FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Commission Secretary's Office

DATE: January 15, 2014

SUBJECT: Comments on Draft AO 2013-18
(Revolution Messaging, LLC)

Attached is an untimely submitted comment received from Joseph Sandler, Neil Reiff, and Dara Lindenbaum on behalf of Revolution Messaging, LLC. This matter is on the January 16, 2014 Open Meeting Agenda.

Attachment

SANDLER, REIFF, YOUNG & LAMB, P.C.

January 15, 2014

BY E-MAIL AND FACSIMILE

Hon. Shawn Woodhead Werth
Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion Request 2013-18 (Revolution Messaging, LLC)

Dear Madame Secretary:

We are writing on behalf of our client, Revolution Messaging, LLC ("Revolution Messaging"), to comment on Drafts A and B of Advisory Opinion 2011-19, which are on the Commission's Open Meeting Agenda for tomorrow, January 16, 2013.

In summary, Draft A does not take into account the nature of the medium at issue and will effectively bar the use of the industry standard form of mobile advertising. The intrinsic limitations of the specific format at issue in this AOR clearly make this format a "small item[] upon which the disclaimer cannot be conveniently printed" within the meaning of the Commission's regulations, 11 C.F.R. §110.11(f). The approach of Draft A is to insist, in effect, that Revolution Messaging's political advertising clients simply choose a different format for their communication. That approach is illogical and inconsistent with both the meaning of the exemption as the Commission had interpreted and applied it, and with the Commission's commitment to accommodate new technologies that lower the cost of campaigning. Draft B is consistent with the language of the regulations and the Commission's longstanding approach to evolving technology. For these reasons, the Commission should adopt Draft B.

Discussion

Under the "small items" exception, the Commission's disclaimer requirements do not apply to "[b]umper stickers, pins, buttons, pens and similar small items upon which the disclaimer cannot be conveniently printed." 11 C.F.R. §110.11(f)(i). As the Commission explained in Advisory Opinion 2002-09 (Target Wireless), "By virtue of their size, the 'small' items listed in [the regulation], such as bumper stickers, pins, buttons and pens are limited in the size and length of the messages that they are able to contain." *Id.* at 4.

In this AOR, Revolution Messaging has asked the Commission simply to confirm the obvious: that a certain class of mobile phone advertisements—smart phone static banner ads, for which the maximum size is of 320 x 50 pixels or less in size--"by virtue of their size"—are indeed "limited in the size and length of the messages that they are able to contain" and therefore fall within the "small items" exemption.

Draft A suggests, however, that the exemption is inapplicable because the advertising of Revolution Messaging's clients "can be presented in larger and expandable formats than the static banner ad of 320 x 50 pixels." Draft A at 6. Specifically, Draft A cites the availability of what the Interactive Advertising Bureau's Mobile Phone Creative Guidelines characterize as entirely different categories of advertising: static interstitial, rich media interstitial and rich media banners. "Revolution Messaging therefore has the technological option to use larger mobile phone advertisements that could accommodate both the desired advertising text and the required disclaimer." *Id.* at 6-7.

The position taken by Draft A is illogical and contrary to the meaning of the "small items" exemption as the Commission has interpreted it.

1. **The Commission Should Analyze the Applicability of the Exemption to the Format Chosen by the Advertiser, Not Require the Advertiser to Use a Different and Less Suitable Format**

If an advertisement in a particular format is too small to display a disclaimer, the "small items" exemption clearly applies even though other items in the same medium, but using a different format, could be made larger. Campaign buttons, for example, can and are made in larger sizes—more than large enough to accommodate a disclaimer. That does mean, of course, that the specific exemption for "buttons" does not apply when a specific campaign button in fact is too small for the disclaimer to be "conveniently printed."

In that regard, the Commission has never required any committee or entity which chooses to use a specific format for political advertising, in a particular medium, to use a different format in order to accommodate a disclaimer. The Commission has never, for example, denied the availability of the "small items" exemption for a bumper sticker on the ground that the advertiser could include a disclaimer if only the bumper sticker were made big enough. Yet, that is precisely what Draft A would do.

The larger-sized mobile formats identified by Draft A are in fact very different than static banner ads. They are less popular and much less prevalent, in part because they are more expensive and in part because mobile websites and mobile applications do not want to have ads that are too obtrusive to their users. The 300 x 50 and 320 x 50 banner ads are standard and widely available. They are the most popular for smartphones today because they work best with how a mobile phone displays digital content. According to the MoPub Mobile Advertising Marketplace Report for the first quarter of 2013, for example, in March 2013 the cost per mille (thousand impressions) for a 320x50 pixel ad was 54 cents compared to 62 cents for a 300x250 ad and $1.85 for 320x480. Of total smartphone spending in March 2013, including tablets, 320x50 ads accounted for nearly 53% of total ad spend—more than all other sizes of advertisements combined.

In such circumstances, the Commission has not required political advertisers to choose an

advertising format different than the one they want to use. To the contrary, the Commission has respected the advertiser's choice of format and then looked at the applicability of the exemption to *that format*. In Advisory Opinion 2002-09 (Target Wireless), for example, the requestor explained that although it *was technically possible* to remove content in a text message (SMS message) to make room for a disclaimer, it would be unattractive to potential subscribers. *See* Letter from Target Wireless to Federal Election Commission, Comment on AOR 2002-09 (August 21, 2002). The Commission determined that the format in which SMS messages are displayed met the requirements for the small-items exemption: "[T]he wireless telephone screens that you have described have limits on both the size and the length of the information that can be conveyed." AO 2002-09 at 4.

Likewise, in the case of Revolution Messaging's clients, the "options" identified by Draft A may frequently be less desirable for a number of reasons. The format about which Revolution Messaging has submitted this request—static banner ads for mobile phones—clearly has "limits on both the size and the length of the information that can be conveyed," just as in AO 2002-09. Indeed, it is literally impossible to make a disclaimer included in this format "clear and conspicuous" as required by the Commission's disclaimer regulation, 110.11(c)(1).

Draft A's reliance on Advisory Opinion 2007-33 (Club for Growth PAC) is clearly misplaced. In that Advisory Opinion, the Commission denied a request to exempt a short television advertisement from the "stand-by-your-ad" spoken disclaimer. The Commission found the "small items" exemption inapplicable in that case because it applies to only visual media, not to a "spoken stand by your ad disclaimer....." *Id.* at 4 (emphasis in original).

The Commission should consider the format about which the requestor, Revolution Messaging, has actually asked and decide whether the small-items exemption applies to that format. The answer should be obvious.

2. Draft A Is Contrary to the Commission's Policy of Accommodating Technological Innovation That Expands Opportunity for Political Communication

As Draft A itself acknowledges, "the Act and Commission regulations need not be barriers to technological innovation and creative forms of advertising." *Id.* at 8. Yet imposing such barriers is precisely what would result from adopting Draft A.

Draft A would bar the most standard mobile advertising format from political advertising and prevent the use of new and often less expensive ways to spend money on paid messaging. Some political advertisers who could afford static banner ads may not be able to afford rich media or interstitial ads. Draft A would require such advertisers to utilize mobile advertising formats to better fit the Commission's requirements, instead of allowing such advertisers to utilize the format that best meets their needs, and thereby expanding access to political communication. Political campaigns and committees should be able to take advantage of the

evolving technology that reduces the amount that any one committee or entity needs to spend to get across a given message, and thereby enhances the ability of more people to participate in the political process.

In that regard, we respect and appreciate the concerns raised by Senator Ron Wyden (D-Ore.) in his letter to the Commission of September 16, 2013, as to maintaining and strengthening disclosure laws. Indeed, Revolution Messaging itself has strongly advocated for increased disclosure of political spending, particularly in the area of spam text messaging. The "small items" exemption, however, long pre-dates the recent controversy about anonymous political spending; in fact, that exemption dates back at least to the first set of FEC regulations issued after the 1974 Amendments to the Federal Election Campaign Act. All Revolution Messaging is asking for is that the Commission apply that exemption by its terms to more recently developed technology.

3. Requiring a Link to a Website Is Not a Feasible Alternative

Draft A suggests that a political committee can satisfy the disclaimer requirements by using its own website as the landing page which then has a disclaimer. Complying with this "modified disclaimer" requirement, however, will not be possible in situations where the website linked to an ad is not controlled by the original advertiser. As has been discussed repeatedly in past Advisory Opinions, while ads that link to the advertiser's own political committee page will have the disclaimer, ads that link to a third party website, out of the control of the advertiser, will not. *See* Advisory Opinions 2011-09 (Facebook); 2010-19 (Google). Therefore, Revolution Messaging urges the Commission to exempt from the disclaimer requirements all static banner mobile advertisement on which it is not physically possible to include a readable disclaimer.

CONCLUSION

For the reasons set forth above, Revolution Messaging strongly urges the Commission to reject Draft A and adopt Draft B of Advisory Opinion 2013-18.

Thank you for your time and attention to this matter.

Sincerely yours,

Joseph E. Sandler
Neil P. Reiff
Dara S. Lindenbaum

Attorneys for Revolution Messaging, LLC

cc: Office of General Counsel