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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 21-02-A
AGENDA ITEM
For meeting of January 14, 2021
SUBMITTED LATE

January 8, 2021

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Acting General Counsel

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Associate General Counsel

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Assistant General Counsel

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Attorney

Subject: Draft AO 2020-02 (Bertrand) Draft A

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 12:00pm (Eastern Time) on January, 13, 2021.

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 2020-02

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Jean-Marc Bertrand
1770 Queen Street East
Toronto, ON M4L 1G7

DRAFT A

Dear Mr. Bertrand:

9 We are responding to your request for an advisory opinion concerning the
10 application of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”),
11 and Commission regulations to your proposed purchase of online political advertisements
12 in connection with elections in the United States. Based on your representation that you
13 are a U.S. citizen, the Commission concludes that the Act and Commission regulations do
14 not prohibit your proposed purchase of such online political advertisements even though
15 you reside abroad. The Commission also concludes that neither the Act nor Commission
16 regulations require you to provide Facebook or any other media platform with proof of a
17 U.S. bank account or a U.S. residential address as a prerequisite to the purchase of
18 political advertisements on their platforms.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 May 29, 2020, and email dated December 10, 2020. You represent that you are a U.S.
22 citizen currently residing in Canada. Advisory Opinion Request at AOR001. You intend
23 to organize voters in the U.S. to vote for third party presidential and vice presidential
24 candidates. AOR003; Advisory Opinion Request Supplement (Dec. 10, 2020) (“AOR
25 Supp.”). In furtherance of this effort, you have attempted to purchase political
26 advertisements on Facebook. *Id.* You state that in order to purchase these
27 advertisements, Facebook requires you to meet certain qualifications, including, but not

1 limited to, providing a U.S. residential address and making all payments from a U.S.
2 bank account in U.S. dollars. AOR002-05; AOR Supp. You state that you do not meet
3 these qualifications because you do not have a U.S. residence or a U.S. bank account.
4 AOR003-05; AOR Supp.

5 ***Questions Presented***¹

6 1. *Are you, a U.S. citizen residing in Canada, permitted to make*
7 *expenditures, independent expenditures, and disbursements for political advertisements*
8 *under the Act and Commission regulations?*²

9 2. *Do the Act or Commission regulations require you to provide Facebook or*
10 *any other social media platform with proof of a U.S. bank account or financial*
11 *instrument(s) drawn on a U.S. bank as a prerequisite to the purchase of political*
12 *advertisements on their platforms?*

13 3. *Do the Act or Commission regulations require you to provide Facebook or*
14 *any other media platform with a U.S. address as a prerequisite to the purchase of*
15 *political advertisements on their platforms?*

¹ The questions presented herein have been edited slightly from the original questions posed in the request for clarity and so they can be appropriately addressed by the Commission.

² The request asks the Commission to determine whether you are a U.S. citizen who is legally allowed to engage in political advertising and other political activities. Whether you are a U.S. citizen is not a question the Commission can answer through the advisory opinion process because it does not involve the application of the Act, Commission regulations, or chapters 95 or 96 of the Internal Revenue Code, and is therefore outside the scope of the Commission's jurisdiction. *See* 52 U.S.C. § 30108(a)(1); 11 C.F.R. §§ 112.1(a)-(b). Therefore, for the purpose of answering the questions presented in your request, the Commission assumes (but does not vouch for) the accuracy of your statement that you are a U.S. citizen. AOR001. The Commission further assumes that you are aware of and will comply with all requirements and prohibitions under the Act and Commission regulations not explicitly addressed herein. *See, e.g.*, 52 U.S.C. § 30122 (prohibiting the making of a contribution in the name of another person); 11 C.F.R. § 110.4(b) (same); 52 U.S.C. § 30104(c) (requiring the filing of reports by persons other than political committees who make independent expenditures in an aggregate value in excess of \$250 during a calendar year); 11 C.F.R. § 109.10(b) (same).

1 4. *Can Facebook or any other media platform use this advisory opinion in*
2 *place of their existing political advertisement guidelines and methods as legal proof that*
3 *you are a U.S. citizen who is allowed to participate in domestic political activities just as*
4 *if you resided in the U.S.?*

5 5. *Will this advisory opinion absolve Facebook or any other media platform*
6 *of further requirements to prove that you are a U.S. citizen who is allowed to participate*
7 *in domestic political activities just as if you resided in the U.S.?*

8 6. *Should it be compulsory for Facebook or any other media platform to*
9 *impose the same qualifications on resident and non-resident U.S. citizens for advertising*
10 *political content on their platforms in the U.S.?*

11 ***Legal Analysis and Conclusions***

12 1. *Are you, a U.S. citizen residing in Canada, permitted to make*
13 *expenditures, independent expenditures, and disbursements for political advertisements*
14 *under the Act and Commission regulations?*

15 Yes, as a U.S. citizen, you may make expenditures, independent expenditures, and
16 disbursements for political advertisements in connection with federal, state, and local
17 elections. The Act and Commission regulations do not distinguish between a U.S. citizen
18 residing in the U.S. and a U.S. citizen residing abroad.

19 Commission regulations prohibit a foreign national from making “any
20 expenditure, independent expenditure, or disbursement in connection with any Federal,
21 State, or local election.” 11 C.F.R. § 110.20(f); *see also* 52 U.S.C. § 30121(a). This
22 provision does not prohibit U.S. citizens from making expenditures, independent
23 expenditures, or disbursements in connection with U.S. elections, however, regardless of

1 their place of residence.³ Therefore, the Act and Commission regulations do not prohibit
2 you, as a U.S. citizen residing in Canada, from making independent expenditures or
3 disbursements for political advertisements in connection with federal, state, or local
4 elections.

5 2. *Do the Act or Commission regulations require you to provide Facebook or*
6 *any other social media platform with proof of a U.S. bank account or financial*
7 *instrument(s) drawn on a U.S. bank as a prerequisite to the purchase of political*
8 *advertisements on their platforms?*

9 3. *Do the Act or Commission regulations require you to provide Facebook or*
10 *any other media platform with a U.S. address as a prerequisite to the purchase of*
11 *political advertisements on their platforms?*

12 No, neither the Act nor Commission regulations require you to provide Facebook
13 or any other media platform with proof of a U.S. bank account, financial instruments
14 drawn on a U.S. bank, or a U.S. residential address as a prerequisite to the purchase of
15 political advertisements on their platforms.

16 In addition to prohibiting foreign nationals from making expenditures,
17 independent expenditures, or disbursements in connection with federal, state, or local
18 elections, as discussed above, Commission regulations prohibit any person from
19 “knowingly” providing substantial assistance in the making of an expenditure,

³ See 52 U.S.C. § 30121(b)(1) (providing that “foreign national” does not include “any individual who is a citizen of the United States”); 11 C.F.R. § 110.20(a)(3)(iii) (same); *see also* 93 Cong. Rec. S4715 (daily ed. March 28, 1974) (statement of Sen. Bentsen) (indicating congressional intent to ensure U.S. citizens abroad could participate in U.S. elections); Advisory Opinion 2016-10 (Parker) at 2-3 (concluding that U.S. citizen living in Canada may solicit contributions to state and local party committees).

1 independent expenditure, or disbursement by a foreign national. 11 C.F.R.
2 § 110.20(h)(2). In a related context, “knowingly” means⁴: (i) having actual knowledge
3 that the source of the funds is a foreign national; (ii) being aware of facts that would lead
4 a reasonable person to conclude that there is a substantial probability that the source of
5 the funds is a foreign national; or (iii) being aware of facts that would lead a reasonable
6 person to inquire whether the source of the funds is a foreign national, but failing to
7 conduct a reasonable inquiry. *Id.* § 110.20(a)(4). The provision of a foreign address or
8 residence abroad would lead a reasonable person to inquire whether the source of funds
9 solicited, accepted, or received is a foreign national. *See id.* § 110.20(a)(5)(ii), (iv).

10 The Commission has encouraged commercial entities that process third party
11 contributions to adopt screening procedures to avoid substantially assisting foreign
12 nationals in making contributions.⁵ Such screening procedures can also be useful to
13 entities that sell online advertising (including Facebook) to comply with the legal
14 prohibition against knowingly providing substantial assistance to foreign nationals in
15 making independent expenditures or disbursements through the purchase of advertising
16 on their platforms. *See id.* § 110.20(h)(2). While neither the Act nor Commission
17 regulations require you to provide such proof as a prerequisite to the purchase of online
18 political advertisements, these entities may, as part of their screening procedures, require

⁴ This definition of “knowingly” relates to the prohibition on knowingly providing substantial assistance to a foreign national in the making of contributions or donations in connection with federal, state, and local elections. *See* 11 C.F.R. § 110.20(h)(1).

⁵ *See, e.g.*, Advisory Opinion 2019-04 (Prytany) at 6 (concluding that commercial vendors providing online contribution-processing services should adopt screening procedures to ensure that contributions do not come from prohibited sources, including foreign nationals); Advisory Opinion 2016-08 (eBundler.com) at 7 (same); Advisory Opinion 2007-04 (Atlatl) at 4 (same).

1 prospective advertisers to provide proof of a U.S. bank account, a financial instrument
2 drawn on a U.S. bank, or a U.S. address.

3 4. *Can Facebook or any other media platform use this advisory opinion in*
4 *place of their existing political advertisement guidelines and methods as legal proof that*
5 *you are a U.S. citizen who is allowed to participate in domestic political activities just as*
6 *if you resided in the U.S.?*

7 5. *Will this advisory opinion absolve Facebook or any other media platform*
8 *of further requirements to prove that you are a U.S. citizen who is allowed to participate*
9 *in domestic political activities just as if you resided in the U.S.?*

10 No, this advisory opinion does not serve as legal proof that you are a U.S. citizen
11 or relieve any entity of its obligation to comply with the Act and Commission
12 regulations. As explained above, the Commission has assumed the accuracy of your
13 representation that you are a U.S. citizen for purposes of this advisory opinion but has not
14 made any determination to that effect, nor does it have the authority to make such a
15 determination. *Supra* n.2; AOR001. For the purpose of rendering an advisory opinion,
16 representations made by a requestor are assumed to be accurate; if a material fact on
17 which the Commission relied is not accurate, the requestor may not rely on the advisory
18 opinion. The Commission therefore relies on your representation that you are a U.S.
19 citizen but this advisory opinion does not establish whether you are in fact a U.S.
20 citizen. Further, to the extent that your questions concern the activities of third parties,
21 they do not qualify as advisory opinion requests. 11 C.F.R. § 112.1(b).

1 6. *Should it be compulsory for Facebook or any other media platform to*
2 *impose the same qualifications on resident and non-resident U.S. citizens for advertising*
3 *political content on their platforms in the U.S.?*

4 The Commission declines to answer this question because it presents a general
5 question of interpretation of the Act or Commission regulations. As such, this question
6 does not qualify as an advisory opinion request. 11 C.F.R. § 112.1(b).

7 This response constitutes an advisory opinion concerning the application of the
8 Act and Commission regulations to the specific transaction or activity set forth in your
9 request. *See* 52 U.S.C. § 30108. The Commission emphasizes that, if there is a change
10 in any of the facts or assumptions presented, and such facts or assumptions are material to
11 a conclusion presented in this advisory opinion, then the requestor may not rely on that
12 conclusion as support for its proposed activity. Any person involved in any specific
13 transaction or activity which is indistinguishable in all its material aspects from the
14 transaction or activity with respect to which this advisory opinion is rendered may rely on
15 this advisory opinion. *See* 52 U.S.C. § 30108(c)(1)(B). Please note that the analysis or

1 conclusions in this advisory opinion may be affected by subsequent developments in the

2 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

3 Any advisory opinions cited herein are available on the Commission's website.

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On behalf of the Commission,

Shana M. Broussard
Chair