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For meeting of February 27, 2014
[SUBMITTED LATE]

February 26, 2013

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS*
Deputy General Counsel

Adav Noti *AN*
Acting Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Theodore M. Lutz *TML*
Attorney

Subject: AO 2013-18 (Revolution Messaging, LLC) Revised Draft B

Attached is a proposed draft of the subject advisory opinion.

Members of the public may submit written comments on the draft advisory opinion. We are making this draft available for comment until 9:00 am (Eastern Time) on February 27, 2014.

Members of the public may also attend the Commission meeting at which the draft will be considered. The advisory opinion requestor may appear before the Commission at this meeting to answer questions.

For more information about how to submit comments or attend the Commission meeting, go to <http://www.fec.gov/law/draftaos.shtml>.

Attachment

2
3 Joseph E. Sandler, Esq.
4 Neil P. Reiff, Esq.
5 Elizabeth L. Howard, Esq.
6 Sandler, Reiff, Young & Lamb, P.C.
7 1025 Vermont Ave., N.W., Suite 300
8 Washington, D.C. 20005

9
10 Dear Mr. Sandler, Mr. Reiff, and Ms. Howard:

11 We are responding to your advisory opinion request on behalf of Revolution Messaging,
12 LLC. Revolution Messaging asks about the application of the Federal Election Campaign Act of
13 1971, as amended (the “Act”), and Commission regulations to a proposal to design and place
14 mobile phone “banner” advertisements for federal political committees and other persons. The
15 Commission concludes that the proposed advertisements qualify for the small items exception to
16 the disclaimer requirements for public communications.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on
19 September 11, 2013, your email dated October 23, 2013, and your supplement dated February 3,
20 2014 (“AOR Supp.”).

21 Revolution Messaging is a limited liability company organized under District of
22 Columbia law. It specializes in providing mobile communications, strategies, content, and text
23 messaging services to progressive non-profit organizations, labor organizations, and Democratic
24 federal and state political committees and organizations. Revolution Messaging creates mobile
25 and digital messaging strategies on behalf of its clients, including creating the content of and
26 placing mobile phone advertisements.

27 Revolution Messaging has been contracted to place mobile phone advertisements by
28 various clients, which include federal committees and labor organizations, some of whom wish

1 to make independent expenditures through mobile phone advertising. Revolution Messaging has
2 encountered several mobile phone advertising vendors that refuse to accept these advertisements
3 unless a disclaimer is included.

4 Mobile phone advertisements appear when users access certain content on their mobile
5 phones. Frequently, these advertisements are shown when users access free mobile phone
6 applications, appearing across the top or bottom of the phone's screen in tandem with the actual
7 application content. Mobile phone advertisements also appear when mobile phone users access
8 certain websites that default in their presentation to a mobile phone format.¹

9 The size and content of mobile phone advertisements are limited by (1) the size of the
10 mobile phone on which the advertisement appears, and (2) the number of pixels available for a
11 particular mobile phone advertisement.² Because the physical size of mobile phones differs
12 between models, mobile phone advertisements are not measured, priced, or purchased based on
13 their physical size. Rather, to provide advertisers with the ability to create and purchase
14 advertisements that appear uniformly on various mobile phones, the Interactive Advertising
15 Bureau's industry standards for mobile phone advertisements establish a maximum number of
16 pixels for the width and height of each type of advertising.³ These pixel limitations help ensure

¹ The request therefore does not implicate advertisements placed in applications or on websites formatted for viewing on a desktop, laptop, or tablet, and the Commission does not address such advertisements herein.

² Mobile phone screens are typically measured in diagonal inches. Providing screen size in diagonal inches gives the largest straight-line measurement that can be obtained from the display. (The quoted screen size, being a diagonal, is larger than the height or width of the display.) As a point of reference, the requestor provides diagonal measurements for several popular phones available on the market: The iPhone 5 is 4 inches diagonally; the Samsung Galaxy S4 is 5 inches diagonally; and the Blackberry 10 is 4.2 inches diagonally.

³ These guidelines are available at <http://www.iab.net/guidelines/508676/50876/mobileguidelines> (last updated Jan. 31, 2012). With reference to the guidelines, Revolution Messaging's proposal is limited to the options listed in the row entitled "Image," except for the "Smartphone Static Interstitial" category. The request does not pertain to "Rich Media/Expandable" advertisements.

The Interactive Advertising Bureau's guidelines for "Image" ads on smartphones indicate that, in some

1 that advertisements do not appear blurry, regardless of the type of mobile phone on which they
2 appear. Because of the pixel limitations, however, attempting to include too much content in an
3 image may reduce the image's overall quality and clarity.

4 Revolution Messaging's proposed advertisements would be images placed as "banner
5 ads." The Interactive Advertising Bureau's mobile phone guidelines include five categories of
6 image banner ads, the smallest of which is limited to 120 x 20 pixels, and the largest of which is
7 limited to 320 x 50 pixels.

8 When tapped or otherwise selected by users, the proposed mobile phone advertisements
9 will either open a website in the phone's internet browser or prompt users to make a phone call.
10 Of those ads that link to a website, there is no limitation on the websites to which users could be
11 directed; ads will not necessarily link to websites of registered political committees. Thus, while
12 some of the mobile phone advertisements that Revolution Messaging proposes to develop and
13 place will link to sites that contain a disclaimer, some will not.

14 Revolution Messaging proposes to "identify the advertiser" in all of its mobile phone
15 advertisements. AOR Supp. at 2. Under this proposal, any mobile phone advertisement will link
16 to an advertiser's website and/or will itself include "some clear identification" of the advertiser.
17 *Id.* at 1-2. For instance, if an authorized committee's mobile phone advertisement lacks a link to
18 the authorized committee's website, Revolution Messaging will ensure that the mobile phone
19 advertisement includes the committee's name or logo or otherwise "make[s] clear that the
20 committee is the sponsor within the ad language." *Id.* at 2. Similarly, if the advertiser is an

circumstances, publishers may allow "[i]ncreased dimensions" of static banner ads for presentation on high resolution devices. *Id.* But because the requestor states that the "largest available advertisement" implicated by the request is 320 x 50 pixels, Advisory Opinion Request at 2, the Commission understands the request not to include the increased dimension options.

1 unauthorized committee, the mobile phone advertisement will include “the name or a
2 recognizable abbreviation of the name of the PAC” or the committee’s logo. *Id.* And if the
3 advertiser is a person other than a political committee, the mobile phone advertisement will
4 include a “clear identification . . . with the words ‘paid by.’” *Id.*

5 ***Question Presented***

6 *Are the advertisements described in the request exempt from the disclaimer requirements*
7 *of the Act and Commission regulations under either the small items or, in the alternative, the*
8 *impracticability exception, and, if not, do the advertisements satisfy the disclaimer*
9 *requirements?*

10 ***Legal Analysis and Conclusion***

11 Yes, the advertisements described in the request are exempt from the disclaimer
12 requirements of the Act and Commission regulations under the small items exception.

13 With limited exceptions, “public communications” made by a political committee must
14 include certain disclaimers, as must any public communications that expressly advocate the
15 election or defeat of a clearly identified candidate. *See* 11 C.F.R. § 110.11(a)(1), (2); *see also* 2
16 U.S.C. § 441d. Under the Act and Commission regulations, a “public communication” is a
17 communication “by means of any broadcast, cable, or satellite communication, newspaper,
18 magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or
19 any other form of general public political advertising.” 2 U.S.C. § 431(22); 11 C.F.R. § 100.26.

20 If a candidate committee pays for and authorizes the public communication, the
21 disclaimer must state that the communication “has been paid for by the authorized political
22 committee.” 11 C.F.R. § 110.11(b)(1); *see also* 2 U.S.C. § 441d(a)(1). If a public
23 communication is authorized by a candidate committee but paid for by someone else, the

1 disclaimer must state who paid for the communication and that the candidate committee
2 authorized it. *See* 11 C.F.R. § 110.11(b)(2); *see also* 2 U.S.C. § 441d(a)(2). If the
3 communication is not authorized by a candidate committee, the disclaimer must “clearly state the
4 full name and permanent street address, telephone number, or World Wide Web address of the
5 person who paid for the communication, and that the communication is not authorized by any
6 candidate or candidate’s committee.” 11 C.F.R. § 110.11(b)(3); *see also* 2 U.S.C. § 441d(a)(3).
7 Every disclaimer “must be presented in a clear and conspicuous manner, to give the reader . . .
8 adequate notice of the identity” of the ad’s sponsor. 11 C.F.R. § 110.11(c)(1).

9 The Commission’s regulations contain several exceptions to these general disclaimer
10 requirements. *See* 11 C.F.R. § 110.11(e)-(f). Revolution Messaging’s request potentially
11 implicates two of these exceptions. First, a disclaimer is not required on “[b]umper stickers,
12 pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently
13 printed.” 11 C.F.R. § 110.11(f)(1)(i) (the “small items exception”). Second, the disclaimer
14 requirements do not apply to “[s]kywriting, water towers, wearing apparel, or other means of
15 displaying an advertisement of such a nature that the inclusion of a disclaimer would be
16 impracticable.” 11 C.F.R. § 110.11(f)(1)(ii) (the “impracticability exception”).

17 Under the small items exception, “practicality (or ‘convenience’ in the regulatory
18 vernacular) is the critical factor in determining the exception’s applicability; size is not
19 dispositive.” *See* Statement of Reasons of Vice Chairman Darryl R. Wold, and Commissioners
20 Lee Ann Elliott, David M. Mason, Danny L. McDonald, and Karl J. Sandstrom at 2, MUR 4791
21 (Ryan for Congress) (“SOR”). In Advisory Opinion 2002-09 (Target Wireless), the Commission
22 determined that the small items exception applied to character-restricted short messaging service
23 (“SMS”) messages in which political advertising was appended to content such as sports scores

1 or news alerts. Advisory Opinion 2002-09 (Target Wireless) at 1-2. Under SMS technology at
2 that time, messages were limited to 160 total characters. *Id.* at 2. The Commission reasoned that
3 this limitation was equivalent to the inherent size and content restrictions of bumper stickers and
4 the other the items enumerated in the small items exception. *Id.* at 4.

5 Subsequently, in Advisory Opinion 2010-19 (Google), the Commission considered the
6 application of the Act's disclaimer requirements to Google's AdWords program. As described in
7 that advisory opinion request, the AdWords program presented online text ads in a fixed,
8 character-limited format with a hyperlink to a landing page; the ads themselves did not contain
9 disclaimers, but the landing pages did. *Id.* at 2. The Commission concluded that the proposal
10 "under the circumstances described . . . [was] not in violation of the Act or Commission
11 regulations," but the Commission did not approve by four affirmative votes a specific conclusion
12 regarding whether AdWords qualified for the small items or impracticability exception. *Id.* at 2.
13 Three Commissioners would have concluded that, because the proposed ads provided a link to
14 the "committee sponsor's website and a landing page that contains a full disclaimer," Google
15 would have satisfied the Act. *See* Concurring Statement of Vice Chair Cynthia L. Bauerly,
16 Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub at 2, Advisory Opinion
17 2010-19 (Google). Three Commissioners would have concluded that Google's ads qualified for
18 the impracticability exception. *See* Concurring Statement of Chairman Matthew S. Petersen,
19 Advisory Opinion 2010-19 (Google).⁴

20 For purposes of the small items exception, Revolution Messaging's proposed
21 advertisements are equivalent to the advertisements at issue in Advisory Opinion 2002-09

⁴ In AOR 2011-09 (Facebook), the Commission considered whether the small items or impracticability exception applied to size-limited Facebook advertisements that would have linked to web pages that might not have included disclaimers. The Commission was unable to approve a response by the required four affirmative votes.

1 (Target Wireless). Like the character restrictions in that opinion, the pixel restrictions of the
2 proposed advertisements necessarily limit the amount of legible text they can contain. For
3 instance, the requestor provides an example showing a non-authorized committee disclaimer
4 (“Paid for by ABC PAC, www.abcpac.com. Not authorized by any candidate or candidate’s
5 committee.”) in a banner ad; this disclaimer consumes almost the entire lower half of the image
6 and leaves very little space for the advertising text, which is reduced to the three-word message
7 “VOTE NOV. 6” and a small encouragement to “click here to find your polling location.” *See*
8 *Advisory Opinion Request at 5. Revolution Messaging would not be able to meaningfully*
9 *reduce the size of the disclaimer, as it is already in a font so compressed that it challenges*
10 *readability, and the pixel limitations prevent Revolution Messaging from increasing the size or*
11 *detail of the image to insert more material. Thus, as in Advisory Opinion 2002-09 (Target*
12 *Wireless), it is not “practical,” SOR at 2, for a political advertisement to include the mandated*
13 *disclaimer without shrinking the political portion of the message to its barest minimum, thereby*
14 *compromising its effectiveness.*

15 Importantly, the pixel limitation that restricts the banner ads’ content is an externally
16 imposed, industry-wide technological standard. The Interactive Advertising Bureau (not
17 Revolution Messaging) has established pixel limitations to ensure that mobile phone
18 advertisements appear uniformly across differently-sized phones, just as Target Wireless “ha[d]
19 no influence” over the industry-wide 160-character limit on SMS messages that was necessary to
20 account for technological limitations on mobile phones and mobile communications in 2002.
21 *See Comment of Target Wireless, Advisory Opinion 2002-09 (Aug. 21, 2002).* The externality
22 of the restriction distinguishes Revolution Messaging’s request from Advisory Opinion Requests
23 2010-19 (Google) and 2011-09 (Facebook): Unlike Google and Facebook, Revolution

1 Messaging cannot simply change the specifications of the advertising to provide adequate space
2 for disclaimers.⁵

3 In sum, the advertisements here are “limited in [their] size and length” by external
4 technological rules that significantly restrict the “messages that they are able to contain.”
5 Advisory Opinion 2002-09 (Target Wireless) at 4. Because these restrictions render the
6 inclusion of a public communications disclaimer impractical, the proposed mobile phone
7 advertisements qualify for the small items exception. Accordingly, the Commission concludes
8 that the mobile phone advertisements that Revolution Messaging proposes to design and place
9 for federal political committees and other persons are exempt from disclaimer requirements
10 under 11 C.F.R. § 110.11(f)(1).⁶

11 Because the mobile phone ads are exempt from the disclaimer requirements under 11
12 C.F.R. § 110.11(f)(1), Revolution Messaging’s proposal to “include a clear identification of the
13 name of the advertiser,” AOR Supp. at 1, is not material to the Commission’s conclusion here.
14 *See generally* 2 U.S.C. § 437f(c) (governing reliance upon advisory opinions).

15 This response constitutes an advisory opinion concerning the application of the Act and
16 Commission regulations to the specific transaction or activity set forth in your request. *See* 2
17 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or
18 assumptions presented, and such facts or assumptions are material to a conclusion presented in

⁵ Advisory Opinion 2007-33 (Club for Growth) is also distinguishable. In that advisory opinion, the Commission concluded that ten- and fifteen-second broadcast advertisements were not exempt from including a full, spoken “stand-by-your-ad” disclaimer. *Id.* at 2. The Commission noted that, in enacting this spoken disclaimer requirement, Congress “did not create an exception” for advertisements of short duration, even though Congress was familiar with the Commission’s small items and impracticability exceptions. *Id.* at 4. The Commission also emphasized that no “physical or technological” limitations prevented the requestor from including the spoken disclaimers. *Id.* at 3.

⁶ In light of this conclusion, the Commission does not address whether the advertising would qualify for the impracticability exception. 11 C.F.R. § 110.11(f)(2).

1 this advisory opinion, then the requestor may not rely on that conclusion as support for its
2 proposed activity. Any person involved in any specific transaction or activity which is
3 indistinguishable in all its material aspects from the transaction or activity with respect to which
4 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C.

5 § 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be
6 affected by subsequent developments in the law including, but not limited to, statutes,
7 regulations, advisory opinions, and case law. The advisory opinions cited herein are available on
8 the Commission's website.

9 On behalf of the Commission,
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11

12 Lee E. Goodman
13 Chairman
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