

August 15, 2002

NOTICE AO DRAFT COMMENT PROCEDURES

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2002-09 is available for public comments under this procedure. It was requested by counsel, Diana Hartstein on behalf of Target Wireless. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2002-09 will be on the Commission's agenda for its public meeting of Thursday August 22, 2002.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EDT) on August 21, 2002.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

CONTACTS

Press inquiries: Ron Harris (202) 694-1220

Acting Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

**To obtain copy of draft AO 2002-09 contact Public Records Office-
Public Disclosure Division (202) 694-1120, or 800-424-9530.**

**For questions about comment submission procedure contact
N. Bradley Litchfield, Associate General Counsel, (202) 694-1650.**

ADDRESSES

Submit single copy of written comments to:

**Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463**

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

2002 AUG 15 P 4: 25

MEMORANDUM

August 15, 2002

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director *[Signature]*

FROM: Lawrence H. Norton
General Counsel *[Signature]*

James A. Kahl *[Signature]*
Deputy General Counsel

John Vergelli *[Signature]*
Acting Assistant General Counsel

Ruth Heilizer *[Signature]*
Staff Attorney

SUBJECT: Draft AO 2002-09 - Alternative Drafts

AGENDA ITEM
For Meeting of: 8-22-02

The attached responds to a question raised by Target Wireless, a vendor of wireless digital telephone services. Target provides content, including sports scores and news items, to individuals who subscribe to these services and who own wireless telephones with digital screens. In its request for an advisory opinion, Target states that it wishes to transmit political messages, along with content, to subscribers but notes that current technology limits the available screen space to 160 characters. Target argues that it cannot transmit disclaimers along with political messages and content and requests that the transmissions be excepted from the disclaimer regulations, either under 11 CFR 110.11(a)(6)(i), the "small item/inconvenience" exception, or 11 CFR 110.11(a)(6)(ii), the "impracticability" exception.

This Office believes that the question presented by Target is a very close legal judgment under the applicable regulations. The primary difficulty is that the Commission's disclaimer requirements, including the exceptions thereto, have not heretofore been analyzed with respect to a new technology such as digital wireless communications services. Moreover, the visual display provided by the SMS technology, which is at the center of this advisory opinion request, possesses both similarities and dissimilarities with the two

Memorandum to the Commission

Page 2

exceptions cited by Target. As a result, we have prepared alternative drafts of this advisory opinion, and we request that both drafts be placed on the agenda for August 22, 2002.

Attachments

Drafts A and B

1 Diana Hartstein, Esq.
2 Caplin & Drysdale
3 One Thomas Circle, NW
4 Suite 1100
5 Washington, DC 20005
6

DRAFT A

DRAFT

7 Dear Ms. Hartstein:

8 This refers to your letters dated August 5, 2002 (with an enclosure), July 25, 2002, June
9 13, 2002, May 14, 2002 (with an enclosure), and February 25, 2002, requesting an advisory
10 opinion concerning the application of the Federal Election Campaign Act, as amended ("the
11 Act") and Commission regulations to the distribution of political advertisements through wireless
12 telecommunications networks.

13 **BACKGROUND**

14 You state that your client, Target Wireless ("Target"), provides content, which you define
15 as "politics, news, sports, etc.," through wireless telecommunications networks and Internet
16 service providers to subscribers of wireless PCS digital telephones. One of Target's primary
17 sources of revenue is advertising. Target has been contacted by candidates and political parties
18 about paying Target to send political advertising to wireless digital telephone subscribers.
19 However, you assert that Target is currently unable to provide this service because Target is
20 uncertain whether the Commission's disclaimer requirements would apply to these
21 communications. You conclude that, because the available technology limits the length of
22 content-and-advertising communications, the Commission should exempt these communications
23 from its disclaimer requirements.

24 With regard to the specific technology involved, you state that, in the United States, all
25 wireless carriers employ "Short Messaging Service" ("SMS") technology. You describe SMS as

1 follows: a wireless customer has the option of subscribing to a content-based information system
2 that permits the delivery and receipt of content and e-mail messages. The content and e-mail
3 messages are displayed as short messages on a liquid crystal display, which serves as the digital
4 screen on each wireless telephone. In order to receive content, customers enter into contracts for
5 SMS messages with wireless telephone carriers. The contracts require customers to pay a flat
6 price for a certain number of minutes per month. August 5, 2002 letter, p. 2.

7 Target envisions that political advertisers would sponsor content, such as sports scores or
8 information about news events, which would appear on subscribers' telephone screens, along
9 with a political message, such as "Kids are Winners with Smith" (May 14, 2002 letter, page 3).

10 You note, however, that, due to technological limitations, SMS messages are limited to 160
11 characters per screen, with "characters" including letters, symbols, spaces, punctuations marks,
12 and single digits. August 5, 2002 letter, p. 2.

13 You maintain that providing disclaimers with the political advertisements, as generally
14 required by 11 CFR 110.11, will prevent candidates for Federal office and others from using
15 wireless media for political advertising. For example, you point out that a disclaimer such as
16 "Paid for by the Republican National Committee" consumes 45 characters and that a longer
17 disclaimer such as "Paid for by the Fisherman's Union PAC and not authorized by any candidate
18 or candidate's committee" consumes 98 characters.¹ May 14, 2002 letter, p. 4. In the latter case,
19 only 62 characters would remain for the advertisement itself and for the accompanying content.

20 On page 1 of your June 13, 2002 letter, you assert that it is not feasible to provide for two
21 continuous pages of political advertising, including content and disclaimers. On pp. 1-2 of your

¹ The Commission reminds Target that, generally, unions, corporations and trade associations may solicit contributions only through their separate segregated funds and only from members of their restricted classes, as

1 August 5, 2002 letter, you explain that, because an SMS two-page message is treated as two
2 separate messages, the chances that the two pages would arrive in tandem are remote. Further,
3 you state that, as SMS technology becomes more popular, the likelihood that both pages of a
4 two-page message will arrive in tandem will decrease. Finally, you point out that contracts for
5 SMS messages require consumers to pay a flat fee for a certain number of minutes. Thus, the
6 second page of a two-page message would consume additional time and would cost consumers
7 money.

8 You also note that the Commission's regulations concerning disclaimers on television
9 advertisements state that disclaimers are considered "clear and conspicuous" if the disclaimers
10 appear in letters "equal to or greater than four (4) percent of the vertical screen height . . ."
11 11 CFR 110.11(a)(5)(iii). In contrast, you point out that even a relatively short disclaimer, such
12 as "Paid for by Smith for Congress" uses 30 of the available 160 characters, or approximately
13 18% of the available characters.

14 You conclude that, given the limited space available with SMS delivery to digital
15 telephones, wireless digital advertising is similar to the disclaimer exceptions listed at 11 CFR
16 110.11(a)(6)(i), which includes certain small items, or 11 CFR 110.11(a)(6)(ii), which includes
17 methods of advertising where a disclaimer would be "impracticable." Therefore, you ask that
18 Target's proposed content-plus-political advertising proposal be exempted from the
19 Commission's disclaimer requirements under 11 CFR 110.11(a)(6)(i) or (ii). As an alternative,
20 you suggest that the political advertisements could either include a web link to the sponsor's
21 identification, such as www.sponsor.com, or a toll-free telephone number so that individuals who

1 read the messages could determine the identify of the sponsor. (Presumably, the sponsor
2 identification would contain the requisite disclaimer.)

3 **ACT AND COMMISSION REGULATIONS**

4 The following discussion is based on the Act, as recently amended by the Bipartisan
5 Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, and the Commission's current
6 regulations.

7 **Current Regulations**

8 Whenever any person makes an expenditure to finance communications expressly
9 advocating the election or defeat of a clearly identified candidate or soliciting any contribution,
10 and does so through various types of mass media (e.g., a broadcasting station) or via "any other
11 type of general public political advertising," the communication is required to include a statement
12 of sponsorship or disclaimer. 2 U.S.C. 441d, 11 CFR 110.11. The disclaimer must clearly state
13 if the communication has been paid for and authorized by a candidate, or the candidate's
14 authorized political committee. If the communication is paid for by other persons but authorized
15 by a candidate (including an authorized political committee of a candidate or its agents), the
16 disclaimer shall clearly state that the communication is paid for by those other persons and
17 authorized by such authorized political committee. On the other hand, if the communication is
18 not authorized by a candidate (including an authorized political committee of a candidate or its
19 agents), the disclaimer shall clearly state the name of the person who paid for the communication
20 and state that it is not authorized by any candidate or the candidate's committee. 2 U.S.C. 441d;
21 11 CFR 109.3, 110.11(a)(1), and 110.11(a)(5).

22 Some exceptions to the Commission's disclaimer requirements are listed at 11 CFR
23 110.11(a)(6)(i) and (ii). These exceptions include 11 CFR 110.11(a)(6)(i), which covers bumper

1 stickers, pins, buttons, pens, and other similar small items upon which a disclaimer cannot be
2 conveniently printed, and 11 CFR 110.11(a)(6)(ii), which covers skywriting, watertowers,
3 wearing apparel, and other methods of displaying political advertising and other means of
4 advertising where displaying a disclaimer would be "impracticable."

5 **Bipartisan Campaign Reform Act**

6 In BCRA, Congress has mandated additional disclaimer requirements.² First, the
7 disclaimer requirements now apply to "any" communication financed by a political committee,
8 not just those that expressly advocate the election or defeat of a clearly identified candidate, or
9 that solicit any contribution. 2 U.S.C. 441d(a). Second, all persons who finance electioneering
10 communications are subject to the provisions of 2 U.S.C. 441d(a).³ Third, for communications
11 that are not authorized by a candidate, an authorized political committee of a candidate, or its
12 agents, under BCRA, disclaimers include the "permanent street address, telephone number or
13 World Wide Web address of the person who paid for the communication." 2 U.S.C. 441d(a)(3).

14 **ANALYSIS**

15 As described in 11 CFR 110.11(a)(6)(i) and (ii), the Commission has provided for certain
16 exceptions to its disclaimer requirements. However, these exceptions are distinguishable from
17 your proposal. First, by virtue of their size, the "small" items listed in 11 CFR 110.11(a)(6)(i),
18 such as bumper stickers, pins, buttons, and pens, can only display very short messages consisting
19 of only a few words, which is why disclaimers "cannot be conveniently printed" on them. In

² BCRA's "disclaimer" provisions will not take effect until November 6, 2002.

³ An electioneering communication "means any broadcast, cable, or satellite communication which refers to a clearly identified candidate for federal office" and "is made within 60 days before a general, special, or runoff election for the office sought by the candidate, or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate." 2 U.S.C. 434(f)(3)(A)(i).

1 contrast, the telephone screens in question, although small in size, are designed to hold up to 160
2 characters of information, more than enough space to display a political advertisement and a
3 disclaimer. The true limitation, which Target imposes on itself, is that it seeks to display content
4 and the political advertisement on the same screen. Therefore, the "small item/convenience"
5 exception in 11 CFR 110.11(a)(6)(i) does not apply to Target's content-plus-political messages.

6 The second exception for "impracticability," as described in 11 CFR 110.11(a)(6)(ii),
7 includes means of advertising such as skywriting, watertowers, and wearing apparel. For
8 example, an individual who uses skywriting as a medium for conveying a political message
9 would find it difficult, if not impossible, to add the information required for a proper disclaimer.

10 In contrast, the medium that Target proposes to use does not, in and of itself, make
11 disclaimers impracticable. The examples provided by Target (see pages 3-4 of the May 14, 2002
12 letter) provide substantial amounts of information. The Commission notes that the 160-character
13 limitation does not prevent Target from transmitting political messages along with disclaimers;
14 thus, such transmissions are not impracticable. Indeed, the practical transmittal of information is
15 the point of wireless communications.

16 Finally, as noted above, Target's messages are not comparable to the items excepted from
17 the disclaimer requirements, as described above in 11 CFR 110.11(a)(6)(i) and (ii), because these
18 items display political advertisements only, whereas Target's proposed messages would include
19 content as well as political advertising. Thus, unlike the excepted items which do not have space
20 for disclaimers, Target's messages have space that is taken up with content.

21 Based on the foregoing, the Commission concludes that Target's proposal, as presented,
22 does not fall within the exceptions to the Commission's disclaimer requirements found at
23 11 CFR 110.11(a)(6)(i) and (ii). BCRA does not provide any additional disclaimer exceptions.

1 Therefore, any political advertisements sent by Target must include disclaimers as set forth in the
2 Act, as amended by BCRA, and in 11 CFR 110.11.

3 The Commission has also considered your alternative proposal that, instead of including
4 disclaimers with each message, the proposed political advertisements would include either a
5 telephone number, which subscribers could call to find out who sponsored the advertisement, or
6 a link to an Internet website which would provide information identifying the sponsor. The
7 Commission, however, rejects both alternatives because neither results in the required disclaimer
8 appearing clearly and conspicuously with the political advertisement itself. 11 CFR
9 110.11(a)(5). The disclaimer could be "easily overlooked" if the reader must follow a link to a
10 screen which may, at best, be separated from the political communication by one or more
11 unrelated screens. Ibid.⁴ (The Commission notes that the reader is particularly likely to forego
12 obtaining sponsor information if doing so costs the reader money, as it may if the reader must
13 place a call from his or her cell phone or if receipt of a second message adds to the subscriber's
14 charges.)

15

⁴ As stated above, BCRA allows communications that are not authorized by a candidate, an authorized political committee of a candidate, or its agents, to include the sponsor's World Wide Web address in the communication, instead of the sponsor's street address or telephone number. 2 U.S.C. 441d(a)(3). However, nothing in BCRA eliminates the need to identify the sponsor of the communication.

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2 Caplin & Drysdale
3 One Thomas Circle, NW
4 Suite 1100
5 Washington, DC 20005
6

DRAFT B

DRAFT

7 Dear Ms. Hartstein:

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9 2002, May 14, 2002 (with an enclosure), and February 25, 2002, requesting an advisory opinion
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18 Target to send political advertising to wireless digital telephone subscribers. However, you assert
19 that Target is currently unable to provide this service because Target is uncertain whether the
20 Commission's disclaimer requirements would apply to these communications. You conclude that,
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22 Commission should exempt these communications from its disclaimer requirements.

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26 that permits the delivery and receipt of content and e-mail messages. The content and e-mail

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6 information about news events, which would appear on subscribers' telephone screens, along with a
7 political message, such as "Kids are Winners with Smith" (May 14, 2002 letter, page 3). You note,
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20 August 5, 2002 letter, you explain that, because an SMS two-page message is treated as two
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5 You also note that the Commission's regulations concerning disclaimers on television
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7 appear in letters "equal to or greater than four (4) percent of the vertical screen height . . ." 11 CFR
8 110.11(a)(5)(iii). In contrast, you point out that even a relatively short disclaimer, such as "Paid for
9 by Smith for Congress" uses 30 of the available 160 characters, or approximately 18% of the
10 available characters.

11 You assert that, given the limited space available with SMS delivery to wireless digital
12 telephones, requiring disclaimers would "constructively estop new media agencies, wireless
13 providers and candidates for public office from utilizing wireless media . . . when implementing
14 advertising initiatives for candidates." February 25, 2002 letter, p. 3. You conclude that either the
15 disclaimer exception listed at 11 CFR 110.11(a)(6)(i), which includes certain small items, or the
16 exception listed at 11 CFR 110.11(a)(6)(ii), which includes methods of advertising where a
17 disclaimer would be "impracticable," should apply. Therefore, you ask that Target's proposed
18 content-plus-political advertising proposal be exempted from the Commission's disclaimer
19 requirements under 11 CFR 110.11(a)(6)(i) or (ii). As an alternative, you suggest that the political
20 advertisements could either include a web link to the sponsor's identification, such as
21 www.sponsor.com, or a toll-free telephone number so that individuals who read the messages could

1 determine the identify of the sponsor. (Presumably, the sponsor identification would contain the
2 requisite disclaimer.)

3 **ACT AND COMMISSION REGULATIONS**

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8 advocating the election or defeat of a clearly identified candidate or soliciting any contribution, and
9 does so through various types of mass media (e.g., a broadcasting station) or via "any other type of
10 general public political advertising," the communication is required to include a statement of
11 sponsorship or disclaimer. 2 U.S.C. 441d, 11 CFR 110.11. The disclaimer must clearly state if the
12 communication has been paid for and authorized by a candidate, or the candidate's authorized
13 political committee. If the communication is paid for by other persons but authorized by a candidate
14 (including an authorized political committee of a candidate or its agents), the disclaimer shall clearly
15 state that the communication is paid for by those other persons and authorized by such authorized
16 political committee. On the other hand, if the communication is not authorized by a candidate
17 (including an authorized political committee of a candidate or its agents), the disclaimer shall clearly
18 state the name of the person who paid for the communication and state that it is not authorized by
19 any candidate or the candidate's committee. 2 U.S.C. 441d; 11 CFR 109.3, 110.11(a)(1), and
20 110.11(a)(5).

21 Some exceptions to the Commission's disclaimer requirements are listed at 11 CFR
22 110.11(a)(6)(i) and (ii). These exceptions include 11 CFR 110.11(a)(6)(i), which covers bumper
23 stickers, pins, buttons, pens, and other similar small items upon which a disclaimer cannot be

1 conveniently printed, and 11 CFR 110.11(a)(6)(ii), which covers skywriting, watertowers, wearing
2 apparel, and other methods of displaying political advertising and other means of advertising where
3 displaying a disclaimer would be "impracticable."

4 **Bipartisan Campaign Reform Act**

5 In BCRA, Congress has mandated additional disclaimer requirements.² First, the disclaimer
6 requirements now apply to "any" communication financed by a political committee, not just those
7 that expressly advocate the election or defeat of a clearly identified candidate, or that solicit any
8 contribution. 2 U.S.C. 441d(a). Second, all persons who finance electioneering communications
9 are subject to the provisions of 2 U.S.C. 441d(a).³ Third, for communications that are not
10 authorized by a candidate, an authorized political committee of a candidate, or its agents, under
11 BCRA, disclaimers include the "permanent street address, telephone number or World Wide Web
12 address of the person who paid for the communication." 2 U.S.C. 441d(a)(3).

13 **ANALYSIS**

14 Based on the facts presented, the Commission concludes that the disclaimer exception at
15 11 CFR 110.11(a)(6)(i) applies to your request. By virtue of their size, the "small" items listed in
16 11 CFR 110.11(a)(6)(i), such as bumper stickers, pins, buttons, and pens are limited in the size and
17 length of the messages that they are able to contain. Similarly, the wireless telephone screens that
18 you have described have limits on both the size and the length of the information that can be
19 conveyed. Indeed, the Commission notes that the SMS technology places even greater limits on the
20 length of a political advertisement than exists with bumper stickers.

² BCRA's "disclaimer" provisions will not take effect until November 6, 2002.

³ An electioneering communication "means any broadcast, cable, or satellite communication which refers to a clearly identified candidate for federal office" and "is made within 60 days before a general, special, or runoff election for the office sought by the candidate, or 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and in the case of a

1 Because the Commission has concluded that the disclaimer exception at 11 CFR
2 110.11(a)(6)(i) applies, it does not analyze Target's proposed alternatives of including sponsor
3 information in a web link or a toll-free telephone number. Additionally, in view of the
4 Commission's decision, it does not analyze Target's proposal under disclaimer exception 11 CFR
5 110.11(a)(6)(ii), which covers skywriting, watertowers, wearing apparel, and other methods of
6 displaying political advertising and other means of advertising where displaying a disclaimer would
7 be "impracticable."

8 This response constitutes an advisory opinion concerning application of the Act and
9 Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C.
10 437f.

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Sincerely,

Karl J. Sandstrom
Vice-Chairman