FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

STATEMENT FOR THE RECORD

BY

COMMISSIONER CAROLINE C. HUNTER

IN ADVISORY OPINION 2010-19 (GOOGLE)

INTRODUCTION

On October 7, the Commission voted 4-2 to adopt a response in Advisory Opinion 2010-19 to give a vague and limited response to Google, Inc., that, "under the circumstances described in [its] request, the conduct is not in violation of the [Federal Election Campaign] Act and Commission regulations."[1] As former Chairman David M. Mason noted in his comments in this advisory opinion, under this "'no rationale' approach . . . it will be impossible for regulated entities to determine whether their advertising programs are materially indistinguishable from Google's, and therefore covered by the opinion."[2]

Moreover, although advisory opinions are not supposed to be used as swords against potential respondents, based on recent experience with enforcement matters that have come before the Commission, AOs often are cited as setting forth new, affirmative requirements on the public. Thus, the response's reference to "the circumstances described in the request" creates the risk that, unless other entities follow the same exact advertising model as Google, their advertisers could be subject to liability for violating the law.

For these reasons, which are explained more fully below, I could not support my colleagues' draft, even though I agreed with its general conclusion – that political committees who purchase Google AdWords ads without including a full disclaimer do not violate the law. Instead, I would have voted to support Draft B,[3] which concluded that political committees which purchase text ads containing up to 95 characters under Google's AdWords programs are not required to contain any form of disclaimers whatsoever.[4] That approach would have followed clearly established Commission precedent in AO 2002-09 (Target Wireless), which has

[1] AO 2010-19 (Google), Certification dated October 7, 2010.
[2] AO 2010-19 (Google), Comment of Aristotle International, *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3108&START=1149905.pdf.
[3] AO 2010-19 (Google), Draft B, Agenda Document No. 10-61, *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3108&START=1148772.pdf.
[4] Although a vote was not taken on Draft A, that draft concluded that Google's AdWords program does not qualify for the "small items" disclaimer exception (or, for that matter, the "impracticability" exception) under the Commission's regulations. As Vice-Chair Bauerly stated, "I think it's very clear that there are larger ads available on the Web . . . I don't think we should be in the business of telling people how to run their ad programs on their websites, but I also firmly believe that if this is an area of such strong market activity, then certainly the market will accommodate something a little bigger if that's what's necessary." Open Meeting, Federal Election Commission, October 7, 2010, *at* http://www.fec.gov/audio/2010/2010100701.mp3.

been relied upon by literally millions of political communications,[5] and I hereby incorporate by reference the background discussion and legal analysis set forth in Draft B.

DISCUSSION

A) Advisory Opinions Are Not Completely *Sui Generis*

Under the Federal Election Campaign Act of 1971, as amended (the "Act"):

> Any advisory opinion rendered by the Commission under subsection (a) of this section may be relied upon by—
> (A) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered; and
> (B) 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 such advisory opinion is rendered.

2 U.S.C. § 437f(c)(1).

Indeed, every single advisory opinion the Commission issues acknowledges in boilerplate language that, "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."[6] In other words, the Commission's advisory opinions are not limited in their application only to the specific requester, but to all other parties who are similarly situated. Were AOs so limited in their effect, the Act would not provide for a ten-day comment period on all AO requests for "any interested party."[7] Nor would the Commission provide for another opportunity for the public to comment on draft responses to advisory opinion requests.[8]

Obviously, the Act and agency procedures provide for public comment because the conclusions the Commission reaches in any AO usually have broader application to the general public. Moreover, this understanding of the role of advisory opinions is not merely academic. In practice, experienced campaign finance professionals also believe that AOs apply to more than only the specific requesters. As Michael E. Toner, another former Commission chairman, stated in his comments on this AO, had the Commission adopted a response here that was inconsistent with prior precedent, "Doing so would create uncertainty *within the regulated community* on when disclaimers are required and could potentially stifle technological innovation in online

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[5] AO 2010-19 (Google), Comment of Google, Inc. at 2 (citing Nielsen: 'Obama Text' Reached 2.9 Million, *available at* http://news.cnet.com/8301-13577_3-10025596-36.html), *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3108&START=1149906.pdf.
[6] *See, e.g.*, AO 2010-19 (Google) at 3.
[7] 2 U.S.C. § 437f(d).
[8] *See, e.g.*, Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 Fed. Reg. 32160, Jul. 7, 2009.

political advertising."[9] And even Google itself did not seek an advisory opinion whose application was limited only to Google. As counsel for Google stated, "[Google's] interest is not in creating uncertainty for players in politics – not their interest in gaining a competitive advantage and disqualifying or creating uncertainty in the market for other players."[10]

The chief problem with the draft my colleagues adopted in this AO is that, as former Chairman Mason identified, when the response vaguely condones "the conduct" "under the circumstances described in the request," it is virtually impossible for the general public to identify what the Commission determined were the "material aspects [of] the transaction or activity with respect to which such advisory opinion is rendered."[11] And without such knowledge, it is of course impossible for the public to determine whether their contemplated activity is "indistinguishable in all its material aspects."[12] In short, the "no rationale" approach simply does not pass muster under the Act.

Indeed, this uncertainty over what constituted the "material aspects" in the "no rationale" approach was evident from the statements made at the public meeting and the various drafts considered at the table. Some of my colleagues apparently believed it was material that Google's ads display a URL of the website to which users would be redirected if they clicked on an ad (the "landing page"), and that the "landing page" would contain any requisite disclaimers.[13] However, Google's initial request also represented that its ads "consist of a headline (*which links to the advertiser's website*),"[14] and its supplemental comment also endorsed the rationale that "*linking to a landing page* that contains a full disclaimer is sufficient to satisfy the section 110.11 requirement."[15] Indeed, "Draft D," which Google proposed, omitted any reference to the URL, and concluded that, "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. These text ads, therefore, would independently satisfy the disclaimer requirement."[16] However, further complicating the picture, Google's AdWords also permit sponsors to link to third parties' "landing pages," in which case "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."[17]

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[9] AO 2010-19 (Google), Comment of Facebook, Inc. at 2, *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3108&START=1150114.pdf (emphasis added)
[10] Open Meeting, Federal Election Commission, October 7, 2010, *at* http://www.fec.gov/audio/2010/2010100701.mp3. *See also* AO 2010-19, Comment of Google, Inc. at 2 ("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)." (emphasis added).
[11] 2 U.S.C. § 437f(c)(1).
[12] *Id.*
[13] *See, e.g.*, AO 2010-19 (Google), Revised Draft A at 1, *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3108&START=1149103.pdf.
[14] AO 2010-19 (Google), Request at 2 (emphasis added).
[15] AO 2010-19 (Google), Comment of Google, Inc. at 3, *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3108&START=1149906.pdf.
[16] AO 2010-19 (Google), Draft D, Agenda Document No. 10-61-C (internal citations omitted), *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3108&START=1150121.pdf
[17] *Id.*

Additionally, as set forth in proposed Draft B in this advisory opinion, I also did not believe that any of "the conduct" described in the request was relevant to whether Google or its advertisers would be "in violation of the Act and Commission regulations." Depending on which aspects of the request my colleagues determined were material (but failed to explain in the adopted draft), the "conduct" here could refer to Google's representation that either: (1) its AdWords ads consist of a URL to the target "landing page"; (2) its AdWords link to the sponsor's "landing page"; and/or (3) that the "landing pages" would contain a requisite disclaimer. Yet, as explained in proposed Draft B, pursuant to the "impracticability" exception under Commission regulations,[18] Google's AdWords ads are not required to contain any disclaimer at all. Thus, no specific "conduct" whatsoever (or content for that matter) is required for the ads to comply with the Act and Commission regulations.

B) Advisory Opinions Can Cut Both Ways

Although advisory opinions are not completely *sui generis* and usually may be relied on by similarly situated parties, they also do not set forth affirmative obligations for the general public. Congress intended the Commission's advisory opinions only to allow "any person who relies upon any provision or finding of an advisory opinion . . . and who acts in good faith in accordance with the provisions and findings of such advisory opinion," to be free of "any sanction provided by this Act."[19] Conversely, under the same statutory provision providing for advisory opinions, Congress specifically admonished the agency that, "Any rule of law which is not stated in this Act . . . may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title."[20]

In short, as has been stated before, "advisory opinions cannot be used as a sword, but instead are merely a shield from burdensome Commission enforcement action."[21] Unfortunately, however, advisory opinions have been used by this agency to cut both ways. In several recent matters, AOs have been interpreted as imposing affirmative obligations on the public, and as the legal basis for finding liability against respondents in enforcement actions.

In MURs 5712 and 5799 (McCain), the Commission, prior to my appointment, found reason to believe ("RTB") that Senator McCain solicited non-Federal funds at fundraisers for the California Republican Party, Governor Schwarzenegger's reelection campaign, and South Carolina Adjutant General Stan Spears' campaign, in violation of the Bipartisan Campaign Reform Act.[22] In so doing, the Commission relied almost entirely on three advisory opinions – AOs 2003-03 (Cantor), 2003-36 (RGA), and 2003-37 (ABC) – as purporting to impose affirmative requirements on Federal candidates and officeholders when they appear, speak, or

[18] 11 C.F.R. § 110.11(f)(1). *See also* AO 2010-19, Draft B, *supra* note 3.
[19] 2 U.S.C. § 437f(c)(2).
[20] 2 U.S.C. § 437f(b).
[21] MUR 5625 (Aristotle), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II at n.3, *available at* http://eqs.nictusa.com/eqsdocsMUR/10044264158.pdf.
[22] MURs 5712 and 5799 (McCain), Certifications dated February 21 and April 10, 2007.

endorse non-Federal candidates at events where non-Federal funds are raised, or when they appear on invitations to such events.[23]

Similarly, in MUR 5935 (Gillibrand), the Office of General Counsel ("OGC") recommended finding reason to believe that Senator Gillibrand violated the law by appearing as a "special guest" on an invitation for a fundraiser for two local New York state candidates which solicited non-Federal funds.[24] As in the McCain matters, OGC relied almost completely on the Cantor, RGA, and ABC advisory opinions as the basis for liability.[25] And, given the basis for the Commission's prior vote in McCain, OGC was not entirely to blame for this analysis. As one commenter in our recent rulemaking on this issue noted, "*Through a series of advisory opinions, the Commission has since created rules* regarding pre-event publicity, disclaimers, and the various roles that federal candidates and officeholders may play at nonfederal fundraising events."[26]

Yet, as explained in my statement of reasons in the McCain matters,[27] and as numerous practitioners in the campaign finance bar confirmed during the rulemaking on this issue,[28] these AOs in fact were ambiguous and confusing. If anything, they created the impression that a Federal candidate or officeholder could include a disclaimer on the invitations to limit their solicitations to Federally permissible funds, as Senator McCain did, and they also were generally unclear about when the use of a candidate's or officeholder's name constituted a solicitation by that individual.

The McCain and Gillibrand matters are by no means exceptional. In MUR 6020 (Pelosi), OGC cited AOs 2003-25 (Weinzapfel) and 2004-1 (Forgy Kerr) for the proposition that "The Commission has determined that a federal candidate's appearance in a communication constitutes material involvement in the content of the communication and satisfies the content prong . . . ."[29] OGC recommended finding RTB against Speaker Pelosi on the grounds that she received an in-kind contribution in the form of a coordinated communication from the Alliance for Climate Protection.[30] In MUR 5625 (Aristotle), the Commission, prior to my appointment,

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[23] MUR 5712 (McCain), Factual and Legal Analysis at 3-6; MUR 5799 (McCain), Factual and Legal Analysis at 3-6.

[24] I voted to reject OGC's recommendation. *See* MUR 5935, Certification dated March 18, 2009.

[25] MUR 5935 (Gillibrand), First General Counsel's Report at 5-7.

[26] Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, Comment of the National Republican Senatorial Committee in Response to Notice of Proposed Rulemaking at 2 (emphasis added), *available at* http://www.fec.gov/pdf/nprm/solicitationshays3/2009/nrsc.pdf.

[27] MURs 5712 and 5799 (McCain), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II at 13-14.

[28] *See, e.g.*, Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, Comment of Sandler, Reiff & Young, P.C. in Response to Notice of Proposed Rulemaking at 2-3, *available at* http://www.fec.gov/pdf/nprm/solicitationshays3/2009/sandlerreiffyoung.pdf; and Comment of the National Republican Congressional Committee at 2-3, *available at* http://www.fec.gov/pdf/nprm/solicitationshays3/2009/nrcc.pdf.

[29] MUR 6020, First General Counsel's Report at 13.

[30] *Id.* at 3. I voted against OGC's recommendation. *See* MUR 6020, Certification dated May 6, 2009. *See also* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II.

relied largely on AO 2004-24 (NGP) as the basis for finding RTB that Aristotle violated the Act's prohibition on the sale and use of contributor information that committees report to the Commission.[31]

I could go on with numerous other examples, but the point is, notwithstanding the Act's clear admonition that Commission advisory opinions are to be used only as protection *against* liability, rather than as an affirmative basis for *finding* liability, they often are not used in such manner. Given this unfortunate reality, the draft adopted by the Commission in this advisory opinion creates a dangerous risk that it will be interpreted as setting forth affirmative disclaimer requirements for Internet advertising. Future commissioners and OGC attorneys, not having had the benefit of listening to the discussion at the two lengthy hearings for this AO and going through the five other drafts that were on the table (some with subtle distinctions), may view any other "conduct" not described in Google's request as a violation of the Act and Commission regulations, as has been the practice in the enforcement matters discussed above. Such an interpretation could not be further from the truth.

CONCLUSION

As set forth in proposed Draft B response to this advisory opinion request, I would have voted to find that Google's AdWords ads do not require any disclaimers whatsoever, pursuant to Commission regulations. The "no rationale" response adopted by the Commission is inconsistent with our statutory requirements under the Act, provides no guidance to any entities other than Google and political committees who choose to advertise with Google, is of limited utility even to Google itself by failing to explain which aspects of Google's AdWords were material to the Commission's conclusion, and creates an unacceptable risk that the AdWords model will become a regulatory baseline for Internet advertising, at the expense of Google's competitors. For these reasons, I could not join my colleagues in this advisory opinion.

December 17, 2010
Date

Caroline C. Hunter
Commissioner

[31] MUR 5625, Factual and Legal Analysis at 1-5. I rejected finding probable cause against Aristotle. *See* MUR 5625, Certification dated March 17, 2010; *see also* Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II.