



October 31, 2017

By Electronic Mail

Erin Chlopak, Esq.
Acting Associate General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Request for Advisory Opinion by Take Back Action Fund

Dear Ms. Chlopak:

Take Back Action Fund hereby requests an advisory opinion pursuant to 52 U.S.C. § 30108 and 11 C.F.R. Part § 112.

Factual Background

Requestor is a 501(c)(4) organization dedicated to educating the public that a government “of the people, by the people, and for the people” means a government that is not beholden to big business, union, and special interest influence. Requestor believes that once individuals better understand these issues, and understand that there are many more like them who share their disdain for the status quo, the natural outgrowth of this understanding will be a better-engaged and more involved citizenry. And then the people — not any corporation or special interest — with eyes wide open will realize their power to Take Back Our Republic. Requestor’s founder and President, John Pudner, has a long history in political campaigns, including advising Representative Dave Brat in his 2014 upset victory over then-House Majority Leader Eric Cantor, and running many political efforts that were key to Republicans winning control of the Virginia legislature in the 1990s and Alabama legislature in 2010 in addition to coalition work in 16 battleground states for Bush/Cheney 2000.

During the 2017-18 election cycle, requestor plans to purchase advertising through various channels, similar to previous online targeting campaigns that were successful in defeating entrenched incumbents such as Rep. Cantor. Some of this advertising will expressly advocate the defeat of candidates who are hiding behind

overhyped allegations of Russian interference in the 2016 election to cover up their opposition to President Trump's efforts to reform our government.

A sample of such advertising follows:

While [Candidate Name] accuses the Russians of helping President Trump get elected, [s/he] refuses to call out [his/her] own Democrat Party for paying to create fake documents that slandered Trump during his presidential campaign.

Instead, [Name] supported Trump's opponent, who approved giving the Russians 20 percent of U.S. uranium. When the FBI uncovered a Russian bribery scheme between Hillary Clinton's State Department and a large payment to her husband Bill Clinton for a speech in Russia, [Name] said nothing.

So why is [Name] covering-up the foreign attacks on the President? It's because [name] doesn't support real reform. [S/he] just doesn't want to drain the swamp.

[Name] is unfit to serve.

Other versions of such advertising might state (in approximately 250 characters and 75 characters, respectively):

- *While [Candidate Name] accuses the Russians of helping President Trump get elected, [s/he] refuses to call out [his/her] own Democrat Party for paying to create fake documents that slandered Trump during his presidential campaign. [Name] is unfit to serve.*
- *[Candidate Name] doesn't want to drain the swamp. [Name] is unfit to serve.*

Some of these advertisements will be accompanied by images, which may incorporate additional text. Requestor plans to pay to distribute these ads and others that include similar messaging and that constitute express advocacy under 11 C.F.R. § 100.22.¹

¹ Requestor will pay for advertising that expressly advocates. Requestor does not seek the Commission's opinion on whether the particular sample advertisements provided herein expressly advocate. Requestor also does not seek the Commission's opinion on the application of the Internal Revenue Code to requestor's planned activity.

One of the channels through which requestor intends to distribute its messages is paid Facebook advertising. Requestor intends to pay to distribute various formats of Facebook ads. The text, character, pixel, and video requirements for these ads differ by format.² Of greatest relevance to political advertisers, Facebook offers Image ads (400 x 150 pixels and recommended 125 characters of text)³ and Facebook Video ads (4 GB maximum file size, plus recommended 125 characters of text).⁴ Some of the images in requestor’s Facebook ads might incorporate additional text; 20 percent of the picture in a Facebook Image ad, for example, may also constitute text, on top of the 125 characters in the ad itself.⁵

To design and budget for its advertising, requestor must know whether and how the disclaimer requirements of 52 U.S.C. § 30120 apply to that advertising. Requestor will comply with the law by including in its advertising any disclaimer that the Commission opines is legally required. But requestor cannot begin to create its messages until it knows the extent of the mandatory disclaimer. If requestor is required to include all of the information specified in section 30120(a), requestor will alter its advertising – such as by reducing the non-disclaimer portion of an ad or increasing the text-to-image ratio – accordingly.

For example, if the Commission opines that a full disclaimer is required and the disclaimer will not fit within the text limit of a Facebook Image ad, requestor

² See Facebook, Ads Guide, <https://www.facebook.com/business/ads-guide> (last visited Oct. 30, 2017); see also Facebook for Politics, Ad Campaigns, <https://politics.fb.com/ad-campaigns/> (last visited Oct. 30, 2017).

³ Facebook, Image Facebook Feed Ad, <https://www.facebook.com/business/ads-guide/image> (last visited Oct. 30, 2017). Facebook notes that “[t]ext over 125 single byte characters is allowed, but may be truncated.” *Id.* If a website link is included in an Image ad, the headline is recommended as no more than 25 characters and the “link description” (meaning text included below the image and above the link) 30 characters. *Id.*

⁴ Facebook, Video Facebook Feed Ad, <https://www.facebook.com/business/ads-guide/video> (last visited Oct. 30, 2017). Facebook notes that “[t]ext over 125 single byte characters is allowed, but may be truncated.” *Id.* As is the case with “Image” ads, if a website link is included, the headline is recommended as no more than 25 characters and the “link description” 30 characters. *Id.*

⁵ See Facebook, Image Facebook Feed Ad, cited *supra* note 3 (noting that “Images that consist of more than 20% text may experience reduced delivery”); see also sample advertisement at *id.*; see also Facebook, Using Text in Ad Images, https://www.facebook.com/business/help/980593475366490?ref=ads_guide (last visited Oct. 30, 2017). Facebook’s advertising policies also note that although the platform previously prohibited ads with text that covered more than 20% of an ad’s image, it now allows for images with greater than 20% text to run, but with less delivery. See Facebook, Advertising Policies at 9 (“Text in Images”), <https://www.facebook.com/policies/ads/> (last visited Oct. 30, 2017).

might incorporate the disclaimer into the image, or into a combination of text and image. If the Commission opines that the full disclaimer is not required, requestor will adjust its designs and purchases to account for the Commission's decision.

Question Presented

When Take Back Action Fund purchases paid Facebook Image and Video advertising that expressly advocates for or against a candidate, must that advertising include all, some, or none of the disclaimer information specified by 52 U.S.C. 30120(a)?

Analysis

Section 30120(a) provides in relevant part that “whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate . . . such communication . . . if not authorized by a candidate . . . shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.” 52 U.S.C. § 30120(a). Section 110.11 of the Commission's regulations narrows this requirement to “public communications, as defined in 11 CFR 100.26, by any person that expressly advocate the election or defeat of a clearly identified candidate.” 11 C.F.R. § 110.11(a)(2). Section 100.26, in turn, defines public communications to include “communications placed for a fee on another person's Web site,” such as paid Facebook advertising. *See* 11 C.F.R. § 100.26.

The Commission's regulations establish two exceptions to the disclaimer requirements. First, under the “small-items exception,” the disclaimer requirements do not apply to “[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)(1)(i). Second, under the “impracticability exception,” disclaimers are not required on “[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable.” *Id.* § 110.11(f)(1)(ii).

In Advisory Opinion 2002-09 (Target Wireless), the Commission considered the application of FECA's disclaimer requirements to paid text-message advertising. At the time, text messages were technologically limited to 160 characters of text and could not include images. *See id.* at 2. The Commission noted that this medium therefore imposed “limits on both the size and the length of the information that [could] be conveyed” by text messages — “similar limits . . . as

those that exist with bumper stickers.” *Id.* at 4. The Commission accordingly concluded that these text-message ads were exempt from the disclaimer requirements under the small-items exception. *Id.* (citing 11 C.F.R. § 110.11(a)(6)(i) (2002)).

In Advisory Opinion 2010-19 (Google), the Commission considered the application of the disclaimer requirements to Google “AdWords.” These were paid, text-only internet advertisements that Google (the vendor of the ads) limited to 95 characters. Google wished to sell AdWords ads that “would not display a disclaimer indicating who authorized or paid for the ad; rather, a full disclaimer would appear on the landing page that appears when a user click[ed]” a URL contained within the ad. *Id.* at 2. The Commission approved Google’s proposal, *id.* at 2, with three Commissioners concluding that the proposal satisfied the disclaimer requirements of section 110.11,⁶ and two Commissioners concluding that the ads were “not required to contain any form of disclaimers whatsoever” under the impracticability exception.⁷

In Advisory Opinion Request 2011-09 (Facebook), Facebook asked the Commission to find that the advertising it sold at the time was exempt from FECA’s disclaimer requirements under both the small-items exception and the impracticability exception. Two particular types of ads were at issue in that request: Standard ads, which consisted of “a miniature image” of 110 by 80 pixels plus 160 characters of text (Advisory Opinion Request 2011-09 at 6); and “Sponsored Stories,” which consisted of a 50 pixel by 50 pixel image plus up to 100 characters of text (*id.* at 7).⁸ The Commission did not issue an advisory opinion in response to this request, with three Commissioners concluding that the ads at issue could satisfy the disclaimer requirements without providing all of the statutorily

⁶ Concurring Statement of Vice Chair Cynthia L. Bauerly, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub, Advisory Opinion 2010-19 (Google), <https://www.fec.gov/files/legal/aos/76087.pdf>.

⁷ See Statement for the Record by Commissioner Caroline C. Hunter, Advisory Opinion 2010-19 (Google), <https://www.fec.gov/files/legal/aos/76088.pdf>; Concurring Statement of Chairman Matthew S. Petersen, Advisory Opinion 2010-19 (Google), <https://www.fec.gov/files/legal/aos/76089.pdf>.

⁸ It does not appear that Facebook continues to offer ads in these sizes and formats. See Facebook, Ads Guide, *cited supra* n. 2.

required information,⁹ and three Commissioners concluding that the ads were exempt under the impracticability exception.¹⁰

In October 2011, the Commission published an Advance Notice of Proposed Rulemaking (“ANPRM”), seeking comment on whether to commence a rulemaking on the subject of disclaimer requirements for internet communications. FEC, *Internet Communication Disclaimers*, 76 Fed. Reg. 63567 (Oct. 13, 2011). The Commission has since twice reopened that ANPRM for comments but to date has not decided even whether to open a rulemaking, much less whether to promulgate a regulation on this topic. *See* 82 Fed. Reg. 46937 (Oct. 10, 2017).

As the Commission noted in Advisory Opinion 2010-19 (Google) — and notes in all of its advisory opinions — the opinion ceases to provide a safe harbor under 52 U.S.C. § 30108 “if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in th[e] advisory opinion.” *Id.* at 2-3. Due to advances in display technologies and advertising specifications since that opinion, requestor believes that “facts or assumptions” that the Commission relied on in Advisory Opinion 2010-19 (Google) likely do not apply to the ads that requestor plans to purchase on Facebook in 2018.

For example, one reasonable reading of Advisory Opinion 2010-19 (Google) is that the full statutory disclaimer is not required on a text-limited digital ad if that ad includes a link to the political committee’s website, and the landing page on that site includes a full disclaimer. However, the ads at issue in that advisory opinion only included text, with a headline limited to 25 characters and two lines of text limited to 70 characters. *See* Advisory Opinion 2010-19 (Google) at 2. Such ads are materially different from the Facebook ads at issue here, which are significantly larger, may permit more text, and allow for features other than text.¹¹ For example, Requestor may purchase a Facebook Image ad, which appears in users’ Facebook Feeds and may include up to 125 characters, along with an image, 20% of which may consist of text.¹² Requestor therefore cannot determine whether Advisory Opinion 2010-19 (Google) applies to its planned advertising.

⁹ *See* FEC Agenda Doc. No. 11-32-B, <https://www.fec.gov/files/legal/aos/77162.pdf>; Certification, Advisory Opinion Request 2011-09 (Facebook) (noting three Commissioners having voted to approve Doc. No. 11-32-B).

¹⁰ *See* FEC Agenda Doc. No. 11-32-A, <https://www.fec.gov/files/legal/aos/77152.pdf>; Certification, Advisory Opinion Request 2011-09 (Facebook) (noting three Commissioners having voted to approve Doc. No. 11-32-A).

¹¹ *See* sources cited *supra* nn. 2-5.

¹² *See* Facebook, Image Facebook Feed Ad, cited *supra* note 3.

Advisory Opinion 2002-09 (Target Wireless) provides even less guidance. That opinion only considered disclaimer requirements for ads that were limited to 160 characters of text and could not include images, which the Commission found to be material facts due to the characteristics of mobile phones at the time. *See id.* at 2. Today, 77% of Americans own smartphones, compared to 0% when the Commission decided Advisory Opinion 2002-09 (Target Wireless).¹³ Because both the advertising and displaying hardware applicable to requestor’s ads are materially different from text message ads in 2002 – particularly in their ability to display images – the requestor requires the Commission’s guidance as to whether Advisory Opinion 2002-09 (Target Wireless) applies to requestor’s planned advertising.¹⁴

Requestor also cannot draw any inferences from the competing draft opinions in Advisory Opinion Request 2011-09 (Facebook). At the time, as discussed above, three Commissioners would have exempted two types of Facebook advertisements from disclaimer requirements under the “impracticable” exception, and three Commissioners would have considered disclaimer requirements satisfied if the advertisements linked to the committee’s website and the website contained a full disclaimer. However, the Facebook ads at issue in that 2011 Advisory Opinion Request are materially different in size, characters, format, and features from the Facebook ads requestor anticipates purchasing.¹⁵ And, in any event, the Commission did not issue an opinion in that matter, so the safe harbor of section 30108 does not apply.

Finally, although Facebook in 2011 asserted that the inclusion of a disclaimer on its ads would be “inconvenient and impracticable,”¹⁶ requestor is aware that the company recently announced that advertisers “will have to disclose which page paid for an ad.”¹⁷ Requestor believes that this further calls into question whether the

¹³ See Pew Research Ctr. for Internet & Tech., *Mobile Fact Sheet* (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/mobile/>.

¹⁴ See sources cited *supra* nn. 2-5.

¹⁵ Compare *supra* p.4 (discussing Advisory Opinion Request 2011-09) with sources cited *supra* nn. 3-5 (describing current Facebook advertising specifications and capabilities).

¹⁶ See Advisory Opinion Request 2011-09 at 8-10.

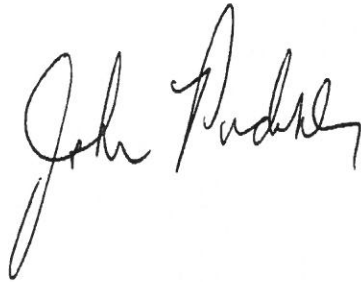
¹⁷ See Facebook Newsroom, *Facebook to Provide Congress with Ads Linked to Internet Research Agency*, (Sept. 21, 2017), <https://newsroom.fb.com/news/2017/09/providing-congress-with-ads-linked-to-internet-research-agency/>; see also Rob Goldman, VP of Facebook Ads, *Update on Our Advertising Transparency and Authenticity Efforts*, Facebook Newsroom (Oct. 27, 2017), <https://newsroom.fb.com/news/2017/10/update-on-our-advertising-transparency-and-authenticity-efforts/>. Because Facebook has just announced

facts and assumptions that were material to the competing, unadopted opinions in Advisory Opinion Request 2011-09 remain valid today.

For the foregoing reasons, Take Back Action Fund requests that the Commission issue an advisory opinion regarding the application of 52 U.S.C. § 30120 to requestor's planned advertising.

Take Back Action Fund requests that its President, John Pudner, and undersigned counsel be permitted to appear before the Commission at any open meeting at which this request will be discussed.

Sincerely,



John Pudner
President
Take Back Action Fund
246B East Glenn Avenue
Auburn, AL 36830



Brendan Fischer*
Director, Federal and FEC Reform
Campaign Legal Center
1411 K Street, NW, Suite 1400
Washington, DC 20005
Counsel to Take Back Action Fund

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this policy, has not yet fully described it, and could change it at any time, requestor seeks the Commission's opinion as to the facts presented *supra* pp. 1-3, without regard to any information that Facebook itself might or might not require to be placed on the ad.