



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

July 11, 2022

The Honorable Allen Dickerson
Chair
Federal Election Commission
1050 First Street, N.E.
Washington, DC 20463

By electronic mail (AO@fec.gov)

Re: Comments in Opposition to Advisory Opinion Request 2022-14 re Google's Pilot Program to Permit Political Campaign Spam

Dear Chair Dickerson:

Citizens for Responsibility and Ethics in Washington ("CREW") respectfully requests the Federal Election Commission ("FEC" or "Commission") deny Advisory Opinion Request 2022-14 (the "AO Request") by Google LLC to permit spam on its platform by federally registered political committees.

As an initial matter, CREW objects to the unlawfully short time period for public comment the FEC has provided for the AO Request. The Federal Election Campaign Act permits the FEC to issue advisory opinions, but "[b]efore rendering an advisory opinion, the Commission shall accept written comments submitted by any interested party within the 10-day period following the date the request is made public." 52 U.S.C. § 30108(d). Although Google's letter is dated July 1, 2022, the Commission only made that request public on July 6. See FEC, Weekly Digest, Week of July 4-8, 2022, <https://www.fec.gov/updates/week-of-july-4-8-2022/> ("On July 6, the Commission made public an advisory opinion request by Google."). Accordingly, the period for public comment must run to no earlier than July 16, 2022. The law does not permit the FEC to shorten or waive that period of public comment, and the mandatory nature of the obligation would mean any advisory opinion issued without permitting the required time period would be a nullity. See *McCutcheon v. FEC*, 496 F. Supp. 3d 318, 333–34 (D.D.C. 2020) (request "was not statutorily eligible for consideration" when "mandated public comment period had not yet closed"). Because the FEC's notice to the public that comments must be submitted by July 11 is contrary to law, the FEC should correct this notice and provide the public an additional ten days from that correction to submit comments.¹

¹ A spokesperson for the FEC stated in an email to Insider that the deadline for comments would be July 16. Dave Levinthal, Hate political email spam? Federal officials are giving you little time to express your feelings on a potentially pivotal ruling, Insider, July 10, 2022, <https://www.businessinsider.com/google-political-emails-spam->

CREW further notes the FEC's recent troubling practice of proposing significant actions without providing reasonable or legally mandated periods for public comment. For example, recently, the FEC adopted an interim rulemaking, Agenda Item 22-19-A1-Revised, without permitting any time for public comment. See Letter from Allen Dickerson Re: Interim Final Rule Removing 11 C.F.R. § 109.10(e)(1)(vi) – Revised, June 7, 2022 (submitted for consideration at June 8, 2022 hearing), <https://www.fec.gov/resources/cms-content/documents/mtgdoc-22-19-A1.pdf>. Indeed, the revised interim rulemaking was issued one day before the public hearing on which the FEC voted. See *id.* Though the interim rulemaking provides for comment after its approval, the rule is slated to go into effect automatically and without consideration of those comments. See FEC, Reporting Independent Expenditures, 87 Fed. Reg. 35863, 35863 (June 14, 2022). Given the importance of transparency to the FEC's central purpose, the lack of transparency into the FEC's own operations is troubling.

Turning to the substance of the AO Request, the request should also be denied. In the AO Request, Google proposes to create a pilot program whereby registered participants will be able to send email without being subject to Google's general spam filters, free of charge. Google's suggestion that this would "improve the user experience," AO Request 11, by flooding their inboxes with spam is at least questionable. But, here, it is also unlawful.

Federal law bars Google, a corporation, from making contributions to influence federal elections, 52 U.S.C. § 30118(a), including by the "provision of...services without charge or at a charge that is less than the usual and normal charge," 11 C.F.R. § 100.52(d)(1). In contrast, the law permits a corporation to engage in a "bona fide commercial activity" with registered political entities, even if such activity confers a benefit on the entity. AO 2008-10 (Voter Voter) at 6. A bona fide commercial activity is one offered "on the same terms and conditions available to all similarly situated persons in the general public." AO 2004-06 (Meetup) at 1.

Here, Google's offer is expressly not available to "all similarly situated persons in the general public." *Id.*² Rather, it is available only to "authorized candidate committees, political party committees, and leadership political action committees that are registered with the Federal Election Commission during the 2022 election cycle." AO Request 1.³ Unlike other situations approved by the Commission, where services were not limited to federally registered political entities, see AO 2018-11 (Microsoft) at 2 (services offered to "federal, state, and local candidate committees; national and state political party committees; campaign technology vendors, and 'think thanks and democracy advocacy non-profits'"), and where the scope of the qualifying entities was defined by the shared need they faced, *id.* (groups faced "online security threats" and hacking), Google here plans to provide a unique service to only

[public-comment-fec-ruling-2022-7](#). The comment confirms the FEC's knowledge that its proposed July 11 deadline is improper, yet provides no explanation for the deadline provided in its public statement.

² The AO Request makes reference to three generally available services Google offers: Bulk Sender Guidelines, Postmaster Tools, and a best practices learning module. AO Request 5–6. Google's proposed pilot program for political groups goes far beyond those services, however, which only seek to inform users how to send non-spam like mail and insight into the amount of their mail being blocked, but do not permit senders to evade Google's spam filters. *Id.*

³ Google assumes that relying on entities registered with the FEC will permit Google to "verify" the identities of the senders. AO Request 7. The FEC, however, does not filter what groups file a Statement of Organization and the Commission believes it currently lacks authority to police scam committees. FEC, Legislative Recommendations of the Federal Election Commission 2021 5–6, <https://www.fec.gov/resources/cms-content/documents/legrec2021.pdf>.

registered political entities and, even among them, one that, as explained below, serves the needs of only one side of the partisan divide.

Google's stated purposes do not explain its decision to confer this unique benefit on political entities, separate from Google's millions of other users. Google's purported desire to "test whether users received more email [than] they want," AO Request 6–7, does not support singling out registered political entities for this special benefit. Rather, a useable test would need to engage in random sampling, not a selective benefit provided to particular mailers to spam.

Unstated in the AO Request is Google's likely real purpose for the pilot program: to capitulate to demands of Republican-affiliated officeholders and entities to evade Google's standard and generally applied spam filters. See Emily Birnbaum and Marianne Levine, [GOP senators' private meeting with Google turns tense over email bias claims](https://www.politico.com/news/2022/05/19/google-meeting-republican-senators-emails-00033834), Politico, May 19, 2022, <https://www.politico.com/news/2022/05/19/google-meeting-republican-senators-emails-00033834>. Google has been under pressure since a recent study found that Google's spam filters "mark a higher percentage of [politically] right emails as spam." Hassan Iqbal, Usman Mahmood Khan, Hassan Ali Khan, Muhammad Shahzad, [A Peek into the Political in Email Spam Filtering Algorithms During Us Election 2020](https://arxiv.org/pdf/2203.16743.pdf), 4 (Mar. 31, 2022), <https://arxiv.org/pdf/2203.16743.pdf>. In response, Republicans in Congress have introduced legislation to permit their candidates to evade spam filters. See Kevin McCarthy, [Leader McCarthy, Rep. Lesko, and GOP Leaders Introduce Bill to Combat Big Tech's Biased Algorithms](https://republicanleader.house.gov/leader-mccarthy-rep-lesko-and-gop-leaders-introduce-bill-to-combat-big-techs-biased-algorithms/) (June 21, 2022) <https://republicanleader.house.gov/leader-mccarthy-rep-lesko-and-gop-leaders-introduce-bill-to-combat-big-techs-biased-algorithms/>; see also Scott, Thune, [Senate Republicans Introduce Political BIAS Emails Act](https://www.scott.senate.gov/media-center/press-releases/scott-thune-senate-republicans-introduce-political-bias-emails-act) (June 16, 2022), <https://www.scott.senate.gov/media-center/press-releases/scott-thune-senate-republicans-introduce-political-bias-emails-act>. Republicans have accused Google of bias and a desire to influence elections in favor of Democrats. See Max Greenwood, [Republicans file FEC complaint over alleged Google censorship of fundraising emails](https://thehill.com/homenews/campaign/3468075-republicans-file-fec-complaint-over-alleged-google-censorship-of-fundraising-emails/), The Hill, Apr. 27, 2022, <https://thehill.com/homenews/campaign/3468075-republicans-file-fec-complaint-over-alleged-google-censorship-of-fundraising-emails/>.

Though CREW takes no position on the propriety of Google's underlying spam-filtering algorithm, CREW notes that a disparate impact in a service caused by "pre-existing ... policies" would not cause the service to be deemed an unlawful attempt to influence federal elections. See General Counsel's Report, MUR 7821 (Twitter), July 8, 2021 (application of "pre-existing content policies" enacted for "commercial reasons ultimately relating to the protection of its brand and its ability to attract advertisers" was bona fide commercial activity, even if it has a disparate impact on candidates). A neutral application of Google's algorithm may have a disparate impact on Republicans' communications, but Google's spam-filters would continue to be a bona fide commercial service if Google continued to apply it.

Indeed, there are likely content-neutral reasons for this disparate impact. For example, the New York Times reported that the Trump Campaign used misleading and potentially fraudulent fundraising practices in its email solicitations. Shane Goldmacher, [How Trump Steered Supporters Into Unwitting Donations](https://www.nytimes.com/2021/04/03/us/politics/trump-donations.html), NY Times, Apr. 3, 2021, <https://www.nytimes.com/2021/04/03/us/politics/trump-donations.html>. Politico reported that the Trump campaign used misleading subject lines and spam-like senders. Danya Hajjaji, [Donald Trump Campaign Emails Use Misleading Subject Lines, Spam-Like Senders](https://www.newsweek.com/trump-campaign-emails-use-misleading-subject-lines-spam-like-senders-1664579), Newsweek, Dec. 31, 2021, <https://www.newsweek.com/trump-campaign-emails-use-misleading-subject-lines-spam-like-senders-1664579>. Assuming such reporting is accurate, one would

expect any truly political neutral algorithm to have a disparate impact. Indeed, Google has explained that the disparate filtering is likely the result of users' behavior marking mail as spam. Birnbaum and Levine, GOP senators' private meeting with Google turns tense over email bias claims (attributing statement to Kent Walker, Google's chief legal officer, explaining impact was due to "past user behavior").

In contrast, an ad-hoc change in business practices by lifting such filters for the purpose of eliminating that disparate impact on one party—in other words, to confer a benefit on one party—is the definition of an activity intended to influence federal elections. It would not be an application of "establish[ed] objective business criteria" in a way that had an unintended disparate impact, AO 2017-16 (Stein and Gottlieb) at 6 (vendors need not "make its services available to committees representing all political ideologies" as long as decision rested on "objective business criteria"), or even a decision to do business with only one ideological side but in exchange for commercially reasonable compensation, *cf.* 11 C.F.R. § 100.52(d)(1). Rather, it is a direct benefit conferred on political campaigns for the purpose of providing a greater value to one campaign over another. It would be no more "non-partisan," AO Request 13, than a proposal to offer, free of charge and equally to all political parties, a service to make campaign ads supporting the Democratic presidential nominee.

Of course, Google is likely motivated by a desire to avoid the possibility of harmful legislation and other retaliatory moves by capitulating to demands of one political party, but that motivation does not make Google's proposal lawful. The desire to obtain good will, and the desire to avoid ill-will, does not establish that the corporation's activities are bona fide commercial activities that do not intend to influence elections. AO 1997-17 (Bush Exploratory Committee) at 8 n.7.

If Google is concerned that its spam filter may be blocking desired mail service, it is of course free to make changes to its service. But it should not and cannot create a carve out that is intended to benefit a single political party, even if it is only motivated by Google's fear of political retribution. Rather than provide a bona fide commercial service that is available to all "similarly situated" entities, AO 2004-06 (Meetup) at 1, Google is proposing to provide a service that in intent and in effect favors one "particular candidate, party or speaker." *Cf.* AO Request 2.

We respectfully request the Commission reject AO Request 2022-14.

Sincerely,

A handwritten signature in black ink, appearing to read "Stuart McPhail". The signature is stylized and somewhat cursive.

Stuart McPhail
Senior Litigation Counsel