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October 4, 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 three drafts of Advisory Opinion 2010-19 circulated on September 17, 2010 and September 23, 2010. We urge the Commission to adopt a unified draft ("Draft D"), which incorporates the best elements of the three existing drafts. We have attached a sample Draft D to these comments.

We strongly agree with Draft C's conclusion that "disclaimers are not required to be appended to text ads on behalf of candidates or political committees generated through Google's AdWords program." Draft C, Advisory Opinion 2010-19. Text ads generated through AdWords are limited to 95 characters. Meanwhile, the tag line used by political committees that make independent expenditures – "Not authorized by any candidate or candidate's committee" – is 57 characters. As Draft A acknowledges, "[i]ncluding the full name of the political committee could require more characters for the disclaimer *than are allowed for the text ad itself*." Draft A, Advisory Opinion 2010-19 (emphasis added). Therefore, it is clearly impracticable for a political committee to include a disclaimer in the text ad. Doing so would require a political committee to forego most, if not all, of the political content of its message, and would discourage committees from sponsoring ads in the first place.

Drafts A and C do not dispute these facts. Instead, they point to the fact that political committees can satisfy the disclaimer requirement by using one of their own websites as the landing page and then including a disclaimer on the landing page. We agree with Drafts A and C that the inclusion of the disclaimer on the landing page satisfies the disclaimer requirement set forth in

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section 110.11, and Google fully supports the regulation requiring "all Internet websites of political committees available to the general public" to include a disclaimer. 11 C.F.R. § 110.11(a)(1).

Unfortunately, this option is not always available. For example, political committees sometimes sponsor ads that link to the website of a candidate that they support. Because the committee sponsoring the text ad does not control or pay for the candidate's website, it cannot comply with the alternative disclaimer option. And because these types of ads would require the 57-character tag line – as well as the "paid for by" line and a website, phone number, or address – it would not be practicable or possible to include a disclaimer in the 95-character text ad.

To ensure that AdWords – and other Internet technologies – can continue their role as the "great equalizer in political debate," the Commission should recognize that text ads qualify for the "impracticable" exception under 11 C.F.R. § 110.11(f)(1)(ii). See Testimony of Commissioner Ellen L. Weintraub Before the California FPPC Subcommittee on Internet Political Activity (March 24, 2010). This conclusion is also compelled by the Commission's decision in Advisory Opinion 2002-9 (Target Wireless). In Advisory Opinion 2002-9, the Commission told the regulated community that 160-character SMS text messages were "small items" exempt from the disclaimer requirement. If 160-character text messages are exempt from the disclaimer requirement, there is no principled basis on which to deny that exemption to 95-character text ads. Doing so would unfairly favor one technology over another.

Advisory Opinion 2002-9 has been relied upon for literally *millions* of political communications. See Nielsen: 'Obama Text' Reached 2.9 Million, available at http://news.cnet.com/8301-13577_3-10025596-36.html (last visited October 1, 2010). As Commissioner Walther recognized earlier this year, the Commission should not upset one of its precedents – especially one that has played such an integral role in the development of political communications – unless there is a compelling reason to do so. See Concurring Opinion of Commissioner Steven T. Walther, Advisory Opinion 2010-3 (National Democratic Redistricting Trust) ("I concur with the result reached by the Commission in Advisory Opinion 2010-3 ... only because to do otherwise would be inconsistent with advice previously given by the Commission in Advisory Opinion 2003-15 (Majette) ... I feel bound by the Majette advisory opinion as precedent in this matter."). No such reason exists here.

Therefore, we strongly encourage the Commission to adopt unified Draft D. It incorporates Draft A and C's conclusion that an alternative disclaimer satisfies section 110.11. It also confirms that, where the use of that disclaimer is not practicable, there is no violation of section 110.11. Draft D would allow technologies such as AdWords to continue to evolve organically, rather than impose artificial restraints on how the technology may be used.

If the Commission does adopt Draft C, we urge that it clarify the basis on which it concludes that the alternative disclaimer requirement satisfies section 110.11. We agree with Facebook's

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September 22, 2010 letter, which argues that linking to a landing page that contains a full disclaimer is sufficient to satisfy the section 110.11 requirement. The Commission should therefore clarify that section 110.11 is satisfied where a text ad links to a landing page that includes a full section 110.11 disclaimer.

Very truly yours,

Handwritten signature in black ink, appearing to read "Marc E. Elias / JB".

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

ADVISORY OPINION 2010-19

Marc E. Elias, Esq.
Jonathan S. Berkon, Esq.
Perkins Coie LLP
607 Fourteenth Street, N.W.
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DRAFT D

Dear Messrs. Elias and Berkon:

We are responding to your advisory opinion request on behalf of Google, Inc. concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act") and Commission regulations to Google, Inc.'s proposal to sell text ads to candidates, their authorized committees, and other political committees. Google, Inc. asks whether disclaimers are required on text ads generated when Internet users use Google's search engine to perform searches. The Commission concludes that disclaimers are not required to be appended to text ads on behalf of candidates or political committees generated through Google's AdWords program.

Background

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

Google, Inc. is a corporation that creates programs and applications that allow persons to search for and collect information on the Internet. Google, Inc.'s AdWords program generates text ads in conjunction with keywords chosen by the advertiser. Text ads have a headline which can consist of up to 25 characters, two lines of text which can consist of up to 70 characters, and a display Uniform Resources Locator ("URL"). This format applies to all advertisers, regardless of whether they are political committees. When a user enters search terms that coincide with the chosen keywords into the Google, Inc. Internet search engine, AdWords generates text ads that appear alongside the search results. Additionally, Google, Inc. has partnered with other websites to participate in Google, Inc.'s AdWords program. Using the chosen keywords, Google, Inc. can

match an advertiser's ads to websites in Google, Inc.'s partner network that are most relevant to the advertiser's message.

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

Questions Presented

- 1. Do text ads on behalf of candidates and political committees generated through Google, Inc.'s AdWords program qualify for the "small items" or "impracticable" exceptions at 11 CFR 110.11(f)(1)(i), (ii)?*
- 2. If text ads on behalf of candidates and political committees generated through Google, Inc.'s AdWords program require a disclaimer, is the requirement satisfied if the text ad links to a landing page that contains a full disclaimer?*

Conclusion

Yes, text ads on behalf of candidates and political committees generated through Google, Inc.'s AdWords program qualify for the "impracticable" exception at 11 CFR 110.11(f)(1)(ii).

With some exceptions, public communications made by a political committee must include certain disclaimers. *See* 2 U.S.C. 441d(a)(1); 11 CFR 110.11(a)(1). Under the Act and Commission regulations, a "public communication" is a communication "by means of any

broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 2 U.S.C. 431(22); 11 CFR 100.26. "General public political advertising" does not include "communications over the Internet, except for communications placed for a fee on another person's Web site." *Id.*

If a candidate, an authorized committee of a candidate, or an agent of either pays for and authorizes the public communication, the disclaimer must state that the communication "has been paid for by such authorized political committee." 2 U.S.C. 441d(a)(1); *see also* 11 CFR 110.11(b)(1). If a public communication is paid for by someone else, but is authorized by a candidate, an authorized committee of a candidate, or an agent of either, the disclaimer must state who paid for the communication and that the communication is authorized by the candidate, authorized committee of the candidate, or the agent of either. *See* 2 U.S.C. 441d(a)(2); *see also* 11 CFR 110.11(b)(2). If the communication is not authorized by a candidate, an authorized committee of a candidate, or an agent of either, the applicable disclaimer (if any) must "clearly state the name and permanent street address, telephone number or World Wide Web address of the person who paid for the communication, and state that the communication is not authorized by any candidate or candidate's committee." 2 U.S.C. 441d(a)(3); *see also* 11 CFR 110.11(b)(3). Every disclaimer "must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity" of the ad's sponsor. 11 CFR 110.11(c)(1).

The Commission's regulations contain several exceptions to these general disclaimer requirements. A disclaimer is not required, *inter alia*, for "[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such nature that the inclusion of a disclaimer would be impracticable." 11 CFR 110.11(f)(1)(ii) (the "impracticable exception").

Text ads generated through Google, Inc.'s AdWords program are limited to 95 characters, including the headline. Taking, for example, a disclaimer for a communication not authorized by a candidate, the disclaimer must clearly state, among other things, that the communication "is not authorized by any candidate or candidate's committee." 2 U.S.C. 441d(a); 11 CFR 110.11(b)(3). The phrase "Not authorized by any candidate or candidate's committee" is 57 characters long. Including the full name of the political committee could require more characters for the disclaimer than are allowed for the text ad itself. Similarly, a communication paid for by an authorized congressional candidate's committee must include a disclaimer that reads, "Paid for by X for Congress." 2 U.S.C. 441d(a)(1). Even if the candidate's name were very short, the disclaimer would still take up more than a quarter of the character limit.

Because of these severe space limitations, it would be highly impracticable (or outright impossible) for a political committee to include a disclaimer in the text ad itself. When a political committee uses one of its own websites as a landing page, the user who clicks on the ad is brought to a page that, by law, must contain a full section 110.11 disclaimer. *See* 11 CFR 110.11(a)(1) (requiring "all Internet websites of political committees available to the general public" to include a disclaimer). These text ads, therefore, would independently satisfy the disclaimer requirement. *See* Advisory Opinion 2004-01 (Bush/Kerr) (required disclaimer for advertisement authorized by two candidates could be delivered by one candidate on behalf of both of them); Advisory Opinion 2004-10 (Metro Networks) (waiving requirement that "stand by your ad" disclaimer be read by candidate); Advisory Opinion 2004-37 (Waters) (disclaimer did not have to separately list each and every federal candidate in brochure featuring numerous federal candidates so long as there was an alternative way to identify them). However, when a political committee does not use one of its own websites as a landing page, it would be

impracticable for the committee to include a disclaimer, because it would not control or pay for the landing page, and therefore could not place a disclaimer on that page.

This conclusion is consistent with Advisory Opinion 2002-09 (Target Wireless). In Advisory Opinion 2002-09, the Commission determined that a 160-character SMS message containing news or entertainment content *and* a political message qualified for the "small items" exception at 11 CFR 110.11(f)(1)(i). The requestor explained to the Commission that, though it was technically possible to excise the news or entertainment content to make room for a disclaimer, such a product would be unattractive to potential subscribers. *See* Letter from Target Wireless to Federal Election Commission, Comment on AOR 2002-9 (August 21, 2002) (emphasis in original) ("While it may be possible to offer political advertising exclusive of content, so as to accommodate the Commission's current disclosure requirements, the realistic opt-in subscription rate for a *political advertising only* SMS service will be so insignificant that this medium will be rendered useless to any Federal candidate wishing to reach more than a handful of voters.").

Based on this representation from the requestor, the Commission concluded that the "small items" exception applied. *See* Advisory Opinion 2002-09 ("[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 similar limits on the length of a political advertisement as those that exist with bumper stickers."). Similarly, Google, Inc. has represented that increasing the size of the text ads generated through AdWords would make the product more expensive and less attractive to advertisers. Therefore, to remain consistent with the advice that the Commission previously gave in Advisory Opinion 2002-09, the Commission now concludes that text ads generated through AdWords are exempt

from the disclaimer requirements set forth at section 110.11. *See* Concurring Opinion of Commissioner Steven T. Walther, Advisory Opinion 2010-03 (National Democratic Redistricting Trust) ("I concur with the result reached by the Commission in Advisory Opinion 2010-03 ... only because to do otherwise would be inconsistent with advice previously given by the Commission in Advisory Opinion 2003-15 (Majette) ... I feel bound by the Majette advisory opinion as precedent in this matter.").

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or conclusion in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. All cited advisory opinions are available on the Commission's website at <http://saos.nictusa.com/saos/searehao>.

On behalf of the Commission,

Matthew S. Petersen
Chairman