



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 23, 2002

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2002-09

Diana Hartstein, Esq.
Caplin & Drysdale
One Thomas Circle, NW
Suite 1100
Washington, DC 20005

Dear Ms. Hartstein:

This refers to your letters dated August 5, 2002 (with an enclosure), July 25, 2002, June 13, 2002, and May 14, 2002 (with an enclosure), requesting an advisory opinion concerning the application of the Federal Election Campaign Act, as amended (“the Act”) and Commission regulations to the distribution of political advertisements through wireless telecommunications networks.

BACKGROUND

You state that your client, Target Wireless (“Target”), provides content, which you define as “politics, news, sports, etc.,” through wireless telecommunications networks and Internet service providers to subscribers of wireless PCS digital telephones. One of Target’s primary sources of revenue is advertising. Target has been contacted by candidates and political parties about paying Target to send political advertising to wireless digital telephone subscribers. However, you assert that Target is currently unable to provide this service because Target is uncertain whether the Commission’s disclaimer requirements would apply to these communications. You conclude that, because the available technology limits the length of content-and-advertising communications, the Commission should exempt these communications from its disclaimer requirements.

With regard to the specific technology involved, you state that, in the United States, all wireless carriers employ “Short Messaging Service” (“SMS”) technology. You describe SMS as follows: a wireless customer has the option of subscribing to a content-based information system that permits the delivery and receipt of content and e-mail messages. The content and e-mail

messages are displayed as short messages on a liquid crystal display, which serves as the digital screen on each wireless telephone. In order to receive content, customers enter into contracts for SMS messages with wireless telephone carriers. The contracts require customers to pay a flat price for a certain number of minutes per month. August 5, 2002 letter, p. 2.

Target envisions that political advertisers would sponsor content, such as sports scores or information about news events, which would appear on subscribers' telephone screens, along with a political message, such as "Kids are Winners with Smith" (May 14, 2002 letter, page 3). You note, however, that, due to technological limitations, SMS messages are limited to 160 characters per screen, with "characters" including letters, symbols, spaces, punctuations marks, and single digits. August 5, 2002 letter, p. 2.

You maintain that providing disclaimers with the political advertisements, as generally required by 11 CFR 110.11, will prevent candidates for Federal office and others from using wireless media for political advertising. For example, you point out that a disclaimer such as "Paid for by the Republican National Committee" consumes 45 characters and that a longer disclaimer such as "Paid for by the Fisherman's Union PAC and not authorized by any candidate or candidate's committee" consumes 98 characters. May 14, 2002 letter, p. 4. In the latter case, only 62 characters would remain for the advertisement itself and for the accompanying content.

On page 1 of your June 13, 2002 letter, you assert that it is not feasible to provide for two continuous pages of political advertising, including content and disclaimers. On pp. 1-2 of your August 5, 2002 letter, you explain that, because an SMS two-page message is treated as two separate messages, the chances that the two pages would arrive in tandem are remote. Further, you state that, as SMS technology becomes more popular, the likelihood that both pages of a two-page message will arrive in tandem will decrease. Finally, you point out that contracts for SMS messages require consumers to pay a flat fee for a certain number of minutes. Thus, the second page of a two-page message would consume additional time and would cost consumers money.

You also note that the Commission's regulations concerning disclaimers on television advertisements state that disclaimers are considered "clear and conspicuous" if the disclaimers appear in letters "equal to or greater than four (4) percent of the vertical screen height . . ." 11 CFR 110.11(a)(5)(iii). In contrast, you point out that even a relatively short disclaimer, such as "Paid for by Smith for Congress" uses 30 of the available 160 characters, or approximately 18% of the available characters.

You assert that, given the limited space available with SMS delivery to wireless digital telephones, requiring disclaimers would "constructively estop new media agencies, wireless providers and candidates for public office from utilizing wireless media . . . when implementing advertising initiatives for candidates." February 25, 2002 letter, p. 3. You conclude that either the disclaimer exception listed at 11 CFR 110.11(a)(6)(i), which includes certain small items, or the exception listed at 11 CFR 110.11(a)(6)(ii), which includes methods of advertising where a disclaimer would be "impracticable," should apply. Therefore, you ask that Target's proposed content-plus-political advertising proposal be exempted from the Commission's disclaimer requirements under 11 CFR 110.11(a)(6)(i) or (ii). As an alternative, you suggest that the political

advertisements could either include a web link to the sponsor's identification, such as www.sponsor.com, or a toll-free telephone number so that individuals who read the messages could determine the identify of the sponsor. (Presumably, the sponsor identification would contain the requisite disclaimer.)

ACT AND COMMISSION REGULATIONS

The following discussion is based on the Act, as recently amended by the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, and the Commission's current regulations.

Current Regulations

Whenever any person makes an expenditure to finance communications expressly advocating the election or defeat of a clearly identified candidate or soliciting any contribution, and does so through various types of mass media (e.g., a broadcasting station) or via "any other type of general public political advertising," the communication is required to include a statement of sponsorship or disclaimer. 2 U.S.C. 441d, 11 CFR 110.11. The disclaimer must clearly state if the communication has been paid for and authorized by a candidate, or the candidate's authorized political committee. If the communication is paid for by other persons but authorized by a candidate (including an authorized political committee of a candidate or its agents), the disclaimer shall clearly state that the communication is paid for by those other persons and authorized by such authorized political committee. On the other hand, if the communication is not authorized by a candidate (including an authorized political committee of a candidate or its agents), the disclaimer shall clearly state the name of the person who paid for the communication and state that it is not authorized by any candidate or the candidate's committee. 2 U.S.C. 441d; 11 CFR 109.3, 110.11(a)(1), and 110.11(a)(5).

Some exceptions to the Commission's disclaimer requirements are listed at 11 CFR 110.11(a)(6)(i) and (ii). These exceptions include 11 CFR 110.11(a)(6)(i), which covers bumper stickers, pins, buttons, pens, and other similar small items upon which a disclaimer cannot be conveniently printed, and 11 CFR 110.11(a)(6)(ii), which covers skywriting, watertowers, wearing apparel, and other methods of displaying political advertising and other means of advertising where displaying a disclaimer would be "impracticable."

Bipartisan Campaign Reform Act

In BCRA, Congress has mandated additional disclaimer requirements.¹ First, the disclaimer requirements will apply to "any" communication financed by a political committee through any type of general public political advertising, not just those that expressly advocate the election or defeat of a clearly identified candidate, or that solicit any contribution. 2 U.S.C. 441d(a). Second, all persons who finance electioneering communications will be subject to the provisions of 2 U.S.C. 441d(a).²

¹ BCRA's "disclaimer" provisions will not take effect until November 6, 2002.

² An electioneering communication "means any broadcast, cable, or satellite communication which refers to a clearly identified candidate for federal office" and "is made within 60 days before a general, special, or runoff election for the office sought by the candidate, or 30 days before a primary or preference election, or a convention or caucus of a

Third, for communications that are not authorized by a candidate, an authorized political committee of a candidate, or its agents, under BCRA, disclaimers will have to include the “permanent street address, telephone number or World Wide Web address of the person who paid for the communication.” 2 U.S.C. 441d(a)(3).

ANALYSIS

Based on the facts presented, the Commission concludes that the disclaimer exception at 11 CFR 110.11(a)(6)(i) applies to your request.³ By virtue of their size, the “small” items listed in 11 CFR 110.11(a)(6)(i), such as bumper stickers, pins, buttons, and pens are limited in the size and length of the messages that they are able to contain. Similarly, the 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.

Because the Commission has concluded that the disclaimer exception at 11 CFR 110.11(a)(6)(i) applies, it does not analyze Target’s proposal under disclaimer exception 11 CFR 110.11(a)(6)(ii), which covers skywriting, watertowers, wearing apparel, and other methods of displaying political advertising and other means of advertising where displaying a disclaimer would be “impracticable.”

This response constitutes an advisory opinion concerning 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 any of the material circumstances proposed change, the conclusion herein would not apply.

Sincerely,

(signed)

Karl J. Sandstrom
Vice-Chairman

political party that has authority to nominate a candidate, for the office sought by the candidate; and in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.” 2 U.S.C. 434(f)(3)(A)(i).

³ The Commission notes that Target suggested in its request certain alternatives to allow recipients to ascertain the identity of the sponsors of political messages (a telephone or website reference). Nothing in this opinion would preclude Target’s use of these approaches.