

RECEIVED

By Commission Secretary's Office at 3:36 pm, Feb 21, 2014



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 13-50-A
AGENDA ITEM
For meeting of 2/27/14
[SUBMITTED LATE]

February 21, 2014

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LS by GMB*
Deputy General Counsel

Adav Noti *AN by GMB*
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 A

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

1 ADVISORY OPINION 2013-18

2

3 Joseph E. Sandler, Esq.

4 Neil P. Reiff, Esq.

5 Elizabeth L. Howard, Esq.

6 Dara S. Lindenbaum, Esq.

7 Sandler, Reiff, Young & Lamb, P.C.

8 1025 Vermont Ave., N.W., Suite 300

9 Washington, D.C. 20005

REVISED DRAFT A

10

11 Dear Mr. Sandler, Mr. Reiff, Ms. Howard, and Ms. Lindenbaum:

12 We are responding to your advisory opinion request on behalf of Revolution Messaging,
13 LLC. Revolution Messaging asks about the application of the Federal Election Campaign Act of
14 1971, as amended (the “Act”), and Commission regulations to a proposal to design and place
15 mobile phone “banner” advertisements for federal political committees and other persons. The
16 Commission concludes that the proposed mobile phone advertisements are not exempt from the
17 Act’s disclaimer requirements and that Revolution Messaging’s proposal does not satisfy those
18 requirements through alternative means.

19 ***Background***

20 The facts presented in this advisory opinion are based on your letter received on
21 September 11, 2013, your email dated October 23, 2013, and your supplement dated February 3,
22 2014 (“AOR Supp.”).

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

1 Revolution Messaging has been contracted to place mobile phone advertisements by
2 various clients, which include federal committees and labor organizations, some of whom wish
3 to make independent expenditures through mobile phone advertising. Revolution Messaging has
4 encountered several mobile phone advertising vendors that refuse to accept these advertisements
5 unless a disclaimer is included.

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

11 The size and content of mobile phone advertisements are limited by (1) the size of the
12 mobile phone on which the advertisement appears, and (2) the number of pixels available for a
13 particular mobile phone advertisement.² Because the physical size of mobile phones differs
14 between models, mobile phone advertisements are not measured, priced, or purchased based on
15 their physical size. Rather, to provide advertisers with the ability to create and purchase
16 advertisements that appear uniformly on various mobile phones, the Interactive Advertising
17 Bureau's industry standards for mobile phone advertisements establish a maximum number of
18 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

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

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 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 to an advertiser’s website⁴ and/or will itself include “some clear identification” of the advertiser.
2 *Id.* at 1-2. For instance, if an authorized committee’s mobile phone advertisement lacks a link to
3 the authorized committee’s website, Revolution Messaging will ensure that the mobile phone
4 advertisement includes the committee’s name or logo or otherwise “make[s] clear that the
5 committee is the sponsor within the ad language.” *Id.* at 2. Similarly, if the advertiser is an
6 unauthorized committee, the mobile phone advertisement will include “the name or a
7 recognizable abbreviation of the name of the PAC” or the committee’s logo. *Id.* And if the
8 advertiser is a person other than a political committee, the mobile phone advertisement will
9 include a “clear identification . . . with the words ‘paid by.’” *Id.*

10 ***Question Presented***

11 *Are the advertisements described in the request exempt from the disclaimer requirements*
12 *of the Act and Commission regulations under either the small items or, in the alternative, the*
13 *impracticability exception, and, if not, do the advertisements satisfy the disclaimer*
14 *requirements?*

15 ***Legal Analysis and Conclusion***

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

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. *See* 11 C.F.R. § 110.11(a).

1 alternative means, *see* Advisory Opinion 2010-19 (Google), Revolution Messaging’s proposal
2 here does not suffice.

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

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

22 The Commission’s regulations contain several exceptions to these general disclaimer
23 requirements. *See* 11 C.F.R. § 110.11(e)-(f). Revolution Messaging’s request potentially

1 implicates two of these exceptions. First, a disclaimer is not required on “[b]umper stickers,
2 pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently
3 printed.” 11 C.F.R. § 110.11(f)(1)(i) (the “small items exception”). Second, the disclaimer
4 requirements do not apply to “[s]kywriting, water towers, wearing apparel, or other means of
5 displaying an advertisement of such a nature that the inclusion of a disclaimer would be
6 impracticable.” 11 C.F.R. § 110.11(f)(1)(ii) (the “impracticability exception”).

7 *Small Items Exception*

8 The Commission has applied the small items exception to the public communication
9 disclaimer requirements in situations where a disclaimer simply would not fit in the space
10 provided based on the physical limitations of the item or a technological constraint. *See*
11 *Advisory Opinion 1980-42 (Hart)* (applying the exception to concert tickets); *Advisory Opinion*
12 *2002-09 (Target Wireless)* (applying the exception to “short messaging service” communications
13 distributed through a wireless telecommunications network). Despite its name, the Commission
14 has previously indicated that the size of an item on which an advertisement is placed is “not
15 dispositive” when applying the small items exception; rather “practicality (or ‘convenience,’ in
16 the regulatory vernacular) is the critical factor in determining the exception’s applicability.” *See*
17 *Statement of Reasons of Vice Chairman Darryl R. Wold, and Commissioners Lee Ann Elliott,*
18 *David M. Mason, Danny L. McDonald, and Karl J. Sandstrom at 2, MUR 4791 (Ryan for*
19 *Congress).*

20 Revolution Messaging’s request bears a surface resemblance to *Advisory Opinion 2002-*
21 *09 (Target Wireless)*. There, the requestor asked whether disclaimers were required in short
22 messaging service (“SMS”) messages that bore a sponsorship message from a political
23 committee. At the time, nationwide SMS technological standards limited the total content of

1 each message to 160 characters. The Commission determined that the small items exception
2 applied, emphasizing the limits on the information that could be conveyed in 160 characters and
3 concluding that “the SMS technology places similar limits on the length of a political
4 advertisement as those that exist with bumper stickers.” Advisory Opinion 2002-09 (Target
5 Wireless) at 4.

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

18 In contrast to the technological limitations faced by Target Wireless, Revolution
19 Messaging’s proposal is more similar to the facts the Commission considered in Advisory
20 Opinion 2007-33 (Club for Growth PAC). There, the requestor proposed to purchase short ten-
21 and fifteen-second television advertisements and asked the Commission whether the requestor
22 could “dispense with” or “truncate” certain required spoken disclaimers given the short length of
23 the proposed advertisements. In response, the Commission indicated that the short length of the

1 proposed advertisements was not driven by any physical or technological limitations intrinsic to
2 television advertising and declined to exempt Club for Growth PAC's ten- and fifteen-second
3 television advertisements from the spoken disclaimer requirements. *See id.* at 3-4 (distinguishing
4 Advisory Opinion 2002-09 (Target Wireless)).

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

9 *Impracticability Exception*

10 The impracticability exception provides that, in addition to skywriting, water towers, and
11 wearing apparel, disclaimers need not be printed on "other means of displaying an advertisement
12 *of such a nature* that the inclusion of a disclaimer would be impracticable." 11 C.F.R.
13 § 110.11(f)(1)(ii) (emphasis added). Thus, although the list of communications in the rule is not
14 exhaustive, the exception applies only where the very nature of a communication medium
15 renders disclaimers impracticable. In the two advisory opinions in which the Commission has
16 analyzed the impracticability exception outside of those media enumerated at 11 C.F.R.
17 § 110.11(f)(1)(ii), the Commission has declined to exempt the communications. *See* Advisory
18 Opinion 2007-33 (Club for Growth PAC); Advisory Opinion 2004-10 (Metro Networks).

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

1 proposed mobile phone advertisements.

2 *Delivery of Disclaimers Through Alternative Methods*

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

14 The Commission is similarly open to the development and use of other technological
15 means of providing required disclaimer information in a format consistent with the way data is
16 delivered to mobile phones. Thus, in situations where traditional delivery of a required
17 disclaimer would be unwieldy, the Commission, while not granting an exemption from
18 disclaimer requirements, has allowed the disclaimer to be delivered in an alternative fashion. *See*
19 Advisory Opinion 2004-01 (Bush/Kerr) at 6-7 (permitting one of two authorizing candidates to
20 deliver oral disclaimer on behalf of both candidates); Advisory Opinion 2004-10 (Metro
21 Networks) (permitting reporter, rather than candidate, to deliver oral disclaimer where reporter
22 read ad live from a helicopter); Advisory Opinion 2004-37 (Waters) at 6 (permitting written
23 disclaimer to refer to authorizing candidates' names printed elsewhere in mailing rather than re-

1 stating each name in disclaimer); *see also* Advisory Opinion 2010-19 (Google) (concluding that
2 character-limited advertisements that directed users to landing page with a disclaimer would “not
3 [be] in violation of the Act or Commission regulations”).

4 Revolution Messaging, however, does not propose an alternative method of delivering a
5 disclaimer. Rather, the proposal here is similar to the one considered in Advisory Opinion 2007-
6 33 (Club for Growth PAC), as the proposal entails “dispensing with, or truncating” the
7 disclaimer. Advisory Opinion 2007-33 (Club for Growth PAC) at 4. Revolution Messaging’s
8 proposed mobile phone advertisements lack the essential identifying information that 2 U.S.C.
9 § 441d(a) requires to be provided to the public about the source of the advertisement. As to
10 political committee ads, Revolution Messaging’s proposal — to include the committee’s logo or
11 a “recognizable” abbreviation of its name in the advertisement itself — would not serve to
12 “clearly state” who paid for and, if relevant, who authorized the communication. Standing alone,
13 a mere logo does not ensure “adequate notice of the identity of the person or political committee
14 that paid for and, where required, authorized the communication.” 11 C.F.R. § 110.11(c)(1).
15 And a recognizable abbreviation is similarly insufficient; indeed, even political committees that
16 may “use a clearly recognized abbreviation or acronym” as a shortened form of their names, *see*
17 11 C.F.R. § 102.14(c), must nonetheless include both their full names and their shortened names
18 “in any disclaimers required by section 110.11.” Advisory Opinion 2013-13 (Freshman
19 Hold’em).

20 As to mobile phone advertisements by persons other than political committees,
21 Revolution Messaging proposes to include either a link to the person’s website or to identify the
22 advertiser with the phrase “paid by.” That proposal also falls short of the statutory and
23 regulatory requirements, which require such communications to include the “address, telephone

1 number or [URL]” of the payor and to “state that the communication is not authorized by any
2 candidate or candidate’s committee,” in addition to including the payor’s name. 2 U.S.C.
3 § 441d(a)(3); 11 C.F.R. § 110.11(b)(3); *see also* Advisory Opinion 2011-14 (Utah Bankers
4 Association Action PAC) (finding disclaimer proposed by unauthorized committee insufficient
5 because disclaimer did not expressly identify payor and payor’s address, telephone number, or
6 website). Further, persons other than political committees are not necessarily required to include
7 disclaimers on websites available to the general public. *See* 11 C.F.R. § 110.11(a). Thus, links
8 in mobile phone advertisements to the websites of such persons may or may not take users to a
9 landing page with a disclaimer consistent with the Act and Commission regulations.

10 The Commission notes that, as in Advisory Opinion 2010-19 (Google), some of the
11 proposed static banner advertisements will link to sites that contain the disclaimers required by
12 11 C.F.R. § 110.11. For small mobile phone advertisements that, when selected, take the phone
13 user directly to a site with a complete disclaimer for the advertisement, the disclaimer
14 requirement would be satisfied. And that is not the only way to satisfy the disclaimer
15 requirement: Rich media, animated (i.e., non-static), or expandable advertisements that contain
16 the information required by 11 C.F.R. § 110.11 may also comply with the Act and Commission
17 regulations, as may other technological means of providing the required information. The
18 essential requirement is that the viewer of the ad receive identifying information about the source
19 of the advertisement, as required by 2 U.S.C. § 441d(a). This conclusion furthers the
20 Commission’s policy and practice of “interpret[ing] the Act and its regulations in a manner
21 consistent with contemporary technological innovations . . . where the use of the technology
22 would not compromise the intent of the Act or regulations.” Advisory Opinion 1999-09
23 (Bradley for President).

