



November 14, 2011

Amy L. Rothstein, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Advanced Notice of Proposed Rulemaking, Internet Communication Disclaimers

Dear Ms. Rothstein:

Facebook, Inc. ("Facebook") submits this letter in response to the Advance Notice of Proposed Rulemaking issued on October 13, 2011 ("ANPRM").¹

More than halfway through the 2012 election cycle, it is clear that candidates depend on social networking services, such as Facebook, to communicate with voters in a cost-effective way. More and more, voters use Facebook and other social networking sites to learn about candidate proposals, interact with other supporters, and organize events. A recent survey found that more than eight in ten U.S. adults are social media users, and nearly nine in ten social media users are registered voters.² Of these social media users, more than 60% expect candidates to have a social media presence and more than half will use social media to learn about the presidential candidates.³

While there are many reasons for the strong presence of candidates on social networking sites, the Commission's decision, in 2006, to adopt a "restrained regulatory approach" to Internet activity remains one of the most important.⁴ During the Internet rulemaking, the Commission was guided by a clear strategic objective: making it easier for political committees and other politically-interested citizens to speak. Before the Commission acted, there was real concern that online political activity would trigger registration requirements and be subject to strict limitations. By exempting nearly all Internet activity from regulation, the Commission laid the groundwork for the proliferation in online political activity that we see today.

¹ See Advanced Notice of Proposed Rulemaking, Internet Communication Disclaimers, 76 F.R. 63567 (Oct. 13, 2011).

² See Get on Twitter and Facebook or Get Out of the Race, New Digitas Study Finds Six in Ten Social Media Users Expect Candidates to Have a Social Media Presence, *available at* <http://www.prnewswire.com/news-releases/get-on-twitter-and-facebook-or-get-out-of-the-race-132939343.html>.

³ *Id.*

⁴ See Final Rule, Internet Communications, 71 F.R. 18589, 18589 (Apr. 12, 2006).

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To date, however, the Commission's treatment of online political advertising has been unclear – to sellers of online advertising, to political committees and, as a recent congressional hearing made clear, to Members of Congress. At a time when the Commission should be making it easier for candidates to communicate with voters, the Commission's failure to provide a coherent approach to online political advertising has made it harder.

For this reason, Facebook applauds the Commission for issuing this Advance Notice of Proposed Rulemaking and encourages it to undertake the rulemaking considered in that Advance Notice. This is an opportunity for the Commission to provide clear guidance to the regulated community and, once again, to make it easier for political committees and other politically-interested citizens to speak. In approaching this rulemaking, the Commission should be guided by three principles.

No discrimination based on platform or technology.

The Commission should not favor one technology or platform over another. In Advisory Opinion 2002-9 (Target Wireless), the Commission found that SMS text messages limited to 160 characters or fewer were "small items" and did not require disclaimers.⁵ But in Advisory Opinions 2010-19 (Google) and 2011-9 (Facebook), the Commission could not reach a decision as to whether character-limited advertisements require disclaimers.⁶ The Commission still has not provided a coherent explanation for how platforms such as Google and Facebook should be treated – especially *vis-à-vis* text messages and other character-limited communications – or how it proposes to ensure that any regulation of new technologies does not result in discrimination based on platform or technology. In this rulemaking, the Commission should resolve these issues.

No content-based restrictions on speech.

Courts have generally upheld disclaimer requirements on the grounds that they "impose no ceiling on campaign-related activities" and "do not prevent anyone from speaking."⁷ In Advisory Opinion 2010-19, however, the Commission approved of an "alternative" disclaimer requirement, which can be satisfied *only* when the political committee sponsor includes certain content within its communication (a link to its webpage). When a political committee chooses to link to an ActBlue page, or a newspaper article, or the website of another candidate or committee, this "alternative" disclaimer requirement *cannot* be satisfied. Restricting the content of Internet communications in this way is bad policy and constitutionally suspect. In crafting a

⁵ See Advisory Opinion 2002-9 (Target Wireless).

⁶ See Advisory Opinions 2010-19 (Google), 2011-9 (Facebook).

⁷ See *Citizens United v. FEC*, 130 S.Ct. 876, 914 (2010), citing *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *McConnell v. FEC*, 540 U.S. 93, 201 (2003) (internal quotation marks and brackets omitted).

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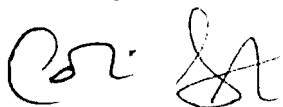
rule for online political advertising, the Commission should not impose any content-based restrictions on speech.

Technology is dynamic, not static.

Any rule that the Commission adopts should be flexible enough to accommodate technologies and platforms that have not yet come to market. A rule crafted narrowly to address today's technologies will quickly be rendered obsolete. Even worse, such a rule might deter or delay new products from being introduced into the political marketplace. The Commission should not stand in the way of innovation; it should create a regulatory environment in which innovation flourishes.

Facebook hopes that the Commission uses this opportunity to provide legal clarity to sellers and buyers of online political advertising. By making it less burdensome for candidates to speak, the Commission can help facilitate the widespread dissemination of information to voters in a medium they have come to rely on for this kind of information.

Sincerely,



Colin S. Stretch
Deputy General Counsel
Facebook, Inc.