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August 21, 2002

Comment to  
AOR 2002-09

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RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

Via Fax and Hand Delivery

Ruth Heilizer  
Federal Election Commission  
Office of General Counsel  
999 E Street, NW  
Washington, DC 20463

Re: Response to AO Draft Comment Procedures for AO 2002-09 (Target Wireless)

Dear Ms. Heilizer:

This letter is in response to the DRAFT ADVISORY OPINION 2002-09 ("Draft"). I understand that two drafts have been prepared in response to AOR 2002-09. Since DRAFT B supports Target Wireless' position, this letter responds to DRAFT A.

The authors of Draft A have failed to understand that a wireless telephone is a media receiver that will only be used as a receiver of political advertising when this advertising is attached to content (information, news, etc.) to which consumers subscribe. While it may be possible to offer political advertising exclusive of content, so as to accommodate the Commission's current disclosure requirements, 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.

The one distinguishing characteristic between SMS text messaging delivered to wireless telephones and radios, televisions, and newspapers is space. One-hundred and sixty characters is all that exists for SMS text messaging, 160 characters that must be sliced and diced to include content such as news and a candidate's communication, leaving virtually no room for any disclaimer whatsoever.

Draft A makes three arguments in opposition to Target Wireless' request whether political advertising via SMS technology on wireless digital telephones is analogous to other types of political advertising that are excepted from the disclaimer requirement in 11 CFR 110.11(a)(6)(i)-(ii). The reasons given in Draft A in finding that political advertising via SMS technology does not fall within the exceptions in 11 CFR 110.11(a)(6)(i)-(ii) suggests that there may be some confusion over the mechanics of political advertising via SMS technology.

First, the Draft explains that by virtue of their size, the "small" items listed in 11 CFR 110.11(a)(6)(i), such as bumper stickers, pins, etc., can only display short messages, which is why disclaimers "cannot be conveniently printed" on them. It incorrectly contrasts that with the size of telephone screens and states that "[t]he true limitation, *which Target imposes on itself*, is that it seeks to display content and the political advertisement on the same screen." (Emphasis added.) Target Wireless in no way whatsoever imposes this limitation on itself. In fact, it does not impose this limitation for two reasons: (1) the 160 character limitation is set by current technology and (2) the amount of characters that Target Wireless is allotted within the 160 characters is determined by the wireless carrier, e.g., Sprint PCS or content provider, e.g., CNN, FOX, etc. Thus, Target Wireless has no influence regarding the determination of the fraction of 160 characters that are available for political advertising within the 160 character limit.

Arguing that Target Wireless has control over the character limitation is analogous to arguing that political advertisers in a newspaper have control over the percentage of news to advertising that is published in a given issue. The newspaper sells advertising space, and an advertiser is not permitted to use more than the space allotted to it. Assuming otherwise would be to assume that the Washington Post could be a newspaper filled entirely with advertisements, if the advertisers, and not the newspaper had control over space allotment. Because this service is opt-in, giving consumers a choice to subscribe or not subscribe, the consumer must receive value beyond what is contained in a candidate's political advertising message. Otherwise, consumers would not sign up for the service if all they were receiving were political advertisements.

The second argument in the Draft also focuses on the fact that disclaimers with political advertisements are not "impracticable" within the 160 character limitation. Again, the number of characters that the carriers and content providers will bestow to political advertisers is not within the advertisers' control. Thus, it is incorrect to assume that political advertisers will be able to put forth their political advertisement and disclaimer within the small fraction of the 160 characters that the carriers, portals, and content providers will allot to political advertisers.

Finally, the Draft states that "unlike the excepted items which do not have space for disclaimers, Target's messages have space that is taken up with content." Let me reemphasize that neither the political advertisers nor Target Wireless will have control over what fraction of the 160 characters is taken up with content and political advertising.

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Additionally, only a consumer who opts-in/subscribes to receive content that is subsidized by political advertisements will receive them. Accordingly, there will not be an issue of "spam" that is, SMS messages will not be sent to consumers who do not subscribe to receive them in return for discounted or free content or news services.

Please see the letters from the Advertising Association of America, Cellular Telecommunications Industry Association, the National Republican Senatorial Committee, and the Association of National Advertisers, in our support who have noted, granting this form of political advertising will only enhance debate on issues and political speech by providing a cost efficient new media vehicle that is more accessible for all candidates and the electorate.

Thank you for your time and consideration.

Sincerely,



Diana Hartstein  
Attorney for Target Wireless