MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson
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Subject: AO 2013-18 (Revolution Messaging, LLC) Revised Draft A

February 21, 2014

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 12:00 pm (Eastern Time) on February 26, 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
Dear Mr. Sandler, Mr. Reiff, Ms. Howard, and Ms. Lindenbaum:

We are responding to your advisory opinion request on behalf of Revolution Messaging, LLC. Revolution Messaging asks about the application of the Federal Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to a proposal to design and place mobile phone “banner” advertisements for federal political committees and other persons. The Commission concludes that the proposed mobile phone advertisements are not exempt from the Act’s disclaimer requirements and that Revolution Messaging’s proposal does not satisfy those requirements through alternative means.

Background

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

Revolution Messaging is a limited liability company organized under District of Columbia law. It specializes in providing mobile communications, strategies, content, and text messaging services to progressive non-profit organizations, labor organizations, and Democratic federal and state political committees and organizations. Revolution Messaging creates mobile and digital messaging strategies on behalf of its clients, including creating the content of and placing mobile phone advertisements.
Revolution Messaging has been contracted to place mobile phone advertisements by various clients, which include federal committees and labor organizations, some of whom wish to make independent expenditures through mobile phone advertising. Revolution Messaging has encountered several mobile phone advertising vendors that refuse to accept these advertisements unless a disclaimer is included.

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

The size and content of mobile phone advertisements are limited by (1) the size of the mobile phone on which the advertisement appears, and (2) the number of pixels available for a particular mobile phone advertisement.² Because the physical size of mobile phones differs between models, mobile phone advertisements are not measured, priced, or purchased based on their physical size. Rather, to provide advertisers with the ability to create and purchase advertisements that appear uniformly on various mobile phones, the Interactive Advertising Bureau’s industry standards for mobile phone advertisements establish a maximum number of 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. With
that advertisements do not appear blurry, regardless of the type of mobile phone on which they appear. Because of the pixel limitations, however, attempting to include too much content in an image may reduce the image’s overall quality and clarity.

Revolution Messaging’s proposed advertisements would be images placed as “banner ads.” The Interactive Advertising Bureau’s mobile phone guidelines include five categories of image banner ads, the smallest of which is limited to 120 x 20 pixels, and the largest of which is limited to 320 x 50 pixels. The guidelines also include standards for advertisements larger than 320 x 50 pixels. For example, a “Smartphone Static Interstitial” advertisement has maximum dimensions of 320 x 250 pixels, and “Rich Media/Expandable” advertisements can be enlarged to 320 x 416 pixels.

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

Revolution Messaging proposes to “identify the advertiser” in all of its mobile phone advertisements. AOR Supp. at 2. Under this proposal, any mobile phone advertisement will link

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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]increased dimensions” of 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.
to an adviser’s website\textsuperscript{4} and/or will itself include “some clear identification” of the adviser.

\textit{Id.} at 1-2. For instance, if an authorized committee’s mobile phone advertisement lacks a link to the authorized committee’s website, Revolution Messaging will ensure that the mobile phone advertisement includes the committee’s name or logo or otherwise “make[s] clear that the committee is the sponsor within the ad language.” \textit{Id.} at 2. Similarly, if the advertiser is an unauthorized committee, the mobile phone advertisement will include “the name or a recognizable abbreviation of the name of the PAC” or the committee’s logo. \textit{Id.} And if the advertiser is a person other than a political committee, the mobile phone advertisement will include a “clear identification . . . with the words ‘paid by.’” \textit{Id.}

\textbf{Question Presented}

\begin{quote}
\textit{Are the advertisements described in the request exempt from the disclaimer requirements of the Act and Commission regulations under either the small items or, in the alternative, the impracticability exception, and, if not, do the advertisements satisfy the disclaimer requirements?}
\end{quote}

\textbf{Legal Analysis and Conclusion}

No, the proposed mobile phone advertisements do not qualify for either the small items exception or the impracticability exception and therefore require disclaimers under the Act and Commission regulations. And while the disclaimer requirements may be satisfied through

\footnote{\textsuperscript{4} All political committee websites available to the general public must include disclaimers. 11 C.F.R. § 110.11(a)(1). The Commission therefore assumes that any political committee’s website to which a mobile phone advertisement links will include the “full disclaimer meeting the requirements of [Commission regulations].” Concurring Statement of Vice Chair Cynthia L. Bauerly, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub at 2, Advisory Opinion 2010-19 (Google). This assumption does not apply to the websites of persons other than political committees, however, because persons other than political committees are not necessarily required to include disclaimers on their websites. \textit{See} 11 C.F.R. § 110.11(a).}
alternative means, see Advisory Opinion 2010-19 (Google), Revolution Messaging’s proposal here does not suffice.

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

If a candidate committee pays for and authorizes the public communication, the disclaimer must state that the communication “has been paid for by the authorized political committee.” 11 C.F.R. § 110.11(b)(1); see also 2 U.S.C. § 441d(a)(1). If a public communication is authorized by a candidate committee but paid for by someone else, the disclaimer must state who paid for the communication and that the candidate committee authorized it. See 11 C.F.R. § 110.11(b)(2); see also 2 U.S.C. § 441d(a)(2). If the communication is not authorized by a candidate committee, the disclaimer must “clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate’s committee.” 11 C.F.R. § 110.11(b)(3); see also 2 U.S.C. § 441d(a)(3).

Every disclaimer “must be presented in a clear and conspicuous manner, to give the reader . . . adequate notice of the identity” of the ad’s sponsor. 11 C.F.R. § 110.11(c)(1).

The Commission’s regulations contain several exceptions to these general disclaimer requirements. See 11 C.F.R. § 110.11(e)-(f). Revolution Messaging’s request potentially
implicates two of these exceptions. First, a disclaimer is not required on “[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)(1)(i) (the “small items exception”). Second, the disclaimer requirements do not apply to “[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable.” 11 C.F.R. § 110.11(f)(1)(ii) (the “impracticability exception”).

Small Items Exception

The Commission has applied the small items exception to the public communication disclaimer requirements in situations where a disclaimer simply would not fit in the space provided based on the physical limitations of the item or a technological constraint. See Advisory Opinion 1980-42 (Hart) (applying the exception to concert tickets); Advisory Opinion 2002-09 (Target Wireless) (applying the exception to “short messaging service” communications distributed through a wireless telecommunications network). Despite its name, the Commission has previously indicated that the size of an item on which an advertisement is placed is “not dispositive” when applying the small items exception; rather “practicality (or ‘convenience,’ in the regulatory vernacular) is the critical factor in determining the exception’s applicability.” See Statement of Reasons of Vice Chairman Darryl R. Wold, and Commissioners Lee Ann Elliott, David M. Mason, Danny L. McDonald, and Karl J. Sandstrom at 2, MUR 4791 (Ryan for Congress).

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

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

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

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

*Impracticability Exception*

The impracticability exception provides that, in addition to skywriting, water towers, and
wearing apparel, disclaimers need not be printed on “other means of displaying an advertisement
of such a nature that the inclusion of a disclaimer would be impracticable.” 11 C.F.R.
§ 110.11(f)(1)(ii) (emphasis added). Thus, although the list of communications in the rule is not
exhaustive, the exception applies only where the very nature of a communication medium
renders disclaimers impracticable. In the two advisory opinions in which the Commission has
analyzed the impracticability exception outside of those media enumerated at 11 C.F.R.
§ 110.11(f)(1)(ii), the Commission has declined to exempt the communications. See Advisory
Opinion 2007-33 (Club for Growth PAC); Advisory Opinion 2004-10 (Metro Networks).

In the case of Revolution Messaging’s proposed advertisements, the advertising medium
is images displayed on mobile phones. As discussed above, there are no physical or
technological limitations of either that medium or mobile phone technology that would make it
inherently impracticable to include a disclaimer within mobile phone image advertisements.

Accordingly, the Commission concludes that the impracticability exception does not apply to the
proposed mobile phone advertisements.

Delivery of Disclaimers Through Alternative Methods

Because neither exception discussed above applies, Revolution Messaging’s advertisements require disclaimers. Nonetheless, the Commission notes that the Act and Commission regulations need not be barriers to technological innovation and creative forms of advertising. Rather than stifling campaign advocacy, technological innovation may promote compliance with campaign finance laws. For example, the California Fair Political Practices Commission has promulgated regulations regarding paid campaign advertisements to squarely address the issue of disclaimers in electronic media advertisements that are limited in size. See Cal. Code Regs. tit. 2, § 18450.4. Instead of granting a blanket exemption from complying with disclaimer requirements for small advertisements, the California regulation provides that small advertisements may use technological features such as rollover displays, links to a webpage, or “other technological means” to meet disclosure requirements. See id. § 18450.4(b)(3)(G)(i).

The Commission is similarly open to the development and use of other technological means of providing required disclaimer information in a format consistent with the way data is delivered to mobile phones. Thus, in situations where traditional delivery of a required disclaimer would be unwieldy, the Commission, while not granting an exemption from disclaimer requirements, has allowed the disclaimer to be delivered in an alternative fashion. See Advisory Opinion 2004-01 (Bush/Kerr) at 6-7 (permitting one of two authorizing candidates to deliver oral disclaimer on behalf of both candidates); Advisory Opinion 2004-10 (Metro Networks) (permitting reporter, rather than candidate, to deliver oral disclaimer where reporter read ad live from a helicopter); Advisory Opinion 2004-37 (Waters) at 6 (permitting written disclaimer to refer to authorizing candidates’ names printed elsewhere in mailing rather than re-
stating each name in disclaimer); see also Advisory Opinion 2010-19 (Google) (concluding that character-limited advertisements that directed users to landing page with a disclaimer would “not [be] in violation of the Act or Commission regulations”).

Revolution Messaging, however, does not propose an alternative method of delivering a disclaimer. Rather, the proposal here is similar to the one considered in Advisory Opinion 2007-33 (Club for Growth PAC), as the proposal entails “dispensing with, or truncating” the disclaimer. Advisory Opinion 2007-33 (Club for Growth PAC) at 4. Revolution Messaging’s proposed mobile phone advertisements lack the essential identifying information that 2 U.S.C. § 441d(a) requires to be provided to the public about the source of the advertisement. As to political committee ads, Revolution Messaging’s proposal — to include the committee’s logo or a “recognizable” abbreviation of its name in the advertisement itself — would not serve to “clearly state” who paid for and, if relevant, who authorized the communication. Standing alone, a mere logo does not ensure “adequate notice of the identity of the person or political committee that paid for and, where required, authorized the communication.” 11 C.F.R. § 110.11(c)(1).

And a recognizable abbreviation is similarly insufficient; indeed, even political committees that may “use a clearly recognized abbreviation or acronym” as a shortened form of their names, see 11 C.F.R. § 102.14(c), must nonetheless include both their full names and their shortened names “in any disclaimers required by section 110.11.” Advisory Opinion 2013-13 (Freshman Hold’em).

As to mobile phone advertisements by persons other than political committees,

Revolution Messaging proposes to include either a link to the person’s website or to identify the advertiser with the phrase “paid by.” That proposal also falls short of the statutory and regulatory requirements, which require such communications to include the “address, telephone
number or [URL]” of the payor and to “state that the communication is not authorized by any
candidate or candidate’s committee,” in addition to including the payor’s name. 2 U.S.C.
§ 441d(a)(3); 11 C.F.R. § 110.11(b)(3); see also Advisory Opinion 2011-14 (Utah Bankers
Association Action PAC) (finding disclaimer proposed by unauthorized committee insufficient
because disclaimer did not expressly identify payor and payor’s address, telephone number, or
website). Further, persons other than political committees are not necessarily required to include
disclaimers on websites available to the general public. See 11 C.F.R. § 110.11(a). Thus, links
in mobile phone advertisements to the websites of such persons may or may not take users to a
landing page with a disclaimer consistent with the Act and Commission regulations.

The Commission notes that, as in Advisory Opinion 2010-19 (Google), some of the
proposed static banner advertisements will link to sites that contain the disclaimers required by
11 C.F.R. § 110.11. For small mobile phone advertisements that, when selected, take the phone
user directly to a site with a complete disclaimer for the advertisement, the disclaimer
requirement would be satisfied. And that is not the only way to satisfy the disclaimer
requirement: Rich media, animated (i.e., non-static), or expandable advertisements that contain
the information required by 11 C.F.R. § 110.11 may also comply with the Act and Commission
regulations, as may other technological means of providing the required information. The
essential requirement is that the viewer of the ad receive identifying information about the source
of the advertisement, as required by 2 U.S.C. § 441d(a). This conclusion furthers the
Commission’s policy and practice of “interpret[ing] the Act and its regulations in a manner
consistent with contemporary technological innovations . . . where the use of the technology
would not compromise the intent of the Act or regulations.” Advisory Opinion 1999-09
(Bradley for President).
This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. § 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. See 2 U.S.C. § 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. The advisory opinions cited herein are available on the Commission’s website.

On behalf of the Commission,

Lee E. Goodman
Chairman