FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ADVISORY OPINION 2017-12 (Take Back Action Fund)

CONCURRING STATEMENT OF COMMISSIONER ELLEN L. WEINTRAUB

This Advisory Opinion is important in the firm answer it gives the requestor: *Political advertisements on Facebook must carry full disclaimers.* Now, this requirement is nothing new; the law says clearly that political advertising, including advertising on the internet, must contain disclaimers.[1] What *is* new is the willingness of the FEC's Republican commissioners to state the law plainly and, hopefully, as we go forward, to hold people accountable for complying with the rules mandating internet disclaimers. This should have immediate and positive consequences in the amount of information the American public receives about the online political advertising it sees.

The Commission's legal determinations must be grounded in current facts and technological developments. As those change, so must the Commission's analyses. The cellphone screen that may have been too small in 2002 to fit a full political advertising disclaimer has been transformed into a window onto all the world's information. And overall, the internet's impact on the political world is remarkable – and accelerating. In 2002, political advertising spending was minuscule. Last year, $1.415 billion was spent on political ads.[2] The small companies that sold political ads in 2002 have been muscled aside by multibillion-dollar social-media behemoths.

While the Commission could agree only to a bare answer in this matter, stating that Take Back Action Fund "must include all of the disclaimer information specified by 52 U.S.C. § 30120(a) on its proposed paid Facebook Image and Video advertising," I subscribe fully to the more complete analysis found in Draft A-1.[3] Despite my Republican colleagues' welcome recognition of technology's potential to facilitate disclosure, in their statement they inexplicably cling to the Commission's antiquated Advisory Opinion in Target Wireless from 2002.[4] Nothing about the online world is the same as it was 15 years ago in 2002 when the Commission addressed ads delivered using the severely limited Short Messaging Service ("SMS"). Then,

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1 52 U.S.C. § 30120(a); 11 C.F.R. §§ 110.11, 100.26.

2 Sean J. Miller, "Digital Ad Spending Tops Estimates," CAMPAIGNS & ELECTIONS (JAN. 4, 2017), *found at* https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates

3 Agenda Document No. 17-59A-1, *found at* http://saos.fec.gov/aodocs/201712_3.pdf

4 AO 2002-09 (Target Wireless).

internet advertising existed in the realm of 160-character messages, each one of which cost their recipients about a nickel apiece, with no way of ensuring that multiple messages arrived in any coherent order. Now, high-definition videos of any length can be freely delivered to and received by the handheld device of virtually every voter in America.

While it would be neater and less confusing if the Commission simply superseded the Target Wireless AO, it is difficult to imagine how anyone in 2018 could claim to be in a position that is "indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered,"[5] the only conditions under which the law allows reliance on advisory opinions written for others.

If some new startup wants to set fire to its investors' money by launching a brand-new political-advertising service that operates solely on SMS, they can go ahead and see if AO 2002-09 (Target Wireless) applies to what they're trying to do. But everyone else should look to AO 2017-12 (Take Back Action Fund) and provide full disclaimers on their internet political advertising.

Ellen L. Weintraub

December 21, 2017

Ellen L. Weintraub
Commissioner

[5] 52 U.S.C. 30108(c)(1)(B).