanded to anyone with an e-mail address.

At the same time as Facebook has expanded its user community, it has developed innovative information-sharing functionalities responding to the immense public demand for greater openness and connectivity—a photo-sharing feature that, with some 48 billion pictures online, constitutes the largest photo archive in the world; a “Wall” feature through which users can post messages on their friends’ individual pages; and the immensely popular “News Feed,” which informs a user’s network of friends about changes in the user’s status and displays user created content. Facebook has also established Facebook Platform, which enables third-party developers to create innovative “social” applications that enhance the Facebook experience and allow users to experience and benefit from the Facebook community on numerous devices and locations around the Internet. Each of the more than 500 million people that use Facebook experience their own personalized homepage and News Feed when they go to Facebook.com, connecting them to their own community of friends and interests.

Facebook is funded almost entirely by advertising. Facebook enables advertisers to place small advertisements on various pages. An example of a Facebook advertisement is below:

T. Jefferson for Congress



Governor, Delegate,
Ambassador, President.
Thomas Jefferson has 200
years of experience, and
is the right man for the
Virginia 5th.

Corey Owens likes this ad.

👍 Like

These advertisements are similar to those described in Google’s advisory opinion request in that the amount of characters available is extremely limited, and the purpose of the advertisement is to encourage users to click-through to another location. In Facebook’s case, users that click on an advertisement are typically directed either to a Facebook Page containing more information or to a distinct website off Facebook. The Facebook advertising format limits the number of characters available to advertisers to 25 in the title and 135 in the body. The disclaimers required by 11 C.F.R. § 110.11(b) could easily consume half of the available body characters. For example, the following

disclaimer for an advertisement paid for by ABC PAC would consume 93 characters or 69% of the available body characters: "Paid for by ABC PAC, www.ABCPAC.com, not authorized by any candidate or candidate's committee." Similarly, the following disclaimer for an advertisement paid for by XYZ political party of Virginia would consume 112 characters or 83% of the available body text: "Paid for by XYZ Party of Virginia, www.XYZVirginia.com, not authorized by any candidate or candidate's committee." Even a shorter disclaimer for an advertisement paid for by a campaign committee – such as "Paid for by Thomas Jefferson for Congress" – would consume 41 characters, which is more than 30% of the available 135 body characters.

II. Impact of Social Media

In the last several years, Facebook and other social media have played a key democratic function at home and abroad. Because these services allow users to quickly share information and build communities, democratic organizers have embraced Facebook as a key tool in places such as Iran and Colombia.¹ Government leaders and policy makers here and around the globe are using Facebook to communicate with citizens.

- In the U.K., Prime Minister David Cameron launched a "crowdsourcing" initiative to seek out citizen proposals on cutting government spending. During a recent web conference with Facebook CEO Mark Zuckerberg, Prime Minister Cameron thanked Facebook for providing the platform for such an initiative.²
- In the United States, the 2008 presidential race was called the "Facebook Election," as President Obama and Senator McCain relied on Facebook for developing grassroots support, and Facebook cosponsored one of the presidential debates (together with a traditional media outlet, ABC News).³
- It is estimated that more than 300 Members of Congress use Facebook in their official capacities.⁴ Thousands of candidates and committees use Facebook for campaign purposes.

¹ Lev Grossman, *Iran Protests: Twitter, the Medium of the Movement*, NEWSWEEK, June 17, 2009; Sibylla Brodzinsky, *Facebook Used to Target Colombia's FARC with Global Rally*, CHRISTIAN SCI. MONITOR, Feb. 4, 2008.

² Gina Lovett, *Government Drafts in Facebook for Second Crowdsourcing Initiative*, NEW MEDIA AGE, July 9, 2010, <http://www.nma.co.uk/news/government-drafts-in-facebook-for-secondcrowdsourcing-initiative/3015666.article>.

³ Brian Stelter, *ABC News and Facebook in Joint Effort to Bring Viewers Closer to Political Coverage*, N.Y. TIMES, Nov. 26, 2007; Virginia Heffeman, *Clicking and Choosing: The Election According to YouTube*, N.Y. TIMES, Nov. 14, 2008; Matthew Fraser & Soumitra Dutta, *Barack Obama and the Facebook Election*, U.S. NEWS AND WORLD REP., Nov. 19, 2008.

⁴ Posting of Tony Romm to The Hill, *'Congress on Facebook' Goes Live*,

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- Federal agencies have adopted Facebook as a powerful communication tool—22 out of 24 major federal agencies use Facebook.⁵

In these and other ways, Facebook and other social networking websites have become an integral part of everyday communication and community-building across America and the world.

As with other disruptive technologies before it, online advertising has become a democratizing force in politics. Historically, only top-ticket and big-budget campaigns had the resources necessary to compete through broadcast media like television and radio. Online advertising, on the other hand, is cheap and targetable, making it an effective communications medium for even down-ballot and low-budget campaigns. In Maryland, for example, there are more than 2.1 million active Facebook users of voting age. By comparison, fewer than 1.8 million votes were cast in Maryland's last gubernatorial election.⁶ A candidate for office in Maryland who uses Facebook to advertise can thus not only efficiently target users, but may also help spur political engagement among citizens who do not ordinarily vote.

III. FEC Regulation of the Internet

The Commission in recent years has recognized the importance of the Internet in American politics at the grassroots level and has appropriately taken a very restrained approach to regulation of the Internet under the Federal Election Campaign Act of 1971, as amended ("Act"). In its 2006 Explanation and Justification for regulations concerning Internet communications, the Commission emphasized that it:

recognizes the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach. The Internet's accessibility, low cost, and interactive features make it a popular choice for sending and receiving information. Unlike other forms of mass communication, the Internet has minimal barriers to entry, including its low cost and widespread accessibility. Whereas the general public can communicate through television or radio broadcasts and most other forms of mass communication only by paying substantial advertising fees, the vast

<http://thehill.com/litbgs/hilicon-valley/technology/97683-congress-on-facebook-goes-live> (May 13, 2010 7:58 EDT).

⁵ *Information Management: Challenges in Federal Agencies' Use of Web 2.0 Technologies*, Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform, 111th Cong. (July 21, 2010) (statement of Gregory C. Wilshusen, Director of Information Security Issues, Government Accountability Office).

⁶ *Official 2006 Gubernatorial General Election Results for Governor/Lieutenant Governor*, http://www.elections.state.md.us/elections/2006/results/general/office_Governor__Lt_Governor.html

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majority of the general public who choose to communicate through the Internet can afford to do so.

71 *Fed. Reg.* 18589, 18589 (Apr. 12, 2006). Indeed, the Commission noted that:

the Internet's near infinite capacity, diversity, and low cost of publication and access has democratized the mass distribution of information, especially in the political context. The result is the most accessible marketplace of ideas in history.

71 *Fed. Reg.* 18589, 18590 (Apr. 12, 2006) (internal quotations omitted). *See also id.* (emphasizing that the Internet "provides relatively unlimited, low-cost capacity for communications of all kinds.") (internal quotations and citations omitted).

LEGAL DISCUSSION

Facebook strongly supports Google's request for confirmation that its advertisements are exempt from disclaimer requirements under 11 C.F.R. § 110.11(f).

I. Disclaimer Requirements for Paid Online Advertising

Commission regulations require that public communications that contain express advocacy or constitute solicitations for federal funds contain certain disclaimers. 11 C.F.R. § 110.11. The definition of public communication in Commission regulations includes "communications placed for a fee on another person's Web site." 11 C.F.R. § 100.26.

If a communication is paid for by a campaign committee, the disclaimer must indicate that "the communication has been paid for by the authorized political committee." 11 C.F.R. § 110.11(b)(1). Communications paid for by another person or political committee must include "the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication." 11 C.F.R. 110.11(b)(3). These communications must also indicate whether they were authorized by a campaign committee. 11 C.F.R. § 110.11(b)(2) and (3).

FEC regulations contain certain exemptions from these disclaimer requirements. As was noted above and explained more fully below, there are compelling grounds for the Commission to conclude that Google's advertisements fall under one of these exemptions.

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II. Google's Advertisements Should Be Exempt from Disclaimer Requirements Pursuant to the Small Items Exemption

Commission regulations exempt from disclaimer requirements “[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed.” 11 C.F.R. § 110.11(f)(i). In its advisory opinion request, Google indicates that its advertisements “provide advertisers with only 95 characters to communicate a message.” Advisory Opinion Request 2010-19 at 5.

In Advisory Opinion 2002-09, Target Wireless sought guidance from the Commission on whether SMS text messages that were limited to 160 characters per screen could be considered “small items” for which no disclaimer was required. In determining that a text message qualified as a “small item,” the Commission noted that “SMS technology places similar limits on the length of a political advertisement as those that exist with bumper stickers.” Advisory Opinion 2002-9 at 4. The Commission also acknowledged that the required disclaimers could consume 30 to 100 characters. *See* Advisory Opinion 2002-9 at 5. As Google’s advertisements include a character limit that is 40% smaller than the text messages that were exempted from disclaimer requirements in Advisory Opinion 2002-09, the Commission should likewise determine that Google’s advertisements qualify as small items and are exempt from disclaimer requirements.

In reaching this conclusion, the Commission should make clear that, under this advisory opinion and Advisory Opinion 2002-09, a wide variety of online advertisements, including those using technologies consisting of up to 160-character messages such as Facebook’s, are exempt from disclaimer requirements. In addition, the Commission should also make clear that the presence or absence of small graphics does not affect this conclusion, provided the advertisements have comparable character and spatial limits to those at issue here and in Advisory Opinion 2002-09. Such an outcome would be appropriate given that mandating the required disclaimers would severely inhibit the use of novel technologies by campaigns and activists for political communications in connection with federal elections.

III. In the Alternative, Google's Advertisements Should Be Exempt from Disclaimer Requirements Due to Impracticability

In addition, Commission regulations exempt from disclaimer requirements “[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of such a disclaimer would be impracticable.” 11 C.F.R. § 110.11(f)(ii). If the Commission does not determine that Google’s advertisements qualify as small items—which Facebook strongly believes is the case—then in the alternative the advertisements should qualify as a means of advertising upon which a disclaimer would be impracticable based upon the very strict character limitations outlined above.

IV. Exempting Google's Advertisements from the Disclaimer Requirements Will Not Deprive Online Viewers of Information Concerning Who is Paying for the Advertisements

The relief Google seeks here is particularly appropriate in light of the nature of the advertisements at issue. Consumers of short-form, online political advertisements that were exempted from the Commission’s disclaimer requirements have historically had no easy way to determine who paid for and was responsible for the communication. Though traditional campaign paraphernalia and online political advertisements share some of the same space constraints, online advertisements have one distinct advantage in terms of disclosure: they can be directly linked to other content, which can include all required Commission disclaimers. As Google notes in its advisory opinion request, an Internet user that clicks on a Google advertisement paid for by a federal campaign can be taken to the campaign’s website, which can include all required disclaimers. *See* Advisory Opinion Request 2010-19 at 7. Aristotle correctly notes in its comment that “the entire purpose of a Google text advertisement is to attract a web user to a site which will include a full disclaimer. This combination could be interpreted, as Google suggests in the alternative, as a substitute means of satisfying the disclaimer requirement.” Aristotle comment on Advisory Opinion Request 2010-19 at 3.

Facebook concurs with this analysis. In light of the foregoing, the Commission should conclude that a disclaimer on a campaign’s webpage that viewers are brought to when they click through an online political advertisement is sufficient to satisfy the Act’s disclaimer requirements.

V. Google's Proposed Modified Disclaimer Requirement Should Not be Adopted Because a URL Does Not Necessarily Convey Meaningful Information About Who is Paying for an Online Advertisement

Google’s advisory opinion request states that that “[i]f a disclaimer is required, the Commission should consider the requirement satisfied if (1) the text advertisement displays the URL of the sponsoring website and (2) the landing page contains a full § 110.1 disclaimer.” Advisory Opinion

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Request 2010-19 at 7. If the Commission determines that a disclaimer is required, Facebook urges the Commission not to adopt the alternative disclaimer requirement identified in Google's advisory opinion request because a URL frequently does not convey meaningful information about the individual or entity funding the advertisement.

In determining that disclaimer requirements apply to certain mass e-mail communications, the Commission identified public disclosure of the individual or entity funding the communications as a key policy goal of the disclaimer requirements. The 2002 Explanation and Justification for the Commission's revised disclaimer requirements states that "the Commission has concluded that the interests served by prompt public disclosure warrant application of the disclaimer provision." 67 Fed. Reg. 76962, 76964 (Dec. 13, 2002).

Under FEC regulations,

[i]f [a] communication, including any solicitation, is not authorized by a candidate, authorized committee of a candidate, or an agent of either of the foregoing, the disclaimer must clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee.

11 C.F.R. § 110.11(b)(3). Accordingly, for communications that are not paid for by a federal candidate,⁷ a URL is included as a substitute for a street address or phone number along with other information to identify the individual or entity who is paying for the communication. A URL alone, like a phone number or street address alone, frequently does not by itself provide enough information to an online advertising viewer to identify the individual or entity funding the communication.

For example, a variety of organizations use URLs that do not include the name of the entity, nor is it readily apparent that the entity is sponsoring the URL. A list of sample URLs followed by the identity of the sponsoring entity or individual follows:

- www.carlyisdreamin.com (Democratic Senatorial Campaign Committee)
- www.zackspacefacts.com (National Republican Congressional Committee)
- www.bprepublicans.com (Democratic National Committee)
- www.acorncarnahan.com (Missouri Republican State Committee)

As the above examples make clear, the URL of a landing page does not necessarily convey the identity of the organization that is paying for the advertisement. It follows that a landing-page URL

⁷ Communications that are authorized by a candidate are not required to include a permanent street address, telephone number, or web address. See 11 C.F.R. § 110.11(b)(1) and (2).

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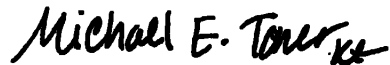
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requirement would not meaningfully advance the information-disclosure objectives of the Commission's regulations.

In light of the foregoing, Facebook urges the Commission not to adopt Google's alternative disclaimer requirement.

Sincerely,

A handwritten signature in black ink that reads "Michael E. Toner" with a stylized flourish at the end.

Michael E. Toner
Counsel for Facebook, Inc.