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AGENDA ITEM

September 23, 2010

For Meeting of 9-23-10

MEMORANDUM

SUBMITTED LATE

TO: The Commission

FROM: Christopher Hughey *CH (RCS)*
Acting General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *R.M.K. (RCS)*
Assistant General Counsel

Tony Buckley *[Signature]*
Attorney

Subject: Draft AO 2010-19 (Google) — Revised Draft A

Attached is a Revised Draft A of the subject advisory opinion. We have been asked to place this draft on the agenda for September 23, 2010.

Attachment

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Marc E. Elias, Esq.
Jonathan S. Berkon, Esq.
Perkins Coie LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2003

REVISED DRAFT A

Dear Messrs. Elias and Berkon:

10 We are responding to your advisory opinion request on behalf of Google, Inc.
11 concerning the application of the Federal Election Campaign Act of 1971, as amended
12 (the “Act”), and Commission regulations to Google, Inc.’s proposal to sell text ads to
13 candidates, their authorized committees, and other political committees. Google, Inc.
14 asks whether disclaimers are required on text ads generated when Internet users use
15 Google’s search engine to perform searches.

16 The Commission concludes that Google, Inc.’s AdWords program does not
17 qualify for the small items exception at 110.11(f)(1)(i), but that including the URL of the
18 sponsoring committee’s website and linking to a page with a complete disclaimer that is
19 clear and conspicuous will satisfy the Act’s disclaimer requirements under Commission
20 precedent.

21 ***Background***

22 The facts presented in this advisory opinion are based on your letter received on
23 August 5, 2010.

24 Google, Inc. is a corporation that creates programs and applications that allow
25 persons to search for and collect information on the Internet. Google, Inc.’s AdWords
26 program generates text ads in conjunction with keywords chosen by the advertiser. Text
27 ads have a headline which can consist of up to 25 characters, and two lines of text and a

1 display Uniform Resource Locator (“URL”) which can consist of up to 70 characters.
2 This format applies to all advertisers, regardless of whether they are political committees.
3 When a user enters search terms that coincide with the chosen keywords into the Google,
4 Inc. Internet search engine, AdWords generates text ads that appear alongside the search
5 results. Additionally, Google, Inc. has partnered with other websites to participate in
6 Google, Inc.’s AdWords program. Using the chosen keywords, Google, Inc. can match
7 an advertiser’s ads to websites in Google, Inc.’s partner network that are most relevant to
8 the advertiser’s message.

9 The primary purpose of a text ad is to attract customers to an advertiser’s web
10 page or “landing page” so that customers may learn more about what the advertiser has to
11 offer. Accordingly, advertisers pay Google, Inc. for a text ad based upon the number of
12 times a user clicks on the ad and is taken to the advertiser’s website. Advertisers do not
13 pay Google, Inc. based on the number of times a text ad appears on a search page.
14 Google, Inc. wishes to sell text ads to candidates, their authorized committees, and other
15 political committees under the AdWords program. These text ads would not display a
16 disclaimer indicating who authorized or paid for the ad; rather, a full disclaimer would
17 appear on the landing page that appears when a user “clicks through” a text ad.

18 ***Questions Presented***

- 19 1. *Do text ads on behalf of candidates and political committees generated through*
20 *Google, Inc.’s AdWords program qualify for the “small items” exception at 11 CFR*
21 *110.11(f)(1)(i)?*
- 22 2. *If text ads on behalf of candidates and political committees generated through*

1 *Google, Inc.'s AdWords program require a disclaimer, is the requirement satisfied if the*
2 *text ad displays the URL of the committee sponsor's website in the text ad and the landing*
3 *page contains a full disclaimer?*

4 ***Legal Analysis and Conclusions***

5 With some exceptions, public communications made by a political committee
6 must include certain disclaimers. *See* 2 U.S.C. 441d(a)(1); 11 CFR 110.11(a)(1). Under
7 the Act and Commission regulations, a “public communication” is a communication “by
8 means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor
9 advertising facility, mass mailing, or telephone bank to the general public, or any other
10 form of general public political advertising.” 2 U.S.C. 431(22); 11 CFR 100.26.
11 “General public political advertising” includes “communications over the Internet” if
12 they are “placed for a fee on another person’s Web site.” *Id.*

13 If a candidate, an authorized committee of a candidate, or an agent of either pays
14 for and authorizes the public communication, the disclaimer must state that the
15 communication “has been paid for by the authorized political committee.” 11 CFR
16 110.11(b)(1); *see also* 2 U.S.C. 441d(a)(1). If a public communication is paid for by
17 someone else, but is authorized by a candidate, an authorized committee of a candidate,
18 or an agent of either, the disclaimer must state who paid for the communication and that
19 the communication is authorized by the candidate, authorized committee of the candidate,
20 or the agent of either. 11 CFR 110.11(b)(2); *see also* 2 U.S.C. 441d(a)(2). If the
21 communication is not authorized by a candidate, an authorized committee of a candidate,
22 or an agent of either, the disclaimer must “clearly state the full name and permanent street

1 address, telephone number, or World Wide Web address of the person who paid for the
2 communication, and that the communication is not authorized by any candidate or
3 candidate’s committee.” 11 CFR 110.11(b)(3); *see also* 2 U.S.C. 441d(a)(3). Every
4 disclaimer “must be presented in a clear and conspicuous manner, to give the reader,
5 observer, or listener adequate notice of the identity” of the ad’s sponsor. 11 CFR
6 110.11(c)(1).

7 Commission regulations do not require disclaimers to be placed on “[b]umper
8 stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be
9 conveniently printed.” 11 CFR 110.11(f)(1)(i) (the “small items exception”).

10 *1. Do text ads on behalf of candidates and political committees generated*
11 *through Google, Inc.’s AdWords program qualify for the “small items” exception at*
12 *11 CFR 110.11(f)(1)(i)?*

13 No, text ads on behalf of candidates and political committees generated through
14 Google, Inc.’s AdWords program do not qualify for the “small items” exception at
15 11 CFR 110.11(f)(1)(i).

16 The Commission has applied the small items exception to situations where a
17 disclaimer simply would not fit in the space provided based on the physical limitations of
18 the item or a technological constraint. *See* Advisory Opinions 1980-42 (Hart) (applying
19 the exception to concert tickets) and 2002-09 (Target Wireless) (applying the exception
20 to communications distributed through a wireless telecommunications network). In
21 Advisory Opinion 2002-09 (Target Wireless), the requestor asked whether disclaimers
22 were required on content, where that content bore a sponsorship message from a political

1 committee. Technology limited the content to 160 characters per page and the requestor
2 could not guarantee that two pages sent consecutively would be received consecutively.
3 The Commission determined that the small items exception applied, noting that “the
4 wireless telephone screens that you have described have limits on both the size and the
5 length of the information that can be conveyed. Indeed, the Commission notes that the
6 [Short Messaging Service] technology places similar limits on the length of a political
7 advertisement as those that exist with bumper stickers.” Advisory Opinion 2002-09
8 (Target Wireless).

9 In contrast to the technological limitations faced by Target Wireless, under the
10 AdWords program, the limitation on the size of an ad or the number of characters that
11 may be included in an ad is not mandated by the physical limitations of the display
12 medium or the AdWords technology. Rather, Google, Inc. indicates that it has set this
13 format and the uniform size for all ads because different-sized ad spaces would, in its
14 business judgment, reduce the value of the smaller ads, as well as the number of ads that
15 can be shown on any page. This business decision does not alleviate the disclaimer
16 requirement because it is possible to increase the size of an ad or the number of
17 characters that may be included in an ad. Accordingly, the small item exception does not
18 apply to text ads generated through AdWords. *See* Advisory Opinion 2007-33 (Club for
19 Growth PAC) (concluding that the small items exception does not apply to ten- and
20 fifteen-second television advertisements).

21 2. *If text ads on behalf of candidates and political committees generated*
22 *through Google, Inc.’s AdWords program require a disclaimer, is the requirement*

1 *satisfied if the text ad displays the URL of the committee sponsor's website in the text ad*
2 *and the landing page contains a full disclaimer?*

3 Yes, under the circumstances described in the request, the Commission considers
4 the disclaimer requirement to be satisfied if (a) the text ad displays the URL of the
5 committee sponsor's website¹ and (b) the landing page contains a full disclaimer meeting
6 the requirements of 11 CFR 110.11. This conclusion is, however, explicitly limited to the
7 business model that Google, Inc. has described in its advisory opinion request regarding
8 the AdWords program as described above. It is also limited to the representation that no
9 advance payment is received by Google, Inc. for special treatment, such as for
10 preferential positioning.

11 In circumstances where the delivery of a required disclaimer would be unwieldy
12 or unfeasible, the Commission historically has allowed the disclaimer to be delivered in
13 an alternate fashion, rather than eliminating the disclaimer requirement. *See* Advisory
14 Opinion 2004-01 (Bush/Kerr) (required disclaimer for advertisement authorized by two
15 candidates could be delivered by one candidate on behalf of both of them); Advisory
16 Opinion 2004-37 (Waters) (disclaimer did not have to separately list each and every
17 federal candidate in brochure featuring numerous federal candidates so long as there was
18 an alternative way to identify them). Similarly, in Advisory Opinion 2004-10 (Metro
19 Networks), the Commission allowed modification of the disclaimer requirements for live
20 broadcasted reports, featuring traffic, news and other content, sponsored by candidates.
21 Given the live nature of the reports and technological limits, the requestor stated that it

¹ You represent that the text ad "displays the URL of the sponsoring committee's website" and that the URL will therefore "notify the user of the website to which she will be directed."

1 would be “physically impossible” for it to include the “stand by your ad” statement
2 spoken by the candidate as set forth in 11 C.F.R. 110.11(c)(3). While the Commission
3 agreed that the nature of the ad rendered the candidate’s speaking of the disclaimer
4 impossible, the Commission did not find that the physical and technological limitations
5 prevented the provision of the disclaimer. Instead, the Commission concluded that a
6 disclaimer was required but permitted the disclaimer to be spoken by the individual
7 providing the report.

8 Text ads generated through Google, Inc.’s AdWords program are limited to 95
9 characters, including the headline. Taking, for example, a disclaimer for a
10 communication not authorized by a candidate, the disclaimer must clearly state, among
11 other things, that the communication “is not authorized by any candidate or candidate’s
12 committee.” 2 U.S.C. 441d(a); 11 CFR 110.11(b)(3). The phrase “Not authorized by any
13 candidate or candidate’s committee” is 57 characters long. Including the full name of the
14 political committee could require more characters for the disclaimer than are allowed for
15 the text ad itself.

16 Google, Inc. proposes an alternative manner that may satisfy the disclaimer
17 requirements if the text ad displays the URL of the political committee’s website and the
18 landing page includes a full disclaimer. The Commission has recognized that URLs of
19 political committees provide important identifying information. First, the URL typically
20 contains some form of the candidate or political committee’s name. Second, by
21 providing its World Wide Web address (a form of URL), a committee is able to meet in
22 part its disclaimer obligations under the Act and Commission regulations. *See* 2 U.S.C.

1 441d(a)(3) and 11 C.F.R. 110.11(b)(3). In addition, users who “click through” a text ad
2 will be taken to the political committee’s website that will contain a disclaimer displayed
3 in a clear and conspicuous manner on the landing page, and Google, Inc. only receives
4 payment for those ads that are clicked through by a user. Accordingly, the Commission
5 determines that, under the circumstances described in the request, the disclaimer
6 requirement is satisfied if the text ad displays the URL of the political committee’s
7 website and the landing page contains a full disclaimer as required by 11 CFR 110.11.²
8 This conclusion is consistent with the Commission’s practice of “interpret[ing] the Act
9 and its regulations in a manner consistent with contemporary technological innovations . .
10 . where the use of the technology would not compromise the intent of the Act or
11 regulations.” Advisory Opinion 1999-09 (Bradley for President) (approving Federal
12 matching funds for contributions received over the Internet through the use of a credit
13 card).

14 This response constitutes an advisory opinion concerning the application of the
15 Act and Commission regulations to the specific transaction or activity set forth in your
16 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
17 of the facts or assumptions presented, and such facts or assumptions are material to a
18 conclusion presented in this advisory opinion, then the requestor may not rely on that
19 conclusion as support for its proposed activity. Any person involved in any specific
20 transaction or activity which is indistinguishable in all its material aspects from the

² The Commission notes that the Act’s disclaimer requirements do not apply to the requestor, but rather to the persons purchasing advertisements through Google’s AdWords program. *See* 11 CFR 110.11(a). While the Commission is providing an answer the question raised by the requestor, the Advisory Opinion itself provides limited protection in the absence of some arrangement between Google and its political advertisers to comply with its substance.

1 transaction or activity with respect to which this advisory opinion is rendered may rely on
2 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
3 conclusions in this advisory opinion may be affected by subsequent developments in the
4 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

5 All cited advisory opinions are available on the Commission's website at
6 <http://saos.nictusa.com/saos/searchao>.

7 On behalf of the Commission,
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10 Matthew S. Petersen
11 Chairman
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