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August 5, 2010

BY HAND DELIVERY

Thomasenia Duncan, Esq.
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FEDERAL ELECTION
COMMISSION
2010 AUG -5 PM 3:27
OFFICE OF GENERAL
COUNSEL

Re: Advisory Opinion Request

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of Google. Google seeks confirmation that "text ads" generated by Google's AdWords program are exempt from the disclaimer requirements of 11 C.F.R. § 110.11, under the "small items" exception. If a disclaimer is required, Google seeks confirmation that displaying the URL of the ad sponsor's website in the text ad and requiring the sponsor's website to include a full § 110.11 disclaimer satisfies the requirement.

I. FACTUAL DISCUSSION

A. Background on AdWords

Google AdWords is an advertising program that connects Internet users to businesses, political candidates, and other entities in which they may be interested.¹ It works in the following way:²

- Using AdWords software, a business, political candidate, or other entity (the "advertiser")

¹ See, e.g. AdWords Beginner's Guide, available at <http://adwords.google.com/support/aw/bin/static.py?hl=en&guide=21899&page=guide.cs>.

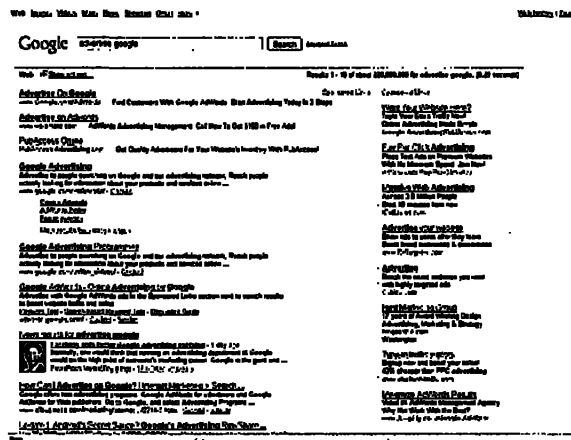
² Other major search engines, such as Yahoo! and Bing, have text ads that work similarly to Google's AdWords.

generates a series of text ads;

- These text ads consist of a headline (which links to the advertiser's website), two lines of text, and a display URL (to notify the user of the website to which she will be directed). An example is below:

Advertise With Google
Want fast results?
Create your ad campaign today!
www.adwords.google.com

- The advertiser then chooses certain keywords that will be associated with each text ad;
- When the Internet user enters search terms in Google's search engine or views content relevant to the selected keywords on publishing sites within the Google Content Network, AdWords generates text ads that appear alongside the natural search results or the content of the website;
- An example is below – there are three text ads at the top of the screen and eight more along the right hand side of the screen.



As the figure above demonstrates, text ads contain a maximum of 95 characters – 25 characters in the headline and 70 characters in the body of the ad.³ This format is standard for all advertisers. Forcing Google or other search engines to generate different sized ad spaces for different advertisers would reduce the value of the smaller ads and the number of ads that can be shown on any page.

³ Text ads generated by Yahoo! and Bing have similar space limitations.

As a result of this severe space limitation, a text ad is fundamentally different from a television or newspaper advertisement. Unlike these advertisements, the text ad does not attempt to make a "final sale" of a product or service. Instead, its primary purpose is to persuade potential customers to visit its website (the "landing page") and learn more about what the advertiser has to offer.

Consequently, advertisers do not pay Google based on the number of times that its text ads appear. Instead, advertisers pay Google based on the number of times that a potential customer clicks on one of its ads. In addition, AdWords rewards advertisers (by offering sponsors cheaper rates and better positioning) based on the quality of the landing page and the historical click-through rate of its ads. This illustrates that both Google and the advertiser view the landing page as the primary forum in which advertiser-to-customer communications take place.

B. Use of AdWords by Candidates and Committees

The Internet is the "great equalizer in political debate." *See* Testimony of Commissioner Ellen L. Weintraub Before the California FPPC Subcommittee on Internet Political Activity (Mar. 24, 2010). "Unlike other forms of mass communication, the Internet has minimal barriers to entry, including its low cost and widespread accessibility." Internet Communications, Explanation and Justification, 71 Fed. Reg. 18589, 18589 (Apr. 12, 2006). While traditional political advertising forces candidates to compress their messages into 30-second sound bites, the Internet allows candidates to have a richer discussion with voters. On their websites, candidates can explain their positions on a wide range of policy issues and converse with voters about their concerns. With e-mail and other interactive tools, candidates can equip supporters to participate in grassroots activities and provide daily updates about the latest campaign news.

However, before a candidate can leverage these inexpensive communication tools, she needs to attract potential supporters to her website. For candidates who begin the campaign with low name recognition, this is not an easy task. In the last few years, many of these candidates have turned to AdWords to help.⁴ During the 2008 election cycle, more than half of "online political users" (including two-thirds of users under the age of 30) used "portal news services," such as Google, to learn more about campaigns.⁵ These users often employ search engines to find candidates who share their views on particular issues. An underdog candidate running on a strong environmental platform, for example, can attract potential supporters to her website by creating text ads with keywords such as "effects of global warming" or "support cap and trade." When an Internet user types those words into a search engine, the candidate's text ad will appear

⁴ Although exact figures are unavailable, candidates spent tens of millions of dollars on AdWords during the 2008 election cycle.

⁵ *See* The Internet's Role in Campaign 2008, Pew Internet & American Life Project (April 2009), *available at* <http://www.pewinternet.org/Reports/2009/6--The-Internets-Role-in-Campaign-2008.aspx>, at 61-62.

next to the search results. If the text ad convinces the user to click through to the candidate's website, the user can read about the candidate's positions on environmental issues and make an educated decision about whether to become a supporter.

These ads are enormously cost-effective for candidates with limited resources. Candidates can target their ads to a specific geographic area and can select websites in Google's content network that are frequented by potential supporters. Campaigns can also measure the effectiveness of each ad by monitoring its click-through rate and fund only those ads that succeed in driving people to their website. For under-funded campaigns who cannot afford to spend money on expensive – or ineffective – advertising, there is no viable alternative.

II. LEGAL DISCUSSION

A. Disclaimer Requirements on Public Communications

FEC regulations require that "public communications" by political committees contain certain disclaimers. *See* 11 C.F.R. § 110.11(a)(1). A "public communication" includes "communications placed for a fee on another person's Web site." *Id.* § 100.26.

If a candidate pays for the communication, the disclaimer must state that the communication "has been paid for by the authorized political committee." *Id.*, § 110.11(b)(1). If someone other than a candidate pays for the communication, the disclaimer must "clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate's committee." *Id.*, § 110.11(b)(3). In all cases, the 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. *Id.*, § 110.11(c)(1).

B. "Small Items" Exception to the § 110.11 Requirement

1. The "small items" exception

The FEC does not require political committees to include disclaimers on "[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed." *Id.*, § 110.11(f)(1)(i). In addition, the Commission recognizes an exception 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." *Id.*, § 110.11(f)(1)(ii).

On two occasions in the last decade, the Commission has applied the "small items" exception to ease or eliminate the disclaimer requirement for new communication mediums – text messaging and embedded radio advertising. *See* Advisory Opinions 2002-09 (Target Wireless), 2004-10 (Metro Networks). Two principles emerge from these opinions. First, where the disclaimer

requirements in § 110.11 would preclude candidates from utilizing the new medium, the requirements should be eased or eliminated. Second, the medium provider should not be compelled to adopt new technologies or fundamentally change its business model to facilitate compliance with § 110.11.

In Advisory Opinion 2002-09 (Target Wireless), the Commission determined that the text messages at issue, which were limited to 160 characters per screen, did not have to include a disclaimer. The Commission acknowledged that typical disclaimers – ranging from "Paid for by Smith for Congress" for candidates to "Paid for by the Fisherman Union's PAC and Not Authorized by any Candidate or Candidate's Committee" for committees – take up between 30 and 100 characters. The space afforded to political advertisers was limited further by the fact that news content took up a certain percentage of the 160 available characters. Rather than substitute its technological or business judgment for that of the company, the Commission accepted these limitations as fact and determined that the "small items" exception applied.⁶

A few years later, the Commission again confronted a new communications medium where the disclaimers prescribed by § 110.11 could not be featured. *See* Advisory Opinion 2004-10 (Metro Networks). Metro Networks had found that some advertisers preferred having their messages "embedded" in live reporting. However, this advertising method made it "physically impossible" for a political candidate to deliver the "stand by your ad" message, since the reporter was not in a studio and the stations' equipment did not allow for the a pre-recorded message to be played in tandem with the live reporting. Given these technological limitations, the Commission concluded that the reporter (rather than the candidate) could read the disclaimer.

2. The "small items" exception applies to text ads generated by Google AdWords

The text ads generated by Google AdWords qualify for the "small items" exception and are therefore exempt from the disclosure requirements of § 110.11.

Google's text ads provide advertisers with only 95 characters to communicate a message. This constitutes fewer than 60 percent of the characters that were available to text message advertisers in Target Wireless. As the Commission acknowledged, disclaimers typically run from 30 to 100 characters. *See* Advisory Opinion 2002-09. Therefore, if the Commission required the

⁶ *See* Advisory Opinion 2002-09 ("because an SMS two-page message is treated as two separate messages, the chances that the two pages would arrive in tandem are remote ... [f]inally ... the second page of a two-page message would consume additional time and would cost consumers money."); Letter to Office of General Counsel from Attorney for Target Wireless (Aug. 21, 2002) (commenting on Draft Advisory Opinion 2002-09) ("[w]hile it may be possible to offer political advertising exclusive of content ... 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.").

hypothetical "Smith for Congress" campaign to include a disclaimer in a Google text ad, the campaign would have only 34 remaining characters in the body of the ad to communicate its message, with an additional 25 characters available in the headline. Meanwhile, if the hypothetical Fisherman's PAC ran a Google text ad, it would consist *entirely* of a disclaimer, with no room available to communicate a message.

Given these space limitations, requiring a full disclaimer in the text ad would foreclose the medium of communication entirely.⁷ Eliminating this medium would prevent under-funded candidates from reaching potential supporters on the Internet and would benefit the well-funded candidates who could afford expensive television advertisements. Such a decision would enhance the role that big-money contributions play in the outcome of political campaigns and would undermine the Commission's policy towards Internet communications. *See* 71 Fed. Reg. at 18589 ("[T]he Commission recognizes the Internet as a unique and evolving mode of mass communication and political speech that ... warrants a restrained regulatory approach.").

Furthermore, the purpose of the disclaimer requirement is to *inform* voters about the source of an ad's funding, not to mislead them. If political text ads had full disclaimers while business ads did not, some users could get the mistaken impression that the political committee advertiser was sponsoring *all* of the text ads on the page. *See* Letter to Office of General Counsel from Attorney for Target Wireless (June 13, 2002), commenting on Advisory Opinion Request 2002-09 ("A subscriber will be even more confused if he receives one SMS text message promoting a candidate and a separate SMS message with a disclaimer when each is received at different times and with no apparent logical connection between the original communication and the disclaimer.").

Because the text ads generated by AdWords are "small items" under both 11 C.F.R. § 110.11(f)(1)(i) and the Commission's precedents, the disclaimer requirements prescribed by § 110.11 should not apply.

C. Use of Alternative Disclaimer to Satisfy § 110.11 Requirements

1. The Commission's record of allowing alternative disclaimers

The Commission "has long recognized that in certain circumstances it is impracticable to provide a full disclosure statement *in the prescribed manner*." Advisory Opinion 2004-10 (emphasis added). On multiple occasions, it has modified the disclaimer requirement to adjust for these circumstances.

⁷ Just as the Commission did not second guess the value of embedding a political communication or the feasibility of sending multiple text messages, it should not force Google to re-engineer its AdWords program for the sole purpose of allowing candidates to include a full § 110.11 disclaimer. *See* Advisory Opinions 2002-09, 2004-10.

For example, the Commission has concluded several times that a communication on behalf of multiple candidates does not need to include separate disclaimers for each candidate. *See* Advisory Opinions 1994-13 (Voter Education Project), 2004-1 (Bush/Kerr), 2004-37 (Waters). In an earlier opinion, the Commission held that as long as the "notice of the political fundraising purpose of the concert [was] given at any location where [fundraising concert] tickets are sold," the concert ticket itself did not need to include the disclaimer. *See* Advisory Opinion 1980-42 (Hart). Finally, in the Metro Networks opinion, the Commission allowed the reporter to read a modified "stand by your ad" disclaimer, which, in addition to dispensing with the requirement that the candidate deliver the disclaimer, did not require that the communication mention the office that the sponsoring candidate sought. *See* Advisory Opinion 2004-07.

2. Inclusion of committee website in text ad and full § 110.11 disclaimer on landing page satisfies the disclaimer requirement

If a disclaimer is required, the Commission should consider the requirement satisfied if (1) the text ad displays the URL of the sponsoring committee's website and (2) the landing page contains a full § 110.11 disclaimer. By ensuring that "'voters are fully informed' about the person or group who is speaking," this sequence of disclaimers fulfills the core purpose underlying § 110.11. *See Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 915 (2010), quoting *Buckley v. Valeo*, 424 U.S. 1, 76 (1976) (quotations omitted).⁸

As the Commission already recognizes, a committee's URL address provides important information to the recipient of a public communication. *See* 11 C.F.R. § 110.11(b)(3) (allowing committees to include URL, rather than telephone or street address, in partial satisfaction of the disclaimer requirement). Google, too, requires text ads to display the sponsor's URL, in order to "give users a clear idea of what website they'll be taken to when they click on the ad." *See* AdWords Beginner's Guide. The value of the information is even greater in this context, because text ads do not disappear until the user takes an action (such as clicking on a link or navigating away from the page). As a result, users can read the text ads at their own pace and then click on the link to confirm the identity of the sponsoring committee.

Including the full § 110.11 disclaimer on the landing page also serves important informational interests. In fact, prior to the District Court's decision in *Shays v. Federal Election Commission*, 337 F.Supp. 2d 28 (D.D.C. 2004), the Commission had concluded that "extending the disclaimer requirements only to political committee websites" satisfied the strong interest in providing "prompt public disclosure." *See* Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, Explanation and Justification, 67 Fed. Reg. 76962, 76963

⁸ In Advisory Opinion 2002-09, Target Wireless proposed a similar sequence of disclaimers to "allow recipients to ascertain the identity of the sponsors of the political messages." *Id.*, n. 3. The Commission stated that "[n]othing in this opinion would preclude Target's use of these approaches." *Id.*

(Dec. 13, 2002).⁹ The Commission continues to require political committees to include a disclaimer on "all Internet websites ... available to the general public," evidencing its belief in the value of this disclaimer. *See* 11 C.F.R. § 110.11(a)(1).

Just as different pages in a multiple-page mailer are part of the same communication, the text ad and landing page form an integrated sequence of advertising. Under Commission rules, "[t]he disclaimer need not appear on the front or cover page of the communication so long as it appears within the communication." *Id.*, § 110.11(c)(2)(iv). Of course, if a voter discards the mailer after only reading the front of it, she will never see the disclaimer. Similarly, if the text ad does not interest the user, she will not click on the headline and may never find out who paid for the ad. However, as long as the recipient of the message can easily obtain the disclaimer information, the core purpose of the requirement has been satisfied.¹⁰ The proposed sequential disclaimer achieves that goal.

Finally, it is significant that sponsors only pay for text ads that are "clicked" by users. In 2006, the Commission drew a line between "communications placed for a fee on another person's website" and other Internet communications. In its Explanation and Justification for this rule, the Commission reasoned that since other forms of "public communications" are "typically placed for a fee," Internet communications "placed for a fee" should also be treated as "public communications" requiring a disclaimer. *See* 71 Fed. Reg. at 18593. Because they are not placed for a fee, the so-called "non-clicked" ads are *not* the type of ads that the Commission had in mind when it required certain Internet communications to include disclaimers.¹¹ Meanwhile, because a user who clicks on a text ad typically lands on the website of the sponsoring committee – which is required to have a disclaimer – the paid "clicked" ads satisfy the basic requirements of § 110.11.

III. QUESTIONS PRESENTED

In light of these issues, Google, Inc. seeks confirmation that:

1. Text ads generated by Google AdWords qualify for the "small items" exception in §

⁹ To comply with this new sequential disclaimer requirement, persons other than political committees that make "express advocacy" communications or solicitations in text ads would need to include such a disclaimer on their websites. *See* 11 C.F.R. § 110.11(a)(2), (3).

¹⁰ The concern, expressed by the Commission in 2002, that some users would not be able to "click through" to the landing page, is inapposite in this context. *See* First General Counsel's Report, MUR 4957 (July 3, 2002), 5-6.

¹¹ In its Explanation and Justification for the Internet regulations, the Commission said that "sponsored links" and "pay per click" ads were not exempt from the definition of "public communications." *See* 71 Fed. Reg. at 18594, n. 28, 18595. However, the E&J did not specifically address whether such ads would still be considered "public communications" if they were never "clicked" and, therefore, never paid for by the sponsor.

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110.11(f)(1)(i).

2. If a disclaimer is required, the requirement is satisfied if the text ad displays the URL of the committee sponsor's website in the text ad and the landing page contains a full § 110.11 disclaimer.

Please do not hesitate to call us should you have any additional questions.

Very truly yours,



Marc E. Elias
Jonathan S. Berkon
Counsel to Google