February 25, 2014

By Electronic Mail

Lisa J. Stevenson
Deputy General Counsel, Law
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Draft Advisory Opinions 2013-18 (Revolution Messaging)

Dear Ms. Stevenson:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to draft Advisory Opinions 2013-18, which have been issued in response to a request for an advisory opinion by Revolution Messaging LLC (AOR 2013-18). Three draft opinions are on the agenda for the Commission's meeting on February 27, 2014—Drafts A and B (Agenda Doc. No. 13-50) and Revised Draft A (Agenda Doc. No. 13-50-A).

Revolution Messaging requests 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." AOR 2013-18 at 1.

Draft A and Revised Draft A both conclude that the proposed mobile phone advertisements are not exempt from the Act's disclaimer requirements. Draft A (Nov. 26, 2013), states that Revolution Messaging could satisfy the disclaimer requirements through alternative means, while Revised Draft A (Feb. 21, 2014), concludes that the alternative means proposed by Revolution Messaging in a supplement to AOR 2013-18 (Feb. 2, 2014) do not satisfy the disclaimer requirements. Draft B concludes that the proposed advertisements qualify for the small items exception to the disclaimer requirements.

We support the adoption of Revised Draft A and strongly oppose the adoption of Draft B, which would eviscerate the disclaimer requirements with respect to emerging-technology electronic devices.

The Supreme Court has consistently upheld the Act's disclaimer requirements because they "provid[e] the electorate with information" and "'insure that the voters are fully informed' about the person or group who is speaking." *Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (citing *McConnell v. FEC*, 540 U.S. 93, 196 (2003) and *Buckley v. Valeo*, 424 U.S. 1, 76 (1976)).

While we support the robust use of new technologies by political advertisers, the Commission must not allow the use of new technologies to come at the expense of the public's

right to know who is paying for a political advertisement delivered via mobile phone or other electronic device. The ability of today's mobile phone technology to facilitate communication—including not only political advertising, but also communication about who is paying for political advertising—is among its principle virtues. Today's Internet-connected mobile phone applications suffer none of the limitations of skywriting and water towers. *See* 11 C.F.R. 110.11(f)(1)(ii).

And with more and more voters accessing political information via Internet-connected mobile phones in every successive election, the importance of the Commission's implementation and enforcement of the Act's disclaimer requirements with respect to mobile phones cannot be overstated. Mobile device advertising is an important part of the future of political campaigning. If the Commission were to discard the disclaimer requirement for this kind of advertising, it would be unilaterally repealing the disclaimer law for a rapidly growing segment of all political advertisements—an act that would be arbitrary, capricious and contrary to law.

Draft B ignores not only the importance of the governmental interests recognized by the Supreme Court to "provid[e] the electorate with information" and "'insure that the voters are fully informed' about the person or group who is speaking," *Citizens United*, 558 U.S. at 368, but also ignores the limitless potential of today's Internet-connected mobile phones to provide this information to voters in a practical way. Draft B should be rejected.

Revised Draft A correctly concludes that 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." Revised Draft A at 4. Revised Draft A also correctly concludes that the Commission is "open to the use of . . . technological means of providing required disclaimer information in a format consistent with the way data is delivered to mobile phones." *Id.* at 9. Revised Draft A explains:

> 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.

Id. at 11.

However, Revolution Messaging has not "propose[d] an alternative method of delivering the disclaimer. Rather, the proposal . . . entails dispensing with, or truncating the disclaimer." *Id.* at 10 (internal quotation marks omitted). "Revolution Messaging . . . has the technological option to use larger mobile phone advertisements that could accommodate both the desired advertising text and the required disclaimer." *Id.* at 7. Where advertising technology can accommodate both the desired advertising text and the required disclaimer, there is no valid justification for compromising the effectiveness of the disclaimer.

For these reasons, we support the adoption of Revised Draft A, which makes clear that (1) mobile phone advertisements are not exempt from the disclaimer requirements, (2) alternative means of delivering complete disclaimer information satisfy the disclaimer requirement (*e.g.*, advertisements that link to a website with a complete disclaimer); and (3) Revolution Messaging's proposals to dispense with, or truncate the disclaimer do not meet the requirements of the law.

Finally, we once again urge the Commission to conduct a rulemaking regarding the application of the disclaimer requirements of 2 U.S.C. § 441d in the context of emerging-technology advertising. The Commission published an Advanced Notice of Proposed Rulemaking (ANPRM 2011-14) on this subject in 2011, which we supported—but the Commission has not yet proceeded with the rulemaking. *See* Internet Communication Disclaimers, Notice 2011-14, 76 Fed. Reg. 63567 (Oct. 13, 2011).

Given that 11 C.F.R. § 110.11 does not explicitly address the disclaimer requirements and specifications in the context of advertising via the Internet, mobile phones or other new electronic devices, and that this is undoubtedly a major growth area in political advertising, a rulemaking to consider the matter more fully is appropriate, necessary and overdue. A rulemaking on this matter would give all interested parties the opportunity to fully consider and comment on the importance of disclaimers on paid political advertising, as well as viable, practical options for implementing the Act's disclaimer requirements in emerging-technology communication environments.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ J. Gerald Hebert	*/s/ Fred Wertheimer*
J. Gerald Hebert Paul S. Ryan Campaign Legal Center	Fred Wertheimer Democracy 21

Paul S. Ryan
The Campaign Legal Center
215 E Street NE
Washington, DC 20002

Counsel to the Campaign Legal Center

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street NW—Suite 600

Washington, DC 20005

Counsel to Democracy 21

Copy to: Each Commissioner
Ms. Shawn Woodhead Werth, Secretary & Clerk of the Commission
Mr. Adav Noti, Acting Associate General Counsel, Policy
Ms. Amy L. Rothstein, Assistant General Counsel
Mr. Robert M. Knop, Assistant General Counsel