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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 17-59-B
AGENDA ITEM
For meeting of December 14,2017
LATE SUBMISSION

December 11, 2017

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
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Attorney

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

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on December 14, 2017.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <https://www.fec.gov/legal-resources/advisory-opinions-process/>

Attachment

1 ADVISORY OPINION 2017-12

2

3 John Pudner

4 President

5 Take Back Action Fund

6 246B East Glenn Avenue

7 Auburn, AL 36830

8

9 Brendan Fischer, Esq.

10 Director, Federal and FEC Reform

11 Campaign Legal Center

12 1411 K Street, NW, Suite 1400

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, and under what conditions, the Federal Election Campaign Act, 52 U.S.C.

19 §§ 30101-46 (the “Act”), and Commission regulations require TBAF to include disclaimers on

20 the Facebook Image and Video advertisements that TBAF intends to purchase and disseminate.

21 Because TBAF represents that the ads will “expressly advocate” the election or defeat of federal

22 candidates and does not provide information suggesting that the sponsored ads will qualify for an

23 exemption from the disclaimer requirement, the Commission concludes that the ads will require

24 disclaimers.

25 ***Background***¹

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

27 501(c)(4) of the Internal Revenue Code. Advisory Opinion Request at AOR001. TBAF plans to

28 purchase advertising on the Facebook platform that will “expressly advocate” the election or

¹ The facts presented in this advisory opinion are based on your letter dated October 31, 2017, your email received on November 7, 2017, and on publicly available information presented by Facebook on its website, <https://www.facebook.com>.

1 defeat of candidates, as that term is defined at 11 C.F.R. § 100.22.² While TBAF indicates that it
2 intends to purchase a variety of ads — which will differ in text, character, and pixel dimensions
3 — it asks whether and how it must comply with the Act’s disclaimer requirements on two
4 particular types of paid Facebook advertisements, Image ads and Video ads, as described and
5 depicted in greater detail on Facebook’s current business website.³

6 In its proposed Image ads, TBAF intends to use approximately 75 characters of text
7 content (exclusive of any required disclaimer), though each ad’s “text will be adjusted according
8 to the specific circumstances in a particular election campaign.” AOR009. The proposed Image
9 ads will be a minimum of 400 x 150 pixels which, according to Facebook’s description, cover
10 the full screen of a cellphone⁴ and range in size of several inches in width and height on display
11 monitors.⁵ Per Facebook ad guidelines, the ads may contain text above and under the image
12 (accompanying a link to a website) in addition to text as part of the image or as an overlay to the
13 image.⁶ Facebook does not restrict the total number of text characters that appear above and
14 below the image in an Image ad, although Facebook recommends no more than 125 characters
15 because text exceeding that amount “may be truncated.”⁷ In addition to the 125 text characters

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.

³ AOR002-AOR003 (citing Facebook, *Facebook Ad Guide: Image, Facebook Feed*, <https://www.facebook.com/business/ads-guide/image>) (“*Facebook Ad Guide: Image*”).

⁴ Facebook characterizes full screen on a cell phone as “full portrait” when using the recommended 9:16 aspect ratio. See Facebook, *Video and Image Specifications for Facebook, Instagram and Audience Network*, <https://www.facebook.com/business/help/103816146375741>.

⁵ *Facebook Ad Guide: Image*.

⁶ AOR002-AOR003 (citing *Facebook Ad Guide: Image*).

⁷ *Id.* at n.3. For Image ads that include a link to a website, the Facebook ad specifications recommend no

1 that surround the image, a Facebook Image ad may contain text overlaying (or incorporated into)
2 the image, though images with more than 20% text overlay risk “reduced delivery” of the ad.⁸
3 That is, “ads with higher amounts of image text will be shown to fewer people (unless the ad
4 qualifies for an exception).”⁹ The exceptions include “[l]egal text, like ‘terms and conditions’
5 . . . (as it applies to the product in your ad).”¹⁰

6 For its Facebook Video ads, TBAF intends to use approximately 250 to 707 characters of
7 text as both audio and on-screen captioning (exclusive of any required disclaimer), with the text
8 “adjusted according to the specific circumstances in a particular election campaign.”¹¹ TBAF
9 has not yet determined the length of its videos, though it notes that Facebook Video ads may be
10 up to 240 minutes long and indicates that it will use up to the maximum amount of video time
11 sufficient to accommodate a disclaimer as part of the video.¹² Facebook depicts this advertising
12 option as covering the entire screen of a cellphone or several inches of width and height on a
13 computer screen.¹³ Facebook Video ad guidelines do not limit the amount of text characters in a
14 video’s on-screen captions, but have the same text restrictions as Image ads — possible

more than 25 text characters in the “headline” above the image and no more than 30 text characters in the “link description” below the image. *Id.*

⁸ *Id.* at n.5 (citing Facebook, *Using Text in Ad Images*, <https://www.facebook.com/business/help/980593475366490>).

⁹ Facebook, *Using Text in Ad Images*, <https://www.facebook.com/business/help/980593475366490>.

¹⁰ *Id.*

¹¹ AOR009 (citing *Facebook Ad Guide: Video, Facebook Feed*, <https://www.facebook.com/business/ads-guide/video>) (“*Facebook Ad Guide, Video*”).

¹² AOR009.

¹³ *Facebook Ad Guide, Video*. Facebook characterizes full screen on a cell phone as “full portrait” when using the recommended 9:16 aspect ratio. See Facebook, *Video and Image Specifications for Facebook, Instagram and Audience Network*, <https://www.facebook.com/business/help/103816146375741>.

1 truncation of more than 125 text characters, with a recommended maximum of 25 characters for
2 a headline and 30 characters for a link description — for the ad text above and below the video.¹⁴

3 TBAF states that it will include in its advertising any disclaimer required under the Act.
4 AOR003. TBAF proposes to include the full disclaimer statement in its advertising by reducing
5 the non-disclaimer portion of an ad or by increasing the text-to-image ratio, as necessary. *Id.*
6 TBAF does not assert that the advertisements it plans to purchase are too small to feature its
7 message with a disclaimer, or that providing a disclaimer in the ads would be impracticable, or
8 that the ads will otherwise qualify for an exception to the disclaimer requirement.¹⁵

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)?¹⁶*

13 ***Legal Analysis and Conclusion***

14 Because TBAF represents that its proposed paid advertisements will “expressly
15 advocate” the election or defeat of federal candidates and does not provide information

¹⁴ AOR003 at n.4 .

¹⁵ 52 U.S.C. § 30120; 11 C.F.R. § 110.11.

¹⁶ This advisory opinion implicates issues that may also be addressed in a forthcoming Commission 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 and does not propose changes to any other rules adopted by the Commission in the 2006 Internet Communications rulemaking. REG 2011-02 (Internet Communication Disclaimers), Certification of Vote (Nov. 16, 2017); *see also* Internet Communication Disclaimers, 76 Fed. Reg. 63,567 (Oct. 13, 2011); Internet Communication Disclaimers; Reopening of Comment Period, 82 Fed. Reg. 46,937 (Oct. 10, 2017).

1 suggesting that they will qualify for an exemption from the disclaimer requirement, the
2 Commission concludes that the ads will require disclaimers.

3 A “disclaimer” is a statement that identifies who paid for a communication and, where
4 applicable, whether the communication was authorized by a candidate. 52 U.S.C. § 30120(a); 11
5 C.F.R. § 110.11. With some exceptions, the Act and Commission regulations require
6 disclaimers for “public communications” that expressly advocate the election or defeat of a
7 clearly identified federal candidate. 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a); *see also* 11
8 C.F.R. § 100.22 (defining “expressly advocating”). The term “public communication” includes
9 “communications placed for a fee on another person’s Web site.” 11 C.F.R. § 100.26.

10 The information required in a disclaimer varies depending on whether the communication
11 is paid for or authorized by a candidate. For example, a communication that is not paid for or
12 authorized by a candidate must “clearly state the full name and permanent street address,
13 telephone number, or World Wide Web address of the person who paid for the communication,
14 and that the communication is not authorized by any candidate or candidate’s committee.”
15 11 C.F.R. § 110.11(b)(3); *see also* 52 U.S.C. § 30120(a)(3).¹⁷ Moreover, every disclaimer “must
16 be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate
17 notice of the identity” of the ad’s sponsor. 11 C.F.R. § 110.11(c)(1). “A disclaimer is not clear
18 and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.” *Id.*

19 TBAF proposes to place its Facebook Image and Video ads for a fee on another person’s

¹⁷ 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 (Facebook’s) website; the ads, therefore, will be public communications. In addition, TBAF
2 represents that its Facebook ads will “expressly advocate” the election or defeat of clearly
3 identified federal candidates. AOR1-2, n.1. Accordingly, the ads must include disclaimers
4 under 11 C.F.R. § 110.11(a) and 52 U.S.C. § 30120(a) unless they are exempt from the
5 disclaimer requirement under 11 CFR § 110.11(f).

6 Unlike the requestors in Advisory Opinion 2002-09 (Target Wireless), Advisory Opinion
7 2010-19 (Google), and Advisory Opinion Request 2011-09 (Facebook), TBAF has not asserted,
8 or provided any information to suggest, that its proposed ads are exempt from the disclaimer
9 requirement.¹⁸ To the contrary, TBAF states that its proposed ads are “materially different” from
10 the ads and ad dimensions considered by the Commission in those matters. AOR006-007.
11 Moreover, TBAF has indicated that it intends to purchase ads with sufficient space or video time
12 to accommodate full disclaimers and the express advocacy content.¹⁹ For example, TBAF
13 indicates that it can reasonably include disclaimers within the ads “by reducing the non-
14 disclaimer portion of an ad or increasing the text-to-image ratio,” presumably without
15 compromising or diminishing the political message that it wishes to convey. AOR003. TBAF
16 “might incorporate the disclaimer into the image, or into a combination of text and image” in a
17 Facebook Image ad “[i]f . . . the disclaimer will not fit within the text limit,” but there is no

¹⁸ See, e.g., 11 C.F.R. § 110.11(f)(1)(i) (excluding from the disclaimer requirement communications on bumper stickers, pins, buttons, pens, and similar small items upon which a disclaimer cannot be conveniently printed); 11 C.F.R. § 110.11(f)(1)(ii) (excluding from the disclaimer requirement skywriting, water towers, wearing apparel, and other means of displaying advertisements of such nature that inclusion of disclaimer would be impracticable).

¹⁹ Cf. Advisory Opinion 2002-09 (Target Wireless) at 2 (requiring disclaimers for severely size- and character-limited SMS messaging over wireless digital telephones “would ‘constructively estop new media agencies, wireless providers and candidates for public office from utilizing wireless media . . . when implementing advertising initiatives for candidates’”).

1 representation that doing so will be inconvenient or impracticable within the dimensions of the
2 proposed ads. AOR003-004.²⁰ TBAF also may extend the minutes it purchases in a Facebook
3 Video ad to accommodate the disclaimer as part of the video. AOR009.

4 Under these circumstances, the Commission concludes that TBAF’s ads will require
5 disclaimers.²¹ Given that the essential element of the disclaimer requirement is to provide
6 information to the public about an advertisement’s source as required by 52 U.S.C. § 30120(a),
7 other methods of providing disclaimer information may also be permissible, consistent with the
8 Commission’s policy and practice of “interpret[ing] the Act and its regulations in a manner
9 consistent with contemporary technological innovations . . . where the use of the technology
10 would not compromise the intent of the Act or regulations.” Advisory Opinion 1999-09
11 (Bradley for President) at 6; *see* Advisory Opinion 2004-37 (Waters) at 6; Advisory Opinion
12 2004-10 (Metro Networks) at 3-4; Advisory Opinion 2004-01 (Bush/Kerr) at 6-7; *see also*
13 Advisory Opinion 2010-19 (Google).

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

17 This response constitutes an advisory opinion concerning the application of the Act and
18 Commission regulations to the specific transaction or activity set forth in your request. *See* 52
19 U.S.C. § 30108. The Commission emphasizes that, if there is a change in any of the facts or

²⁰ The Facebook Ad Guides cited by TBAF depict Facebook Image and Video ads as covering the entire screen of a cellphone. *See Facebook Ad Guide: Image; Facebook Ad Guide: Video.*

²¹ The Commission assumes that TBAF’s disclaimers will be “clear and conspicuous” under 11 C.F.R. § 110.11(c)(1).

1 assumptions presented, and such facts or assumptions are material to a conclusion presented in
2 this advisory opinion, then the requestor may not rely on that conclusion as support for its
3 proposed activity. Any person involved in any specific transaction or activity which is
4 indistinguishable in all its material aspects from the transaction or activity with respect to which
5 this advisory opinion is rendered may rely on this advisory opinion. *See* 52 U.S.C.
6 § 30108(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
7 affected by subsequent developments in the law including, but not limited to, statutes,
8 regulations, advisory opinions, and case law. Any advisory opinions cited herein are available
9 on the Commission's website.

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On behalf of the Commission,

Steven T. Walther
Chairman