

September 17, 2010

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

Two Alternative DRAFTS of ADVISORY OPINION 2010-19 are available for public comments under this procedure. It was requested by Marc E. Elias, Esq., and Jonathan S. Berkon, Esq., on behalf of Google, Inc.

The two alternative Drafts of Advisory Opinion 2010-19 are scheduled to be on the Commission's agenda for its public meeting of Thursday, September 23, 2010.

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 pm noon (Eastern Time) on September 22, 2010.

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 timely received comments 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 Records Office.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Rosemary C. Smith
Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to 2010-19, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Rosemary C. Smith, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463



FEDERAL ELECTION
COMMISSION
SECRETARIAT

FEDERAL ELECTION COMMISSION 2010 SEP 17 P 4: 09
Washington, DC 20463

AGENDA ITEM

September 17, 2010 For Meeting of 9-23-10

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

Rosemary C. Smith *RCS by RMK*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

SUBMITTED LATE

Anthony Buckley *AB*
Attorney

Subject: Draft AO 2010-19 (Google) - Alternative Drafts

Attached are two proposed drafts (Drafts A and B) of the subject advisory opinion. We request that these drafts be placed on the agenda for September 23, 2010.

Attachments

1
2 **ADVISORY OPINION 2010-19**

3
4 **Marc E. Elias, Esq.**
5 **Jonathan S. Berkon, Esq.**
6 **Perkins Coie LLP**
7 **607 Fourteenth Street, N.W.**
8 **Washington, D.C. 20005-2003**

DRAFT A

9
10 **Dear Messrs. Elias and Berkon:**

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

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

22 ***Background***

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

25 **Google, Inc. is a corporation that creates programs and applications that allow**
26 **persons to search for and collect information on the Internet. Google, Inc.’s AdWords**
27 **program generates text ads in conjunction with keywords chosen by the advertiser. Text**
28 **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 the text ad displays the URL of the
5 committee sponsor's website and the landing page contains a full disclaimer meeting the
6 requirements of 11 C.F.R. 110.11.

7 In circumstances where the delivery of a required disclaimer would be unwieldy
8 or unfeasible, the Commission historically has allowed the disclaimer to be delivered in
9 an alternate fashion, rather than eliminating the disclaimer requirement. *See Advisory*
10 *Opinion 2004-01 (Bush/Kerr) (required disclaimer for advertisement authorized by two*
11 *candidates could be delivered by one candidate on behalf of both of them); Advisory*
12 *Opinion 2004-37 (Waters) (disclaimer did not have to separately list each and every*
13 *federal candidate in brochure featuring numerous federal candidates so long as there was*
14 *an alternative way to identify them). Similarly, in Advisory Opinion 2004-10 (Metro*
15 *Networks), the Commission allowed modification of the disclaimer requirements for live*
16 *broadcasted reports, featuring traffic, news and other content, sponsored by candidates.*
17 *Given the live nature of the reports and technological limits, the requestor stated that it*
18 *would be "physically impossible" for it to include the "stand by your ad" statement*
19 *spoken by the candidate as set forth in 11 C.F.R. 110.11(c)(3). While the Commission*
20 *agreed that the nature of the ad rendered the candidate's speaking of the disclaimer*
21 *impossible, the Commission did not find that the physical and technological limitations*
22 *prevented the provision of the disclaimer. Instead, the Commission concluded that a*

1 disclaimer was required but permitted the disclaimer to be spoken by the individual
2 providing the report.

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

11 Google, Inc. proposes an alternative manner that may satisfy the disclaimer
12 requirements if the text ad displays the URL of the political committee's website and the
13 landing page includes a full disclaimer. The Commission has recognized that URLs of
14 political committees provide important identifying information. First, the URL typically
15 contains some form of the candidate or political committee's name. Second, by
16 providing its World Wide Web address (a form of URL), a committee is able to meet in
17 part its disclaimer obligations under the Act and Commission regulations. See 2 U.S.C.
18 441d(a)(3) and 11 C.F.R. 110.11(b)(3). In addition, users who "click through" a text ad
19 will be taken to the political committee's website that will contain a disclaimer displayed
20 in a clear and conspicuous manner on the landing page, and Google, Inc. only receives
21 payment for those ads that are clicked through by a user. Accordingly, the Commission
22 determines that, under the circumstances described in the request, the disclaimer

1 requirement is satisfied if the text ad displays the URL of the political committee's
2 website and the landing page contains a full disclaimer as required by 11 CFR 110.11.¹
3 This conclusion is consistent with the Commission's practice of "interpret[ing] the Act
4 and its regulations in a manner consistent with contemporary technological innovations . .
5 . where the use of the technology would not compromise the intent of the Act or
6 regulations." Advisory Opinion 1999-09 (Bradley for President) (approving Federal
7 matching funds for contributions received over the Internet through the use of a credit
8 card).

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
12 of the facts or assumptions presented, and such facts or assumptions are material to a
13 conclusion presented in this advisory opinion, then the requestor may not rely on that
14 conclusion as support for its proposed activity. Any person involved in any specific
15 transaction or activity which is indistinguishable in all its material aspects from the
16 transaction or activity with respect to which this advisory opinion is rendered may rely on
17 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
18 conclusions in this advisory opinion may be affected by subsequent developments in the
19 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

¹ 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 All cited advisory opinions are available on the Commission's website at
2 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen
Chairman

1 ADVISORY OPINION 2010-19

2
3 Marc E. Elias, Esq.
4 Jonathan S. Berkon, Esq.
5 Perkins Coie LLP
6 607 Fourteenth Street, N.W.
7 Washington, D.C. 20005-2003

DRAFT B

8
9 Dear Messrs. Elias and Berkon:

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

16 The Commission concludes that disclaimers are not required to be appended to
17 text ads on behalf of candidates or political committees generated through Google’s
18 AdWords program under the impracticable exception at 11 CFR 110.11(f)(1)(ii).

19 ***Background***

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

22 Google is a corporation that creates programs and applications that allow persons
23 to search for and collect information on the Internet. Google’s AdWords program
24 generates text ads in conjunction with keywords chosen by the advertiser. Text ads have
25 a headline which can consist of up to 25 characters, and two lines of text and a display
26 Uniform Resource Locator (“URL”) which can consist of up to 70 characters. When a
27 user enters search terms that coincide with the chosen keywords into the Google Internet

1 search engine, AdWords generates text ads that appear alongside the search results.
2 Additionally, Google has partnered with other websites to participate in Google's
3 AdWords program. Using the chosen keywords, Google can match an advertiser's ads to
4 websites in Google's partner network that are most relevant to the advertiser's message.

5 Advertisers pay Google for a text ad's appearance only if the user clicks on the ad
6 and is taken to the advertiser's website. If the user sees the ad, but does not click on it,
7 the advertiser is not charged for the ad's appearance. Google wishes to sell text ads to
8 candidates, their authorized committees, and other political committees under the
9 AdWords program. These text ads would not display a disclaimer indicating who
10 authorized or paid for the ad; rather, a full disclaimer would appear on the landing page
11 that appears when a user "clicks through" a text ad.

12 ***Questions Presented***

13 1. *Do text ads on behalf of candidates and political committees generated through*
14 *Google's AdWords program qualify for any of the disclaimer exceptions at 11 CFR*
15 *110.11(f)(1)?*

16 2. *If text ads on behalf of candidates and political committees generated through*
17 *Google's AdWords program require a disclaimer, is the requirement satisfied if the text*
18 *ad displays the URL of the committee sponsor's website in the text ad and the landing*
19 *page contains a full disclaimer?*

1 ***Legal Analysis and Conclusions***

2 1. *Do text ads on behalf of candidates and political committees generated through*
3 *Google's AdWords program qualify for any of the disclaimer exceptions at 11 CFR*
4 *110.11(f)(1)?*

5 Yes, the Commission concludes that such ads qualify for the “impracticable”
6 exception at 11 CFR 110.11(f)(1)(ii).

7 With some exceptions, public communications made by a political committee
8 must include certain disclaimers. *See* 2 U.S.C. 441d(a)(1); 11 CFR 110.11(a)(1). Under
9 the Act and Commission regulations, a “public communication” is a communication “by
10 means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor
11 advertising facility, mass mailing, or telephone bank to the general public, or any other
12 form of general public political advertising.” 2 U.S.C. 431(22); 11 CFR 100.26.

13 “General public political advertising” does not include “communications over the
14 Internet, except for communications placed for a fee on another person’s Web site.” *Id.*

15 If a candidate, an authorized committee of a candidate, or an agent of either pays
16 for and authorizes the public communication, the disclaimer must state that the
17 communication “has been paid for by such authorized political committee.” 2 U.S.C.
18 441d(a)(1); *see also* 11 CFR 110.11(b)(1). If a public communication is paid for by
19 someone else, but is authorized by a candidate, an authorized committee of a candidate,
20 or an agent of either, the disclaimer must state who paid for the communication and that
21 the communication is authorized by the candidate, authorized committee of the candidate,
22 or the agent of either. 2 U.S.C. 441d(a)(2); *see also* 11 CFR 110.11(b)(2). If the

1 communication is not authorized by a candidate, an authorized committee of a candidate,
2 or an agent of either, the applicable disclaimer (if any) must “clearly state the name and
3 permanent street address, telephone number or World Wide Web address of the person
4 who paid for the communication, and state that the communication is not authorized by
5 any candidate or candidate’s committee.” 2 U.S.C. 441d(a)(3); *see also* 11 CFR
6 110.11(b)(3). Every disclaimer “must be presented in a clear and conspicuous manner, to
7 give the reader, observer, or listener adequate notice of the identity” of the ad’s sponsor.
8 11 CFR 110.11(c)(1).

9 The Commission’s regulations contain several exceptions to these general
10 disclaimer requirements. A disclaimer is not required, *inter alia*, for “[s]kywriting, water
11 towers, wearing apparel, or other means of displaying an advertisement of such a nature
12 that the inclusion of a disclaimer would be impracticable.” 11 CFR 110.11(f)(1)(ii) (the
13 “impracticable exception”). Google’s AdWords program limits text ads to 95 characters,
14 including the headline. Thus, if candidate and political committee text ads generated
15 through Google’s AdWords program are required to include a disclaimer, most—if not
16 all—of the character limit will be consumed by the disclaimer. Take, for example, a
17 communication not authorized by a candidate, whose disclaimer must clearly state,
18 among other things, that the communication “is not authorized by any candidate or
19 candidate’s committee.” 2 U.S.C. 441d(a); 11 CFR 110.11(b)(3). The phrase “Not
20 authorized by any candidate or candidate’s committee” is 57 characters long. That added
21 to the full name of the political committee could exhaust nearly the entire character limit,
22 leaving few, if any, characters remaining to express a political message. Similarly, a

1 communication paid for by an authorized congressional candidate's committee must
2 include a disclaimer that reads, "Paid for by X for Congress." 2 U.S.C. 441d(a)(1). Even
3 if the candidate's name were very short, the disclaimer still would take up more than a
4 quarter of the character limit. Accordingly, the Commission concludes that requiring a
5 disclaimer to be appended to text ads on behalf of candidates or political committees
6 generated through Google's AdWords program would be impracticable under to 11 CFR
7 110.11(f)(1)(ii).

8 2. *If text ads on behalf of candidates and political committees generated through*
9 *Google's AdWords program require a disclaimer, is the requirement satisfied if the text*
10 *ad displays the URL of the committee sponsor's website in the text ad and the landing*
11 *page contains a full disclaimer?*

12 This question is moot given the Commission's response in Question One.

13 This response constitutes an advisory opinion concerning the application of the
14 Act and Commission regulations to the specific transaction or activity set forth in your
15 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
16 of the facts or assumptions presented, and such facts or assumptions are material to a
17 conclusion presented in this advisory opinion, then the requestor may not rely on that
18 conclusion as support for its proposed activity. Any person involved in any specific
19 transaction or activity which is indistinguishable in all its material aspects from the
20 transaction or activity with respect to which this advisory opinion is rendered may rely on
21 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or
22 conclusions in this advisory opinion may be affected by subsequent developments in the

- 1 law including, but not limited to, statutes, regulations, advisory opinions, and case law.
- 2 All cited advisory opinions are available on the Commission's website at
- 3 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen
Chairman