



January 15, 2014

Via Electronic Filing

Shawn Woodhead Werth
Secretary and Clerk
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: AO 2013-18 (Revolution Messaging, LLC)

Dear Ms. Werth:

Revolution Messaging, LLC, has submitted an Advisory Opinion Request concerning the applicability to mobile phone advertisements of the “small items” and “impracticability” exemptions to the Commission’s general disclaimer requirements. Having reviewed the draft advisory opinions circulated by the Commission’s staff on November 26, 2013, the Center for Competitive Politics (“CCP”) writes to provide its perspective and urge the adoption of Draft B.

As the Request notes, Revolution Messaging was forced to seek the Commission’s guidance because it “has encountered mobile advertising vendors that refuse to accept [its clients’] ads unless a disclaimer is included.” Consequently, “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.”

Both drafts agree that the Request implicates two potential exceptions to the general disclaimer requirements for public communications that expressly advocate the election or defeat of a clearly identified candidate. *See* 11 C.F.R. § 110.11(a)(1), (2) and 110.11(e)-(f). These exceptions are the “small items exception,” which applies to “[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed” and the “impracticability exception” for “[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)(i)-(ii).

It should be noted that neither exception requires that the inclusion of a disclaimer be *impossible*. Draft A in particular notes that, for the small items exception, “practicality (or ‘convenience’ in the regulatory vernacular) is the critical factor in determining the exception’s applicability; size is not dispositive.” See Draft A at 5 (quoting 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)).

Practicality and convenience are two sides of the same coin: the issue is whether the imposition of a disclaimer requirement will render a particular mode of communication too inconvenient for practical use. That is true for a wide range of traditional media, including those listed in the regulations themselves. If it is “impractical” to append a disclaimer to pins and bumper stickers, it is certainly impractical for *smaller* spaces such as mobile phone banner ads.

Draft A avoids this intuitive point by second-guessing the Request, which specifically noted that industry standards “limit the dimensions of the largest available advertisement to 320 x 50 pixels.” This is important since “[t]he externality of the [pixel] restriction” means that “Revolution Messaging cannot simply change the specifications of the advertising to provide adequate space for disclaimers.” Draft B at 7.

Not so, says Draft A:

Revolution Messaging’s mobile phone advertisements can be presented in larger and expandable formats than [sic] 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.”

Put differently, Draft A suggests that, because Revolution Messaging’s clients may purchase a different product, the inclusion of a disclaimer is not “impracticable.”

Of course, that argument also applies to traditional items. Pens containing customizable “larger and expandable formats” are available, such as “banner pens”

that contain a pull-out, printed inset. *See* <http://www.scrollpens.com>.¹ Yet no one suggests that the “small item” exemption cannot apply to ordinary pens because there is a new “technological means of providing required disclaimer information in a format consistent with” modern pen-manufacturing innovation. Such a position would be undeniably silly.

The same is true here. As a practical matter, Draft A ignores the details of the Interactive Advertising Bureau’s (“IAB’s”) guidelines. The largest available “image” ads are 320 x 50 pixels. The other products listed under “Rich Media/Expanded” are different in kind as well as in size. If one clicks on the expandable menu and explores the detailed descriptions of these categories, one finds, for example, that “[f]ull screen [expansion] is dependent on the device model and may be restricted by status bars or navigation menus of the OS, browser and/or application.” Interactive Advertising Bureau, Mobile Phone Creative Guidelines, <http://www.iab.net/guidelines/508676/508676/mobileguidelines>. Draft A cites the “Static Interstitial” option without explaining what that option actually entails, likely because the answer is technical and non-obvious. Apparently, these are essentially full-screen pop-up ads that, according to Google, “immediately present rich HTML5 experiences... at natural app transition points such as launch, video pre-roll[,] or game level load.”² Forbes Media provides a useful example.³

There are a number of reasons Revolution Messaging’s clients may prefer banner ads to these more intrusive, more expensive, differently-situated products. Perhaps their audience has phones that cannot handle “rich HTML5 experiences,” or they wish to advertise on apps that do not have “natural transition points.” CCP, like the FEC, does not have the technical competence to make assumptions on this topic. Revolution Messaging does, which is why it has requested guidance on a particular type of communication.

Technology is constantly in flux, and at some point common-sense regulation should be the norm. If an item is undeniably “small,” and the reproduction of the (unnecessarily wordy) disclaimer is undeniably inconvenient (in both the technical

¹ An image of one of these pens, as it appeared on the company’s website on January 14, 2014, is attached to this comment as Appendix A. The website itself includes a helpful animated demonstration of the concept.

² Google, DoubleClick for Publishers (DFP) Interstitial Ads, <https://developers.google.com/mobile-ads-sdk/docs/dfp/advanced>.

³ Forbes Media, Interstitials, <http://www.forbesmedia.com/interstitials> (“[g]arner 100% user attention; no other elements on the screen to distract users from your message!”).


and ordinary senses of the word), the better approach is to faithfully apply the Commission's regulations and allow the speech while permitting the disclaimer's omission.

The alternative is a situation where the FEC, a body with a very particular expertise that does not extend to the business choices of mobile phone advertisers, attempts to get ahead of both innovation and the market. Speakers will lose, as a practical matter, their preferred means of communicating with the public.⁴

Technology is a tool, nothing more. And while it can certainly provide new means of conveying broadcast advertisements, disclaimer and all, it can also create new versions of traditional items like pencils and bumper stickers. The FEC should not be in the business of requiring mobile advertisers to force full-screen pop-up ads on consumers, simply because this entirely different product exists for some mobile platforms, any more than it should force political campaigns to abandon standard pens now that the Scroll Pen is available.⁵

CCP urges the Commission to adopt Draft B.

Respectfully submitted,



Allen Dickerson
Legal Director

⁴ Of course, even without a disclaimer, any political committee advertiser that spends more than \$200 on independent expenditure ads in a calendar year will need to disclose the expenditures to the FEC. Other persons must report independent expenditures of more than \$250 in a calendar year.

⁵ Other examples exist. *Compare* 11 C.F.R. § 110.11(f)(1)(i) (exempting “wearing apparel” under impracticability exception), *with* <http://www.tex-t.co.uk/> (T-shirt containing “scrolling LED programmable text” with a limit of 512 characters). Which is the point: just because a technological innovation occurs does not make the resulting product a substitute for more traditional means of conveying a simple political message. Nor does it permit the Commission to essentially ban the use of preexisting technologies in favor of later, bulkier, more expensive, less-desirable alternatives. To adopt a rhetorical page from the world of computer programming: the continuing existence of political bumper stickers is a feature, not a bug.

Appendix A

NOW, YOU CAN TURN YOUR CUSTOMER'S INTO A WINNER WITH SCROLL PEN!

Introducing sequential numbering for website and trade show giveaways!



The graphic features a scrollable banner with a dark green background and a scroll pen on the right side. The banner contains the following text:

DOUBLE TREE
by Hilton

GRAND PRIZE
Apple iPad

Your lucky number is:
638156

Check booth #8345 daily
for winning numbers.

Book Your Conference Today By Calling 787-625-312
Or Email Us At reservations@sanjuandoubletree.com

- 184 completely renovated rooms
- Flexible work area & four ample meeting rooms
- Hotel-wide broadband WiFi
- Four excellent onsite restaurants
- Contemporary "Precor" Fitness Center & spa room
- Refreshing pool and whirlpool
- Warm chocolate chip cookie at check in.

The scroll pen is silver and black, with the DoubleTree by Hilton logo and "HONORS" branding on the scrollable part.