



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO: THE COMMISSION  
STAFF DIRECTOR  
GENERAL COUNSEL  
CHIEF COMMUNICATIONS OFFICER  
FEC PRESS OFFICE  
FEC PUBLIC DISCLOSURE**

**FROM: ACTING COMMISSION SECRETARY AND CLERK**

**DATE: SEPTEMBER 22, 2010**

**SUBJECT: COMMENTS AO 2010-19 (Google)**

**Transmitted herewith is a timely submitted comments from Mark E. Elias and Jonathan S. Berkon Counsel for Google, Inc. regarding the above-captioned matter.**

**Proposed Advisory Opinion 2010-19 is on the agenda for Thursday, September 23, 2010.**

**Attachment**

FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

RECEIVED  
FEC MAIL CENTER

2010 SEP 22 PM 1:38

Perkins  
Coie

2010 SEP 22 P 3:10

Marc Erik Elias  
PHONE (202) 434-1609  
FAX (202) 654-9126  
EMAIL MElias@perkinscoie.com

607 Fourteenth Street N.W.  
Washington, D.C. 20005-2003  
PHONE: 202.628.6600  
FAX: 202.434.1690  
www.perkinscoie.com

September 22, 2010

**BY HAND DELIVERY**

Shawn Woodhead Werth  
Commission Secretary  
Federal Election Commission  
999 E Street N.W.  
Washington, D.C. 20463

**Re: Advisory Opinion Request 2010-19**

Dear Ms. Werth:

We are writing on behalf of Google, Inc. in response to the two alternative drafts of Advisory Opinion 2010-19 circulated on September 17, 2010. We agree with Draft B's conclusion that Google's text ads qualify for the "impracticable" exception set forth at 11 C.F.R. § 110.11(f)(1)(ii) and believe that the text ads also qualify for the "small items" exception set forth at 11 C.F.R. § 110.11(f)(1)(i). We also agree with Draft A's conclusion that that "the [section 110.11] disclaimer requirement [is] satisfied if the text ad displays the URL of the committee sponsor's website and the landing page contains a full disclaimer meeting the requirements of 11 C.F.R. 110.11." Therefore, we support a unified opinion that incorporates both of these conclusions. Such an opinion would provide flexibility to the regulated community that faces ever-changing options for using technology for political communications, while advancing the policy interests underlying section 110.11.

**I. Text Ads Generated by Google AdWords are Exempt Under Either the "Small Items" or "Impracticable" Exceptions.**

We agree with Draft B's conclusion that text ads generated by Google's AdWords program are exempt under the "impracticable" exception set forth at 11 C.F.R. § 110.11(f)(1)(ii). We also believe that the text ads are exempt under the "small items" exception set forth at 11 C.F.R. § 110.11(f)(1)(i). We urge the Commission to adopt either position in its final opinion, in order to maintain a level playing field between different technologies.

41863-1099/LEGAL19186256.4

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · LOS ANGELES  
MENLO PARK · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · SHANGHAI · WASHINGTON, D.C.

Perkins Cole LLP and Affiliates

September 22, 2010

Page 2

The regulations exempt from the disclaimer requirement "[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed" and "[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable." 17 C.F.R. §§ 110.11(f)(1)(i), (ii).

In Advisory Opinion 2002-9, the Commission concluded that 160-character Short Messaging Service ("SMS") text messages qualified as "small items." See Advisory Opinion 2002-9. Draft A does not dispute that Google's text ads are smaller than SMS messages. Instead, it reasons that text ads are not "small items" because their size is determined by market considerations rather than technological constraints. See Draft A, Advisory Opinion 2010-19 ("[Google's] business decision does not alleviate the disclaimer requirement because it is possible to increase the size of an ad or the number of characters that may be included in an ad."). This, according to Draft A, contrasts with the SMS messages in AO 2002-9. See *id.* ("Technology limited the content to 160 characters per page and the requester could not guarantee that two pages sent consecutively would be received consecutively.").

Yet before it concluded that SMS messages were "small items" in 2002, the Commission considered and rejected the argument that Draft A tries to make. In response to Target's request, the General Counsel's office issued two draft opinions. The first draft concluded that SMS messages were *not* exempt "small items" because, "[t]he true limitation, which Target imposes on itself, is that it seeks to display content and the political advertisement on the same screen." Draft A, Advisory Opinion 2002-9. Therefore, "unlike the excepted items which do not have space for disclaimers, Target's messages have space that is taken up with content." *Id.*

The second draft considered by the Commission in 2002 took a different approach. Rather than try to parse out whether "technology" or the "market" was the larger impediment to including a disclaimer, the second draft simply evaluated the SMS messages as they were actually used by consumers in the marketplace. Once the Commission focused on whether – *not why* – SMS messages were "small items," it quickly concluded that they qualified for the exception. See Draft B, Advisory Opinion 2002-9 ("[T]he wireless telephone screens that you have described have limits on both the size and the length of the information that can be conveyed. Indeed, the Commission notes that the SMS technology places even greater limits on the length of a political advertisement than exists with bumper stickers.").

The approach that the Commission ultimately adopted in 2002 – by a decisive 4 to 1 margin – is consistent with the underlying purpose of the "small items" and "impracticable" exceptions. Political committees do not communicate in a vacuum. Instead, they speak through the mediums established and supported by the non-political marketplace. The exceptions set forth at sections 110.11(f)(1)(i) and (ii) recognize that where a particular medium cannot possibly or practically include a disclaimer, it is better to allow for speech without the disclaimer than to stifle speech altogether.

September 22, 2010

Page 3

The Commission should therefore recognize text ads as exempt under either the "small items" or "impracticable" exceptions. By recognizing that a 95-character text ad -- like a 160-character SMS message -- is too small to include a disclaimer, the Commission would ensure that new media technologies compete on an even playing field.

**II. The Section 110.11 Disclaimer Requirement is Satisfied if the Text Ad Displays the URL of the Committee Sponsor's Website and the Landing Page Contains a Section 110.11 Disclaimer.**

We also agree with Draft A's conclusion that "the [section 110.11] disclaimer requirement [is] satisfied if the text ad displays the URL of the committee sponsor's website and the landing page contains a full disclaimer meeting the requirements of 11 C.F.R. 110.11." Draft A, *Advisory Opinion 2019-10*. We urge the Commission to adopt this conclusion in its final opinion.

The Commission "has long recognized that in certain circumstances it is impracticable to provide a full disclosure statement in the prescribed manner." *Advisory Opinion 2004-10*. This is one of these circumstances. Text ads generated by Google's AdWords program are limited to 95 characters, including the headline. As Draft A points out, when a political committee sponsors a text ad, the "Not authorized by any candidate or candidate's committee" tagline itself consumes 57 characters; when the "paid for by" tagline and the identifying website, phone number, or address are added, the full disclaimer typically exceeds the 95 character limit, leaving no room for actual communications.

Under Google's alternative disclaimer proposal, political committee sponsors can satisfy the disclaimer requirement by (1) including a URL of their website in the text ad and (2) including a full section 110.11 disclaimer on the landing page. Political committees are already required to include a disclaimer on "all Internet websites ... available to the general public." 11 C.F.R. § 110.11(a)(1). Therefore, whenever a political committee uses one of its publicly available websites as the landing page, it will comply with the alternative disclaimer requirement.

Google's proposal allows Internet users to easily determine who has paid for a text ad. By clicking through to the landing page, the Internet user will be able to view all of the information contained in a standard section 110.11 disclaimer. Because it ensures that "'voters are fully informed' about the person or group who is speaking," the alternative disclaimer requirement proposed by Google fully satisfies the core purpose of section 110.11. See *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 915 (2010), quoting *Buckley v. Valeo*, 424 U.S. 1, 76 (1976) (quotations omitted).

September 22, 2010  
Page 4

Very truly yours,

*Marc Erik Elias / JSB*

Marc Erik Elias  
Jonathan S. Berkon  
Counsel for Google, Inc.