

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

AOR 2013-18

September 11, 2013

Via Hand Delivery

Lisa Stevenson, Esq.  
Deputy General Counsel  
Federal Election Commission  
999 E Street N.W.  
Washington, D.C. 20463

Re: **Advisory Opinion Request**

Dear Ms. Stevenson:

Pursuant to 2 U.S.C. §437f and the Commission's rules, 11 C.F.R. §112.1, we are writing on behalf of our client, Revolution Messaging, LLC ("Revolution Messaging") to request an advisory opinion regarding the applicability of the "small items" and "impracticable" exemptions to the disclaimer requirements under the Federal Election Campaign Act and Commission regulations to mobile phone advertisements.

**I. Revolution Messaging**

Revolution Messaging, a District of Columbia limited liability company, is a full-service digital technology and strategy company, specializing in the provision of mobile communications strategies, content, and text messaging services to progressive non-profit organizations, labor organizations, and Democratic federal and state political committees, including candidates for federal office, and other organizations. Revolution Messaging creates mobile and digital messaging strategies on behalf of its clients, including creating the content of, placing and providing mobile advertisements.

Revolution Messaging has been contracted to place and provide mobile advertisements by various clients, including federal committees and labor organizations. Some of these clients wish to use mobile advertising for independent expenditures as defined by 2. U.S.C. § 431(17). Although some of Revolution Messaging's clients' mobile advertisements will link to sites which contain a disclaimer, some will not.

Revolution Messaging has encountered several mobile advertising vendors that refuse to accept these ads unless a disclaimer is included. As discussed below, given the physical size constraints of the mobile advertisements and the technology involved, it is not possible to include a disclaimer that complies with Commission regulations in these advertisements. Thus, these clients will be prevented from placing mobile advertisements that contain express advocacy unless the Commission clarifies that these small mobile advertisements are exempt from disclaimer requirements.

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
2013 SEP 20 13 9 11 AM '13  
OFFICE OF GENERAL COUNSEL

## II. Mobile Advertisements

Mobile phone advertisements appear on mobile phones when a user accesses certain content on their mobile phones. Frequently, these ads appear when users access free mobile phone applications and appear at the top or bottom of the mobile phone screen in tandem with the actual application content. In addition, these mobile advertisements may appear on a portion of the screen when a user accesses certain web sites.

Mobile advertisements are subject to size and content limitations based on two distinct criteria: 1) the size of the mobile phone on which the advertisement appears, and 2) the number of pixels available for a particular mobile advertisement.

Although today's top selling mobile phones are more advanced than ever, in order to retain their utility, physical size limitations exist. 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 the width of the display and provides an "aspect ratio" (the ratio between the vertical and horizontal size) in addition to physical size. Today's most common mobile phones measure 5 inches diagonally or less. Specifically, the iPhone 5 measures 4 inches diagonally; the Samsung Galaxy S4 measures 5 inches diagonally; and the Blackberry 10 measures 4.2 inches diagonally. Of course, mobile phone advertisements will appear even smaller than the full screen size of the mobile phone.

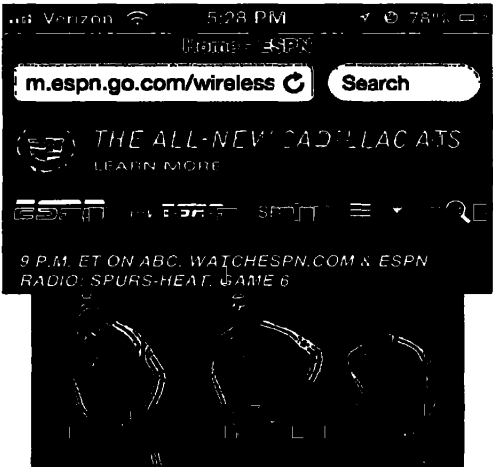
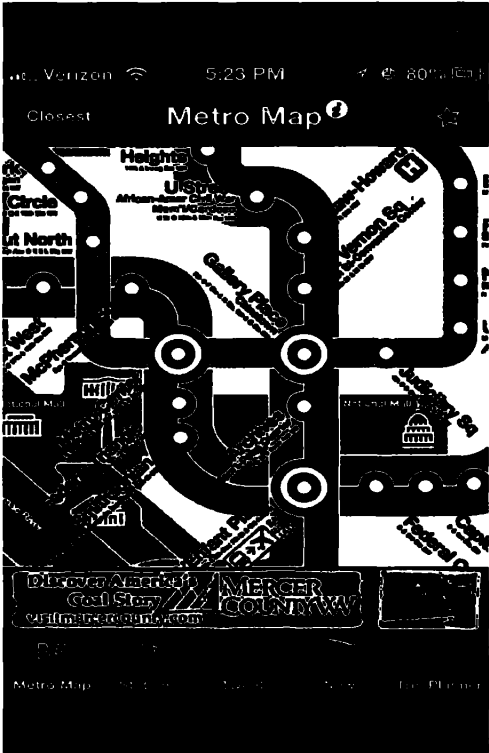
As the physical size of the various mobile phones varies, mobile advertisements are not measured, priced or purchased based on physical size. To provide advertisers with the ability to create and purchase advertisements that will appear uniformly on various mobile phones, the Interactive Advertising Bureau ("IAB") created industry standards for mobile phone advertisements.<sup>1</sup> These industry standards measure mobile advertisements' dimensions by the width and height of pixels available.

A pixel is the building block upon which mobile images are created. The more pixels an image has, the more detailed the image can be rendered. Pixel limitations restrict the possible content of an advertisement - as each graphic or piece of content requires a certain number of pixels - which will vary based on several factors, including the crispness of the image, the number of colors used, and the amount of detail included in a graphic. These pixel limitations are similar to character limitations in that pixel limitations curtail the amount of content which can be included in an advertisement.

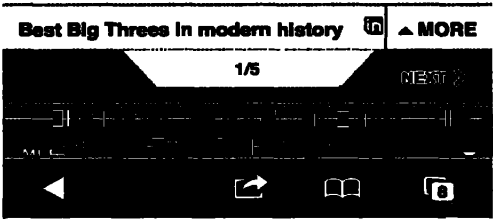
IAB's Mobile Phone Creative Guidelines limit the dimensions of the largest available advertisement to 320 x 50 pixels. These ads, often referred to as "banner ads," generally appear across the top of a mobile phone's screen. See true-to-size examples of these banner advertisements below:

---

<sup>1</sup> These guidelines are available at <http://www.iab.net/guidelines/508676/508767/mobileguidelines>.



**Living On The Edge**  
Like it or not, the Miami Heat's stars will be judged harshly if they fall to the Spurs.



These pixel limitations help ensure that advertisements do not appear blurry regardless of the type of mobile phone on which it appears. In addition, attempting to include too much content in a limited pixel graphic may result in an image of reduced quality and clarity. These physical and technological limitations restrict a political advertiser's ability to include a disclaimer on mobile advertisements.

### **III. Legal Discussion**

Pursuant to the Act and Commission regulations, all public communications require a disclaimer. 11 C.F.R. § 110.11. Specifically, all required disclaimers must be "presented in a clear and conspicuous manner... A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked." 11 C.F.R. § 110.11(c). The Commission's regulations establish certain exemptions to this broad disclaimer requirement. Specifically, items, such as "[b]umper stickers, pins, buttons, pens, and similar small items upon which a disclaimer cannot be conveniently printed" are exempt from the disclaimer requirements, 11 C.F.R. § 110.11(f)(1)(i). Also exempt are "water towers, wearing apparel, or other means of displaying a communication an advertisement of such a nature that the inclusion of a disclaimer would be impracticable." 11 C.F.R. § 110.11(f)(1)(ii).

Although the Commission previously concluded that certain limited character advertisements are exempt from the disclaimer requirements, FEC Advisory Opinion 2010-19 (Google), it welcomed "those other entities [with] slightly different concerns and... business models... to submit their requests." (Commission Open Meeting Audio Recording (Sept. 23, 2010) (Statement of Commissioner Weintraub) (starting at 06:25). By submitting this Advisory Opinion Request, Revolution Messaging is requesting the Commission to clarify its regulations and conclude that mobile advertisements which are subject to content restrictions due to the pixel limitations and physical size limitations applicable to mobile phone advertisement qualify for either the "small item" or "impracticable" exemption.

#### **A. Small Item Exemption**

The Commission should conclude that mobile advertisements qualify for the "small items" exemption for several reasons. First, these mobile advertisements are "small" under any reasonable definition of "small." In fact, these advertisements are physically far smaller than other items expressly exempt from the disclaimer requirements due to their physical size, e.g., bumper stickers and pins.<sup>2</sup>

In concluding that text messages qualify for an exemption to the disclaimer requirements under 11 C.F.R. § 110.11(f)(1)(i), the Commission explained these communications are "limited in the size and length of the messages that they are able to contain." Mobile advertisements are subject to almost identical physical "wireless telephone screen [size restrictions which]... limit [] both the size and the length of the information that can be conveyed," applicable to text

---

<sup>2</sup> See Google Request, Advisory Opinion 2010-19 (noting that the "standard political button is 2.25 inches in diameter, though buttons of 3.5 inches in diameter are regularly sold as well.") (citing [http://www.onlineconversion.com/shape\\_area\\_circle.htm](http://www.onlineconversion.com/shape_area_circle.htm)).

messages. Further, the pixel (as opposed to the SMS) technology “places similar limits on the length of a political advertisement as those that exist with bumper stickers.” FEC Advisory Opinion 2002-09 (Target Wireless). Due to these physical size and technological restrictions, these ads are too small to contain a disclaimer which “is not difficult to read.” 11 C.F. R. § 110.11(c).

As the banner ad examples provided in Section II above demonstrate, due to the physical and pixel limitations of these ads, the content is exceptionally limited. This media is too small to include any actual messaging as well as a legible federal disclaimer:

Paid for by ABC PAC, [www.abcpac.com](http://www.abcpac.com). Not authorized by any candidate or candidate’s committee.<sup>3</sup>

The disclaimer alone consists of fourteen words - twice as many as the number of words in the content of the wordiest example above. Specifically, it would take more than 40% of the available pixels to include the required disclaimer (fourteen words) on a banner ad which includes only ten words, such as in the example below.



Even if the Commission were to craft a shorter alternate disclaimer, the number of pixels required to ensure that the disclaimer is legible and easy to read would prevent political advertisers from using mobile advertisements as a medium to communicate with voters. To be sure, these advertisements are too small to include a disclaimer that can be “conveniently printed” because of the physical size limitations and the technological pixel limitations.

<sup>3</sup> 11 C.F.R. § 110.11(b)(3).

### **B. Impracticable Exemption**

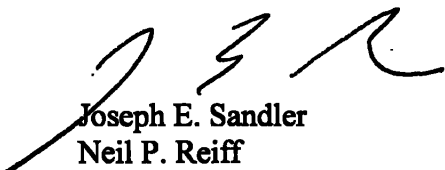
In the alternative, the Commission should conclude that these advertisements qualify as an "advertisement of such nature that the inclusion of a disclaimer would be impracticable." 11 C.F.R. § 110.11(f)(ii). As is clear from the true-to-size mobile advertisement examples in Section II above, even if a significant portion of the available pixels is allocated to the disclaimer, due to the specific restrictions applicable to this communications medium, it is impossible to ensure that a disclaimer complies with the Act.

Further, as the example above demonstrates, even a disclaimer using a significant portion of the available pixels and space cannot clearly meet the Commission's requirements as this disclaimer is easily considered "difficult to read." Therefore, the Commission should clarify that it is impracticable to include disclaimers on these advertisements and thus, these mobile advertisements qualify for an exemption pursuant to 11 C.F.R. § 110.11(f)(1)(ii).

### **IV. Conclusion**

Based upon the factual and legal analysis above, the Commission should conclude that the mobile advertisements that Revolution Messaging and its client seek to place qualify for an exemption to the disclaimer requirements of the Act and the Commission's rules and issue an advisory opinion to this effect.

Sincerely,



Joseph E. Sandler  
Neil P. Reiff  
Elizabeth L. Howard  
Counsel to Revolution Messaging, LLC

Liz Howard

Dear Mr. Lutz: Please find our responses below

10/23/2013 04:52:54 PM

From: Liz Howard <Howard@sandlerreiff.com>  
To: "TLutz@fec.gov" <TLutz@fec.gov>, "Joseph E. Sandler" <sandler@sandlerreiff.com>,  
Cc: "ANoti@fec.gov" <ANoti@fec.gov>, "rkноп@fec.gov" <rkноп@fec.gov>, "NStipanovic@fec.gov" <NStipanovic@fec.gov>  
Date: 10/23/2013 04:52 PM  
Subject: RE: Revolution Messaging Advisory Opinion Request

---

Dear Mr. Lutz:

Please find our responses below:

1. Confirmed.
2. Confirmed.
3. Confirmed.
4. Confirmed.

Do not hesitate to contact us if you need any additional information.

Sincerely,

Elizabeth Howard

Sandler Reiff Young & Lamb, P.C.  
1025 Vermont Avenue NW, Suite 300  
Washington, D.C. 20005  
w. (202) 479 - 1111  
f. (202) 479 - 1115

This message is intended only for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure. If the reader of this message is not the intended recipient or any employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by email. Thank you for your cooperation.

**IRS Circular 230 Disclosure:** To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the

Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

**From:** TLutz@fec.gov [mailto:TLutz@fec.gov]  
**Sent:** Tuesday, October 22, 2013 11:18 AM  
**To:** Joseph E. Sandler; Liz Howard  
**Cc:** ANoti@fec.gov; rknop@fec.gov; NStipanovic@fec.gov  
**Subject:** Fw: Revolution Messaging Advisory Opinion Request

----- Forwarded by Theodore Lutz/FEC/US on 10/22/2013 11:15 AM -----

**From:** Theodore Lutz/FEC/US  
**To:** "Joseph E. Sandler" <sandler@sandlerreiff.com>,  
**Cc:** Neven Stipanovic/FEC/US@FEC, Robert Knop/FEC/US@FEC  
**Date:** 09/26/2013 02:35 PM  
**Subject:** Revolution Messaging Advisory Opinion Request

---

Dear Mr. Sandler:

In our recent telephone conversations, you provided us with additional information regarding the advisory opinion request submitted on behalf of Revolution Messaging. We have set out below our understanding of the new information. Please either confirm the accuracy of these statements or correct any misperceptions.

1. With reference to the IAB Mobile Phone Creative Guidelines chart, Revolution Messaging is asking the Commission to address the options listed in the row entitled "Image" on the IAB chart – except for the smartphone interstitial ad (300x250). Revolution Messaging is not asking the Commission to address the options in the row entitled "Rich Media/Expandable."
2. The advertisements implicated in the request will be embedded in mobile phone applications or websites that, when accessed on a mobile phone, default in their presentation to a mobile phone format. The request therefore does not implicate advertisements placed on websites formatted for viewing on a desktop, laptop, or tablet.
3. The proposed advertisements, when clicked by a user, will either open a website in the phone's browser or prompt the user to make a phone call. Of those advertisements that link to a website, there is no limitation on the websites a user could be directed to (i.e., the advertisement will not necessarily link to a candidate or political committee's website).
4. Revolution Messaging asks the following question: "Are the advertisements described in the request exempted from the disclaimer requirements of the Act and Commission regulations under either the small items or, in the alternative, the impracticability exception?"

We would appreciate your response by email. Your response may be treated as a supplement to the advisory opinion request and, as such, may be placed on the public record. Thank you for your cooperation.

Sincerely,

Theodore M. Lutz  
Office of General Counsel – Policy Division  
Federal Election Commission  
[tlutz@fec.gov](mailto:tlutz@fec.gov) | (202) 694-1650