

Campaign Finance Policy and Email Spam Filtering: The Google Advisory Opinion Request

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Political campaigns [rely heavily](#) on email and the internet to raise money and court voters. On August 11, 2022, the [Federal Election Commission \(FEC\)](#) approved an [advisory opinion request \(AOR\)](#) from Google permitting the company to establish a pilot program enabling Gmail users to provide feedback affecting which political fundraising messages they receive rather than relying on the service's existing spam filters. The AOR is one component of a much larger debate in Congress and beyond about the role that social media platforms and technology companies play in American politics. This CRS Insight provides congressional readers with brief background on the AOR and related [campaign finance policy](#) issues. Other CRS products linked herein discuss policy and legal topics that are beyond the scope of this Insight.

What are Advisory Opinions?

The [Federal Election Campaign Act \(FECA\)](#) establishes the [advisory opinion \(AO\) process](#) to enable those regulated by campaign finance law or FEC regulations to ask whether specific, planned conduct is permissible. Questions may not be hypothetical.

FECA requires votes from a [majority of at least four commissioners](#) to approve an AO. An AO is not issued if the commission deadlocks (a vote of fewer than four commissioners reaching agreement one way or another). Members of Congress, in their official or candidate capacities, frequently make AO requests, provide comments, or both. AOs can have long-term ramifications because [FECA permits](#) other entities operating under “indistinguishable” circumstances as the requester to rely on AO guidance.

Campaign Finance Policy Background

[Candidates, parties, and political action committees \(PACs\)](#) generally have wide leeway to make their own strategic decisions, including about fundraising tactics, provided that they are consistent with relevant law and regulation. Campaign finance law generally does not regulate campaign conduct, but instead specifies how funds affecting campaigns may be raised and spent. In particular, FECA [limits contributions](#); requires identifying information (“disclaimers”) on communications that raise funds or call

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for election or defeat of candidates (or, in some cases, mention candidates); and requires regulated entities to publicly report (“disclose”) their financial activity. Some disclaimer requirements, such as for [online advertising](#), vary by media type. [Separate requirements](#), in telecommunications law, also apply to some campaign advertising.

Just as political committees are generally free—at least under campaign finance law—to make their own operational decisions, FECA generally does not place unique requirements on specific industries, such as email providers or technology companies. FECA bans corporations and unions from making federal campaign contributions from their general treasury funds.

What Google Requested

Google primarily sought guidance on whether its planned pilot program would constitute a prohibited in-kind corporate contribution under FECA. Specifically, [Google asked](#):

May Google launch a free and non-partisan pilot program to test Gmail design features, which will be open to authorized candidate committees, political party committees, and leadership political action committees, where spam detection as applied to messages from a pilot participant will rely predominantly on direct feedback from the recipient rather than standard spam detection, and each pilot participant will receive information regarding the rate of emails delivered into Gmail users’ inboxes, as long as the pilot participant is in compliance with the program’s requirements?

The AOR [generated](#) more than 2,600 [public comments](#). Many comments appeared to be from private citizens, expressed general opposition to the proposal and frustration with unwanted political email, and contained little policy discussion.

Discussion

The Google request focused on the relatively narrow question of whether the pilot program would constitute a prohibited in-kind contribution. At its August 11 meeting, the FEC considered two draft AOs. (It is common for the commission to consider alternative drafts.) The commission approved [Draft A](#), with pending technical changes, by a 4-1 vote. One commissioner abstained.

Despite general similarities, the two drafts differed in their analysis of whether Google’s proposed pilot would or would not constitute a prohibited in-kind contribution. In brief, [Draft A](#) determined that it would not because Google would offer the pilot in the normal course of its business operations. By contrast, [Draft B](#) determined that the pilot would constitute a prohibited in-kind contribution because the program would be a departure from normal business operations and would be available only to some users. The drafts generated substantial discussion among commissioners and several questions for Google’s counsel about whether the motivation for or administration of the pilot would provide unique benefits to certain political committees compared with other bulk senders.

Some [accounts](#) have characterized the Google AOR as an attempt to respond to criticism from some Members of Congress that Google’s email filters allegedly advantage one party over another. One [scholarly study](#), which some Members of Congress have [raised in questioning Google](#), and which the company [reportedly refutes](#), found that spam-filtering algorithms for the Gmail, Outlook, and Yahoo email services “treat the left and the right ... differently. Gmail leans toward the left as it marks a higher percentage of the right emails as spam. Outlook and Yahoo, on the other hand, lean towards the right.” Those findings were based on selected data from the 2020 election cycle. One of the study’s authors [told the Washington Post](#) that “while the paper ‘demonstrates that there is a bias’ under certain circumstances across services, it ‘has nothing in it that demonstrates that someone is deliberately trying to turn the elections.’”

Overall, the Google AOR is [one element](#) in ongoing congressional attention to the role technology—and [technology companies](#)—play in the political process. Much of that debate is not directly related to campaign finance policy, and potentially is more relevant [for several other policy and legal areas](#), ranging from [social media companies’ use of algorithms](#) generally, to [antitrust](#), [First Amendment](#), and [telecommunications](#). At least two recently introduced bills, H.R. 8160 and S. 4409, propose limits on algorithmic filtering for campaign emails. Those bills cite FECA to define “political campaign,” but do not otherwise appear to propose amendments to campaign finance law. Other bills (H.R. 3611; H.R. 6796; S. 1896) do not specifically apply to fundraising, but would require additional transparency about online platforms’ algorithm use and would require FEC participation in an interagency body examining algorithms and online platforms.

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