



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

**TO: THE COMMISSION
ACTING STAFF DIRECTOR
ACTING GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE**

FROM: OFFICE OF THE COMMISSION SECRETARY *[Signature]*

DATE: October 6, 2010

SUBJECT: LATE COMMENT ON DRAFT AO 2010-19

Transmitted herewith is a late submitted comment by Michael E. Toner regarding the above-captioned matter.

Proposed Advisory Opinion 2010-19 is on the agenda for October 7, 2010.

Attachment



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October 5, 2010

BY FACSIMILE AND HAND DELIVERY

Mr. Christopher Hughey
 Acting General Counsel
 Federal Election Commission
 999 E Street, NW
 Washington, DC 20004

Re: Comment Concerning Advisory Opinion 2010-19 Drafts (Google)

Dear Mr. Hughey:

Pursuant to 2 U.S.C. § 437f(d), I submit this additional comment on behalf of Facebook, Inc. ("Facebook") regarding the Commission's Draft C and Google's proposed Draft D of Advisory Opinion 2010-19 ("Draft C" and "Draft D.") The Commission should adopt Draft D, which is consistent with prior Commission advisory opinions and which makes clear that Google's advertisements are exempt from disclaimer requirements under the "impracticable" exception at 11 C.F.R. § 110.11(f)(1)(ii). The Commission should reject Draft C because it is inconsistent with Commission precedent.

DISCUSSION

Facebook strongly supports Google's request for confirmation that its advertisements are exempt from disclaimer requirements under 11 C.F.R. § 110.11(f)(1)(ii) as Draft D appropriately concludes.

I. Draft D is Consistent with Commission Precedent

Draft D is consistent with Commission precedent in Advisory Opinion 2002-09 (Target Wireless.) In Advisory Opinion 2002-09, the Commission determined that 160-character text messages were exempt from disclaimer requirements under the "small items" exemption at 11 C.F.R. § 110.11(f)(1)(i). Draft D concludes that Google's advertisements, which consist of up to 95 characters, are also exempt from

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disclaimer requirements under the "impracticable" exemption at 11 C.F.R. § 110.11(f)(1)(ii).

Google's advertisements have smaller character limits than the advertisements addressed in the Target Wireless advisory opinion. Accordingly, if the Commission rejects Draft D and determines that a full or partial disclaimer on Google's advertisements are required, the Commission would essentially be overruling Advisory Opinion 2002-09. Doing so would create uncertainty within the regulated community on when disclaimers are required and could potentially stifle technological innovation in online political advertising. As Google emphasized in its October 4, 2010 comments, millions of advertisers in recent years have relied on Advisory Opinion 2002-09 in developing online advertising. See *Ninkoa: 'Obama Text' Reached 2.9 Million*, available at http://news.cnet.com/8301-13577_3-10025580-36.html.

In his concurring opinion in Advisory Opinion 2010-03 (National Democratic Redistricting Trust), Commissioner Walther rightly noted the importance of adhering to Commission precedent under circumstances similar to these. Commissioner Walther concurred in the result reached by the Commission in Advisory Opinion 2010-03 and emphasized that "to do otherwise would be inconsistent with advice previously given by the Commission in Advisory Opinion 2003-15 (Majette). While I do not necessarily agree with the analysis and the result that was reached in Advisory Opinion 2003-15... I feel bound by the Majette advisory opinion as precedent in this matter." Concurring Opinion of Commissioner Steven T. Walther, Advisory Opinion 2010-03.

The Commission should likewise adhere to established precedent in this matter by reaffirming the continued vitality of Advisory Opinion 2002-09 and adopting Draft D.

II. Draft C is Inconsistent with Commission Precedent

Draft C is inconsistent with Commission precedent in Advisory Opinion 2002-09 because it would require an alternative disclaimer on an advertisement with a smaller character limit than the advertisements exempted from disclaimer requirements in Advisory Opinion 2002-09. As Google aptly notes in its October 4, 2010 comments:

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.

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Accordingly, Facebook urges the Commission to reject Draft C and instead adopt Draft D that determines as a matter of law that no disclaimers are required on Google's advertisements.

Sincerely,


Michael E. Toner
Counsel for Facebook, Inc.