

AGENDA DOCUMENT NO. 10-61-C



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

FC 1011

NOT -6 P 5:12  
**AGENDA ITEM**

For Meeting of 10-7-10

October 6, 2010

**SUBMITTED LATE**

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*  
Acting General Counsel

Rosemary C. Smith *RCS*  
Associate General Counsel

Robert M. Knop *Rmk 12*  
Assistant General Counsel

Anthony Buckley *AB*  
Attorney

Subject: Draft AO 2010-19 (Google) – Draft D

Attached is proposed Draft D of the subject advisory opinion. We have been asked to place this draft on the agenda for October 7, 2010.

Attachments

1 ADVISORY OPINION 2010-19

2

3 Marc E. Elias, Esq.

**DRAFT D**

4 Jonathan S. Berkon, Esq.

5 Perkins Coie LLP

6 607 Fourteenth Street, N.W.

7 Washington, D.C. 20005-2003

8

9 Dear Messrs. Elias and Berkon:

10

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. The Commission concludes that disclaimers  
17 are not required to be appended to text ads on behalf of candidates or political  
18 committees generated through Google's AdWords program.

19 ***Background***

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

22 Google, Inc. is a corporation that creates programs and applications that allow  
23 persons to search for and collect information on the Internet. Google, Inc.'s AdWords  
24 program generates text ads in conjunction with keywords chosen by the advertiser. Text  
25 ads have a headline which can consist of up to 25 characters, two lines of text which can  
26 consist of up to 70 characters, and a display Uniform Resources Locator (“URL”). This  
27 format applies to all advertisers, regardless of whether they are political committees.  
28 When a user enters search terms that coincide with the chosen keywords into the Google,

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

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

15 ***Questions Presented***

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

1 **Conclusion**

2 Yes, text ads on behalf of candidates and political committees generated through  
3 Google, Inc.'s AdWords program qualify for the “impracticable” exception at 11 CFR  
4 110.11(f)(1)(ii).

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” does not include “communications over the  
12 Internet, except for communications 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 such authorized political committee.” 2 U.S.C.  
16 441d(a)(1); *see also* 11 CFR 110.11(b)(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. *See* 2 U.S.C. 441d(a)(2); *see also* 11 CFR 110.11(b)(2). If the  
21 communication is not authorized by a candidate, an authorized committee of a candidate,  
22 or an agent of either, the applicable disclaimer (if any) must “clearly state the name and  
23 permanent street address, telephone number or World Wide Web address of the person

1 who paid for the communication, and state that the communication is not authorized by  
2 any candidate or candidate's committee.” 2 U.S.C. 441d(a)(3); *see also* 11 CFR  
3 110.11(b)(3). Every disclaimer “must be presented in a clear and conspicuous manner, to  
4 give the reader, observer, or listener adequate notice of the identity” of the ad's sponsor.  
5 11 CFR 110.11(c)(1).

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

11 Text ads generated through Google, Inc.'s AdWords program are limited to 95  
12 characters, including the headline. Taking, for example, a disclaimer for a  
13 communication not authorized by a candidate, the disclaimer must clearly state, among  
14 other things, that the communication “is not authorized by any candidate or candidate's  
15 committee.” 2 U.S.C. 441d(a); 11 CFR 110.11(b)(3). The phrase “Not authorized by  
16 any candidate or candidate's committee” is 57 characters long. Including the full name of  
17 the political committee could require more characters for the disclaimer than are allowed  
18 for the text ad itself. Similarly, a communication paid for by an authorized congressional  
19 candidate's committee must include a disclaimer that reads, “Paid for by X for Congress.”  
20 2 U.S.C. 441d(a)(1). Even if the candidate's name were very short, the disclaimer would  
21 still take up more than a quarter of the character limit.

22 Because of these severe space limitations, it would be highly impracticable (or  
23 outright impossible) for a political committee to include a disclaimer in the text ad itself.

1 When a political committee uses one of its own websites as a landing page, the user who  
2 clicks on the ad is brought to a page that, by law, must contain a full section 110.11  
3 disclaimer. *See* 11 CFR 110.11(a)(1) (requiring “all Internet websites of political  
4 committees available to the general public” to include a disclaimer). These text ads,  
5 therefore, would independently satisfy the disclaimer requirement. *See* Advisory Opinion  
6 2004-01 (Bush/Kerr) (required disclaimer for advertisement authorized by two candidates  
7 could be delivered by one candidate on behalf of both of them); Advisory Opinion  
8 2004-10 (Metro Networks) (waiving requirement that “stand by your ad” disclaimer be  
9 read by candidate); Advisory Opinion 2004-37 (Waters) (disclaimer did not have to  
10 separately list each and every federal candidate in brochure featuring numerous federal  
11 candidates so long as there was an alternative way to identify them). However, when a  
12 political committee does not use one of its own websites as a landing page, it would be  
13 impracticable for the committee to include a disclaimer, because it would not control or  
14 pay for the landing page, and therefore could not place a disclaimer on that page.

15 This conclusion is consistent with Advisory Opinion 2002-09 (Target Wireless).  
16 In Advisory Opinion 2002-09 (Target Wireless), the Commission determined that a  
17 160-character SMS message containing news or entertainment content *and* a political  
18 message qualified for the “small items” exception at 11 CFR 110.11(f)(1)(i). The  
19 requestor explained to the Commission that, though it was technically possible to excise  
20 the news or entertainment content to make room for a disclaimer, such a product would  
21 be unattractive to potential subscribers. *See* Letter from Target Wireless to Federal  
22 Election Commission, Comment on AOR 2002-9 (August 21, 2002) (emphasis in  
23 original) (“While it may be possible to offer political advertising exclusive of content, so

1 as to accommodate the Commission's current disclosure requirements, the realistic opt-in  
2 subscription rate for a *political advertising only* SMS service will be so insignificant that  
3 this medium will be rendered useless to any Federal candidate wishing to reach more than  
4 a handful of voters.”).

5           Based on this representation from the requestor, the Commission concluded that  
6 the “small items” exception applied. *See* Advisory Opinion 2002-09 (Target Wireless)  
7 (“[T]he wireless telephone screens that you have described have limits on both the size  
8 and the length of the information that can be conveyed. Indeed, the Commission notes  
9 that the SMS technology places similar limits on the length of a political advertisement as  
10 those that exist with bumper stickers.”). Similarly, Google, Inc. has represented that  
11 increasing the size of the text ads generated through AdWords would make the product  
12 more expensive and less attractive to advertisers. Therefore, to remain consistent with  
13 the advice that the Commission previously gave in Advisory Opinion 2002-09 (Target  
14 Wireless), the Commission now concludes that text ads generated through AdWords are  
15 exempt from the disclaimer requirements set forth at section 110.11. *See* Concurring  
16 Opinion of Commissioner Steven T. Walther, Advisory Opinion 2010-03 (National  
17 Democratic Redistricting Trust) (“I concur with the result reached by the Commission in  
18 Advisory Opinion 2010-03 . . . only because to do otherwise would be inconsistent with  
19 advice previously given by the Commission in Advisory Opinion 2003-15 (Majette) . . . I  
20 feel bound by the Majette advisory opinion as precedent in this matter.”).

21           This response constitutes an advisory opinion concerning the application of the  
22 Act and Commission regulations to the specific transaction or activity set forth in your  
23 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any

1 of the facts or assumptions presented, and such facts or assumptions are material to a  
2 conclusion presented in this advisory opinion, then the requestor may not rely on that  
3 conclusion as support for its proposed activity. Any person involved in any specific  
4 transaction or activity which is indistinguishable in all its material aspects from the  
5 transaction or activity with respect to which this advisory opinion is rendered may rely on  
6 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note the analysis or  
7 conclusions in this advisory opinion may be affected by subsequent developments in the  
8 law including, but not limited to, statutes, regulations, advisory opinions, and case law.  
9 All cited advisory opinions are available on the Commission's website at  
10 <http://saos.nictusa.com/saos/searchao>.

11  
12  
13  
14  
15  
16

On behalf of the Commission,

Matthew S. Petersen  
Chairman