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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

AGENDA DOCUMENT NO. 13-50  
AGENDA ITEM  
For meeting of December 5, 2013

November 26, 2013

**MEMORANDUM**

TO: The Commission

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

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) Drafts A and B

Attached are proposed drafts of the subject advisory opinion.

Members of the public may submit written comments on these draft advisory opinions. We are making these drafts available for comment until 12:00 pm (Eastern Time) on December 4, 2013.

Members of the public may also attend the Commission meeting at which these drafts 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

1 ADVISORY OPINION 2013-18

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

**DRAFT A**

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 mobile phone advertisements are not exempt from the  
16 Act’s disclaimer requirements but that Revolution Messaging could satisfy those requirements  
17 through alternative means.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on  
20 September 11, 2013, and your email dated October 23, 2013.

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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> These pixel limitations help ensure

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> These guidelines are available at <http://www.iab.net/guidelines/508676/50876/mobileguidelines>. With reference to the guidelines, Revolution Messaging proposes to place mobile phone advertisements listed in the "Image" row with dimensions at or less than 320 x 50 pixels. The Interactive Advertising Bureau's guidelines for "Image" ads on smartphones indicate that, in some circumstances, publishers may allow "[i]ncreased dimensions" of

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. The guidelines also include standards for advertisements larger than  
8 320 x 50 pixels. For example, a "Smartphone Static Interstitial" advertisement has maximum  
9 dimensions of 320 x 250 pixels, and "Rich Media/Expandable" advertisements can be enlarged  
10 to 320 x 416 pixels.

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

17 ***Question Presented***

18        *Are the advertisements described in the request exempt from the disclaimer requirements*  
19 *of the Act and Commission regulations under either the small items or, in the alternative, the*  
20 *impracticability exception?*

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static banner ads for presentation on high resolution devices. *Id.* But because the requestor states that the largest static banner 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 for such ads.

1 ***Legal Analysis and Conclusion***

2 No, the proposed mobile phone advertisements do not qualify for either the small items  
3 exception or the impracticability exception and therefore require disclaimers under the Act and  
4 Commission regulations. Nevertheless, in accordance with Advisory Opinion 2010-19 (Google),  
5 the mobile phone advertisements may satisfy these disclaimer requirements by providing the  
6 required information through alternative means.

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

14 If a candidate committee pays for and authorizes the public communication, the  
15 disclaimer must state that the communication “has been paid for by the authorized political  
16 committee.” 11 C.F.R. § 110.11(b)(1); *see also* 2 U.S.C. § 441d(a)(1). If a public  
17 communication is authorized by a candidate committee but paid for by someone else, the  
18 disclaimer must state who paid for the communication and that the candidate committee  
19 authorized it. *See* 11 C.F.R. § 110.11(b)(2); *see also* 2 U.S.C. § 441d(a)(2). If the  
20 communication is not authorized by a candidate committee, the disclaimer must “clearly state the  
21 full name and permanent street address, telephone number, or World Wide Web address of the  
22 person who paid for the communication, and that the communication is not authorized by any

1 candidate or candidate’s committee.” 11 C.F.R. § 110.11(b)(3); *see also* 2 U.S.C. § 441d(a)(3).  
2 Every disclaimer “must be presented in a clear and conspicuous manner, to give the reader . . .  
3 adequate notice of the identity” of the ad’s sponsor. 11 C.F.R. § 110.11(c)(1).

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

12 *Small Items Exception*

13 The Commission has applied the small items exception to the public communication  
14 disclaimer requirements in situations where a disclaimer simply would not fit in the space  
15 provided based on the physical limitations of the item or a technological constraint. *See*  
16 Advisory Opinion 1980-42 (Hart) (applying the exception to concert tickets); Advisory Opinion  
17 2002-09 (Target Wireless) (applying the exception to “short messaging service” communications  
18 distributed through a wireless telecommunications network). Despite its name, the Commission  
19 has previously indicated that the size of an item on which an advertisement placed is “not  
20 dispositive” when applying the small items exception; rather “practicality (or ‘convenience,’ in  
21 the regulatory vernacular) is the critical factor in determining the exception’s applicability.” *See*  
22 Statement of Reasons of Vice Chairman Darryl R. Wold, and Commissioners Lee Ann Elliott,

1 David M. Mason, Danny L. McDonald, and Karl J. Sandstrom at 2, MUR 4791 (Ryan for  
2 Congress).

3 Revolution Messaging’s request bears a surface resemblance to Advisory Opinion 2002-  
4 09 (Target Wireless). There, the requestor asked whether disclaimers were required in short  
5 messaging service (“SMS”) messages that bore a sponsorship message from a political  
6 committee. At the time, nationwide SMS technological standards limited the total content of  
7 each message to 160 characters. The Commission determined that the small items exception  
8 applied, emphasizing the limits on the information that could be conveyed in 160 characters and  
9 concluding that “the SMS technology places similar limits on the length of a political  
10 advertisement as those that exist with bumper stickers.” Advisory Opinion 2002-09 (Target  
11 Wireless) at 4.

12 Like Target Wireless’s communications, Revolution Messaging’s advertisements are  
13 subject to a strict technological size limit (as measured in pixels). However, unlike Target  
14 Wireless — which did not have the option to use alternative SMS technology with larger  
15 character limits — Revolution Messaging’s mobile phone advertisements can be presented in  
16 larger and expandable formats than the static banner ad of 320 x 50 pixels. For instance, as  
17 evidenced by the Interactive Advertising Bureau’s guidelines, “Static Interstitial” mobile phone  
18 advertisements have a pixel limit of 320 x 250; a “Smartphone Rich Interstitial” advertisement  
19 has a pixel count of 300 x 250; and “Rich Banner & Expandable” and “Rich Wide Banner &  
20 Expandable” mobile phone advertisements are expandable up to 300 x 250 and 320 x 416,  
21 respectively. Revolution Messaging therefore has the technological option to use larger mobile  
22 phone advertisements that could accommodate both the desired advertising text and the required

1 disclaimer.

2           In contrast to the technological limitations faced by Target Wireless, Revolution  
3 Messaging's proposal is more similar to the facts the Commission considered in Advisory  
4 Opinion 2007-33 (Club for Growth PAC). There, the requestor proposed to purchase short ten-  
5 and fifteen-second television advertisements and asked the Commission whether the requestor  
6 could "dispense with" or "truncate" certain required spoken disclaimers given the short length of  
7 the proposed advertisements. In response, the Commission indicated that the short length of the  
8 proposed advertisements was not driven by any physical or technological limitations intrinsic to  
9 television advertising and declined to exempt Club for Growth PAC's ten- and fifteen-second  
10 television advertisements from the spoken disclaimer requirements. *See id.* at 3-4 (distinguishing  
11 Advisory Opinion 2002-09 (Target Wireless)).

12           Just as Club for Growth PAC had the option to purchase television advertisements longer  
13 than fifteen seconds, Revolution Messaging can create and place mobile phone advertisements  
14 larger than 320 x 50 pixels. Accordingly, the Commission concludes that the small items  
15 exception does not apply to the proposed mobile phone advertisements.

16           *Impracticability Exception*

17           The impracticability exception provides that, in addition to skywriting, water towers, and  
18 wearing apparel, disclaimers need not be printed on "other means of displaying an advertisement  
19 *of such a nature* that the inclusion of a disclaimer would be impracticable." 11 C.F.R.  
20 § 110.11(f)(1)(ii) (emphasis added). Thus, although the list of communications in the rule is not  
21 exhaustive, the exception applies only where the very nature of a communication medium  
22 renders disclaimers impracticable. In the two advisory opinions in which the Commission has



1 analyzed the impracticability exception outside of those media enumerated at 11 C.F.R.  
2 § 110.11(f)(1)(ii), the Commission has declined to exempt the communications. *See* Advisory  
3 Opinion 2007-33 (Club for Growth PAC); Advisory Opinion 2004-10 (Metro Networks).

4 In the case of Revolution Messaging's proposed advertisements, the advertising medium  
5 is images displayed on mobile phones. As discussed above, there are no physical or  
6 technological limitations of either that medium or mobile phone technology that would make it  
7 *inherently* impracticable to include a disclaimer within mobile phone image advertisements.  
8 Accordingly, the Commission concludes that the impracticability exception does not apply to the  
9 proposed mobile phone advertisements.

10 *Delivery of Disclaimers Through Alternative Methods*

11 Because neither exception discussed above applies, Revolution Messaging's  
12 advertisements require disclaimers. Nonetheless, the Commission notes that the Act and  
13 Commission regulations need not be barriers to technological innovation and creative forms of  
14 advertising. In situations where traditional delivery of a required disclaimer would be unwieldy,  
15 the Commission, while not granting an exemption from disclaimer requirements, has allowed the  
16 disclaimer to be delivered in an alternative fashion. *See* Advisory Opinion 2004-01 (Bush/Kerr)  
17 at 6-7 (permitting one of two authorizing candidates to deliver oral disclaimer on behalf of both  
18 candidates); Advisory Opinion 2004-10 (Metro Networks) (permitting reporter, rather than  
19 candidate, to deliver oral disclaimer where reporter read ad live from a helicopter); Advisory  
20 Opinion 2004-37 (Waters) at 6 (permitting written disclaimer to refer to authorizing candidates'  
21 names printed elsewhere in mailing rather than re-stating each name in disclaimer); *see also*  
22 Advisory Opinion 2010-19 (Google) (concluding that character-limited advertisements that

1 directed users to landing page with a disclaimer would “not [be] in violation of the Act or  
2 Commission regulations”).

3         Rather than stifling campaign advocacy, technological innovation may promote  
4 compliance with campaign finance laws. For example, the California Fair Political Practices  
5 Commission has promulgated regulations regarding paid campaign advertisements to squarely  
6 address the issue of disclaimers in electronic media advertisements that are limited in size. *See*  
7 Cal. Code Regs. tit. 2, § 18450.4. Instead of granting a blanket exemption from complying with  
8 disclaimer requirements for small advertisements, the California regulation provides that small  
9 advertisements may use technological features such as rollover displays, links to a webpage, or  
10 “other technological means” to meet disclosure requirements. *See id.* § 18450.4(b)(3)(G)(i).  
11 The Commission is similarly open to the development and use of other technological means of  
12 providing required disclaimer information in a format consistent with the way data is delivered to  
13 mobile phones.

14         The Commission notes that, as in Advisory Opinion 2010-19 (Google), some of the  
15 proposed static banner advertisements will link to sites that contain the disclaimers required by  
16 11 C.F.R. § 110.11. For small mobile phone advertisements that, when selected, take the phone  
17 user directly to a site with a complete disclaimer for the advertisement, the disclaimer  
18 requirement would be satisfied. But this is not the only way to satisfy the disclaimer  
19 requirement. Rich media, animated (i.e., non-static), or expandable advertisements that contain  
20 the information required by 11 C.F.R. § 110.11 may also comply with the Act and Commission  
21 regulations, as may other technological means of providing the required information. The  
22 essential requirement is that the viewer of the ad receive identifying information about the source

1 of the advertisement, as required by 2 U.S.C. § 441d(a). This conclusion furthers the  
2 Commission’s policy and practice of “interpret[ing] the Act and its regulations in a manner  
3 consistent with contemporary technological innovations . . . where the use of the technology  
4 would not compromise the intent of the Act or regulations.” Advisory Opinion 1999-09  
5 (Bradley for President).

6 This response constitutes an advisory opinion concerning the application of the Act and  
7 Commission regulations to the specific transaction or activity set forth in your request. *See* 2  
8 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or  
9 assumptions presented, and such facts or assumptions are material to a conclusion presented in  
10 this advisory opinion, then the requestor may not rely on that conclusion as support for its  
11 proposed activity. Any person involved in any specific transaction or activity which is  
12 indistinguishable in all its material aspects from the transaction or activity with respect to which  
13 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C.  
14 § 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be  
15 affected by subsequent developments in the law including, but not limited to, statutes,  
16 regulations, advisory opinions, and case law. The advisory opinions cited herein are available on  
17 the Commission’s website.

18 On behalf of the Commission,  
19

20  
21  
22 Ellen L. Weintraub  
23 Chair

1 ADVISORY OPINION 2013-18

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

**DRAFT B**

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, and your email dated October 23, 2013.

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

26 Revolution Messaging has been contracted to place mobile phone advertisements by  
27 various clients, which include federal committees and labor organizations, some of whom wish  
28 to make independent expenditures through mobile phone advertising. Revolution Messaging has

1 encountered several mobile phone advertising vendors that refuse to accept these advertisements  
2 unless a disclaimer is included.

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

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

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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 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

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 ***Question Presented***

15 *Are the advertisements described in the request exempt from the disclaimer requirements*  
16 *of the Act and Commission regulations under either the small items or, in the alternative, the*  
17 *impracticability exception?*

18 ***Legal Analysis and Conclusion***

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

21 With limited exceptions, "public communications" made by a political committee must

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request is 320 x 50 pixels, Advisory Opinion Request at 2, the Commission understands the request not to include the increased dimension options.

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

7       If a candidate committee pays for and authorizes the public communication, the  
8 disclaimer must state that the communication “has been paid for by the authorized political  
9 committee.” 11 C.F.R. § 110.11(b)(1); *see also* 2 U.S.C. § 441d(a)(1). If a public  
10 communication is authorized by a candidate committee but paid for by someone else, the  
11 disclaimer must state who paid for the communication and that the candidate committee  
12 authorized it. *See* 11 C.F.R. § 110.11(b)(2); *see also* 2 U.S.C. § 441d(a)(2). If the  
13 communication is not authorized by a candidate committee, the disclaimer must “clearly state the  
14 full name and permanent street address, telephone number, or World Wide Web address of the  
15 person who paid for the communication, and that the communication is not authorized by any  
16 candidate or candidate’s committee.” 11 C.F.R. § 110.11(b)(3); *see also* 2 U.S.C. § 441d(a)(3).  
17 Every disclaimer “must be presented in a clear and conspicuous manner, to give the reader . . .  
18 adequate notice of the identity” of the ad’s sponsor. 11 C.F.R. § 110.11(c)(1).

19       The Commission’s regulations contain several exceptions to these general disclaimer  
20 requirements. *See* 11 C.F.R. § 110.11(e)-(f). Revolution Messaging’s request potentially  
21 implicates two of these exceptions. First, a disclaimer is not required on “[b]umper stickers,  
22 pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently

1 printed.” 11 C.F.R. § 110.11(f)(1)(i) (the “small items exception”). Second, the disclaimer  
2 requirements do not apply to “[s]kywriting, water towers, wearing apparel, or other means of  
3 displaying an advertisement of such a nature that the inclusion of a disclaimer would be  
4 impracticable.” 11 C.F.R. § 110.11(f)(1)(ii) (the “impracticability exception”).

5 Under the small items exception, “practicality (or ‘convenience’ in the regulatory  
6 vernacular) is the critical factor in determining the exception’s applicability; size is not  
7 dispositive.” *See* Statement of Reasons of Vice Chairman Darryl R. Wold, and Commissioners  
8 Lee Ann Elliott, David M. Mason, Danny L. McDonald, and Karl J. Sandstrom at 2, MUR 4791  
9 (Ryan for Congress) (“SOR”). In Advisory Opinion 2002-09 (Target Wireless), the Commission  
10 determined that the small items exception applied to character-restricted short messaging service  
11 (“SMS”) messages in which political advertising was appended to content such as sports scores  
12 or news alerts. Advisory Opinion 2002-09 (Target Wireless) at 1-2. Under SMS technology at  
13 that time, messages were limited to 160 total characters. *Id.* at 2. The Commission reasoned that  
14 this limitation was equivalent to the inherent size and content restrictions of bumper stickers and  
15 the other the items enumerated in the small items exception. *Id.* at 4.

16 Subsequently, in Advisory Opinion 2010-19 (Google), the Commission considered the  
17 application of the Act’s disclaimer requirements to Google’s AdWords program. As described in  
18 that advisory opinion request, the AdWords program presented online text ads in a fixed,  
19 character-limited format with a hyperlink to a landing page; the ads themselves did not contain  
20 disclaimers, but the landing pages did. *Id.* at 2. The Commission concluded that the proposal  
21 “under the circumstances described . . . [was] not in violation of the Act or Commission  
22 regulations,” but the Commission did not approve by four affirmative votes a specific conclusion



1 regarding whether AdWords qualified for the small items or impracticability exception. *Id.* at 2.  
2 Three Commissioners would have concluded that, because the proposed ads provided a link to  
3 the “committee sponsor’s website and a landing page that contains a full disclaimer,” Google  
4 would have satisfied the Act. *See* Concurring Statement of Vice Chair Cynthia L. Bauerly,  
5 Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub at 2, Advisory Opinion  
6 2010-19 (Google). Three Commissioners would have concluded that Google’s ads qualified for  
7 the impracticability exception. *See* Concurring Statement of Chairman Matthew S. Petersen,  
8 Advisory Opinion 2010-19 (Google).<sup>4</sup>

9 For purposes of the small items exception, Revolution Messaging’s proposed  
10 advertisements are equivalent to the advertisements at issue in Advisory Opinion 2002-09  
11 (Target Wireless). Like the character restrictions in that opinion, the pixel restrictions of the  
12 proposed advertisements necessarily limit the amount of legible text they can contain. For  
13 instance, the requestor provides an example showing a non-authorized committee disclaimer  
14 (“Paid for by ABC PAC, www.abcpac.com. Not authorized by any candidate or candidate’s  
15 committee.”) in a banner ad; this disclaimer consumes almost the entire lower half of the image  
16 and leaves very little space for the advertising text, which is reduced to the three-word message  
17 “VOTE NOV. 6” and a small encouragement to “click here to find your polling location.” *See*  
18 Advisory Opinion Request at 5. Revolution Messaging would not be able to meaningfully  
19 reduce the size of the disclaimer, as it is already in a font so compressed that it challenges  
20 readability, and the pixel limitations prevent Revolution Messaging from increasing the size or  
21 detail of the image to insert more material. Thus, as in Advisory Opinion 2002-09 (Target

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<sup>4</sup> 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 Wireless), it is not “practical,” SOR at 2, for a political advertisement to include the mandated  
2 disclaimer without shrinking the political portion of the message to its barest minimum, thereby  
3 compromising its effectiveness.

4           Importantly, the pixel limitation that restricts the banner ads’ content is an externally  
5 imposed, industry-wide technological standard. The Interactive Advertising Bureau (not  
6 Revolution Messaging) has established pixel limitations to ensure that mobile phone  
7 advertisements appear uniformly across differently-sized phones, just as Target Wireless “ha[d]  
8 no influence” over the industry-wide 160-character limit on SMS messages that was necessary to  
9 account for technological limitations on mobile phones and mobile communications in 2002.  
10 *See* Comment of Target Wireless, Advisory Opinion 2002-09 (Aug. 21, 2002). The externality  
11 of the restriction distinguishes Revolution Messaging’s request from Advisory Opinion Requests  
12 2010-19 (Google) and 2011-09 (Facebook): Unlike Google and Facebook, Revolution  
13 Messaging cannot simply change the specifications of the advertising to provide adequate space  
14 for disclaimers.<sup>5</sup>

15           In sum, the advertisements here are “limited in [their] size and length” by external  
16 technological rules that significantly restrict the “messages that they are able to contain.”  
17 Advisory Opinion 2002-09 (Target Wireless) at 4. Because these restrictions render the  
18 inclusion of a public communications disclaimer impractical, the proposed mobile phone

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<sup>5</sup>           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.

1 advertisements qualify for the small items exception. Accordingly, the Commission concludes  
2 that the mobile phone advertisements that Revolution Messaging proposes to design and place  
3 for federal political committees and other persons are exempt from disclaimer requirements  
4 under 11 C.F.R. § 110.11(f)(1).<sup>6</sup>

5 This response constitutes an advisory opinion concerning the application of the Act and  
6 Commission regulations to the specific transaction or activity set forth in your request. *See* 2  
7 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or  
8 assumptions presented, and such facts or assumptions are material to a conclusion presented in  
9 this advisory opinion, then the requestor may not rely on that conclusion as support for its  
10 proposed activity. Any person involved in any specific transaction or activity which is  
11 indistinguishable in all its material aspects from the transaction or activity with respect to which  
12 this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C.  
13 § 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be  
14 affected by subsequent developments in the law including, but not limited to, statutes,  
15 regulations, advisory opinions, and case law. The advisory opinions cited herein are available on  
16 the Commission's website.

17 On behalf of the Commission,  
18  
19

20  
21 Ellen L. Weintraub  
22 Chair  
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<sup>6</sup> 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).