



Docket: 02-278

The Center for Democracy & Technology (CDT) and Common Cause (CC) respectfully submit these comments in response to the Federal Communication Commission's Public Notice requesting comment on the petition for an expedited clarification and declaratory ruling filed by Revolution Messaging, LLC. This Notice was issued on October 23, 2012.

We urge the Commission to grant Revolution's petition for a ruling that internet-to-phone text messaging technology is a type of "automatic telephone dialing system" subject to the prohibitions of the Telephone Consumer Protection Act of 1991 (TCPA).¹

Introduction

The TCPA prohibits noncommercial solicitations through automatic dialing systems, artificial or prerecorded voicemails, Short Message Service (SMS) text messages, and fax machines, except in case of emergency or if the caller has received prior consent. Revolution Messaging filed a petition with the Federal Communications Commission to clarify that this prohibition applies to internet-to-phone text messaging technology and similar technologies involving the storage and automatic dialing of wireless numbers. The petition was accepted on January 19, 2012.

In the original text of the statute, businesses were allowed to send text messages to consumers if they could prove an "established business relationship." However, the definition of "established business relationship" was deemed overly vague, as consumers interact with many businesses on a daily basis. In February 2012 the Federal Communications (FCC) amended the TCPA to remove this exception and close this loophole. Now, businesses are required to receive "prior express written consent" before sending a text message.² We commend the FCC for amending the TCPA to better serve its purpose for consumers. Technology regulations must adapt over time as innovation advances and new services are created. As we will discuss below, the next logical step is to clarify that Internet-to-phone text messaging technology is a type of "automated telephone dialing system," and therefore prohibited without prior consent.

In its petition, Revolution Marketing pointed out examples of this practice where firms with political interests circumvented the TCPA by taking advantage of loophole and sending unsolicited text messages via email instead of via telephone. However, the

¹ 47 U.S.C. § 227

² In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 12-21 (2012).



practice has expanded since the petition was filed in January. During the recent presidential campaign, for example, the marketing firm ccAdvertising sent spam text messages to consumers' wireless telephones during the week before the election. These messages contained statements about President Obama's political agenda and urged consumers to vote against the candidate on Election Day. Many if not most of these consumers had never consented to receiving these text messages. Furthermore, consumers of all ages received these messages. For example, a reporter at the *New York Times* noted that his 13-year-old daughter received an email text that stated "Obama denies protection to babies who survive abortions. Obama is just wrong."³

How Internet-to-phone technology works

Internet-to-phone text messaging technology is accomplished through collecting and storing cellular telephone numbers and using Simple Mail Transfer Protocol (SMTP) to transmit a text message to the recipient's cellular phone without the recipient's consent. Companies will typically buy cellular phone numbers in bulk from third-party marketers. All major mobile carriers allow free email-to-text messaging through the phone's email client, which transmits messages to a recipient as a text message using a unique address depending on their provider (e.g. 5555555555@sprint.messaging.net or 5555555555@tmobile.messaging.net). Usually the consumer's mobile carrier cannot be identified, so the company creates multiple email addresses using domain names from each carrier, and the correct one will transmit successfully to the consumer's text message inbox. Many companies will simply create their own domain name from which to send emails. For example, ccAdvertising purchased the domain name Aicett.com and sent their texts from SMS@Aicett.com; however, if consumers tried to visit the page Aicett.com to learn about the provenance of the text, the URL Aicett.com simply directed users to a blank page.⁴

Given the extremely low cost of sending email from internet based services, a company has the power to create millions of email addresses and send a virtually unlimited number of unsolicited noncommercial text messages. The haphazard, untargeted manner of these communications only increases the odds that messages will be unwanted. To an ordinary consumer, the internet-to-text communications are indistinguishable from other text messages; the only difference is that the "from" field of

³ Brendan Sasso, *The Hill*, "GOP ad firm defends anti-Obama texts as protected speech," 2 November 2012, <<http://thehill.com/blogs/hillicon-valley/technology/265569-gop-ad-firm-defends-anti-obama-texts-as-protected-speech>>.

⁴ Lisa Neff, *Wisconsin Gazette*, "FCC asked to investigate unsolicited anti-gay, anti-Obama text messages," 1 November 2012, <<http://www.wisconsin gazette.com/breaking-news/fcc-asked-to-investigate-unsolicited-anti-gay-anti-obama-text-messages.html>>.



the text lists an email address instead of a telephone number, such as ccAdvertising's SMS@Aicett.com. There is no reliable way for consumers to find out who is sending these messages or to unsubscribe from receiving them as they can for telephone calls via the National Do-Not-Call registry.

In addition to the stress and annoyance of receiving unsolicited communications, these texts in many cases result in direct costs to the text message recipient. Customers without unlimited text messaging plans face unwarranted costs to receive these messages. Many customers purchase texts in bulk, and face overage charges if they exceed a monthly allotment. Any unwanted messages count against that quota and risk pushing the user over the limit. These messages are particularly problematic for customers who do not purchase any text plan and thus face a per message fee for each text they send or receive. In August 2011, Public Knowledge reported that consumers who opt not to purchase a monthly text plan face fees of \$0.15-.20 per message.⁵ If internet-to-text messages are deemed outside the scope of the TCPA, consumers may be inundated with unwanted messages — especially during election seasons — and consumers could face significant charges from increased text message spam.

TCPA applies to email-to-telephone text messages

The TCPA and FCC regulations prohibit using an “automatic telephone dialing system” (ATDS) to initiate any call to cellular phones without the prior consent of the recipient. This applies regardless of the content of the call define, and a text message is considered a “call.”⁶ The TCPA and FCC regulations define an “automatic telephone dialing system” as “equipment which has the capacity (A) to store or produce numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”⁷

Internet-to-phone text messaging technology certainly meets the first element of the definition. Collection and storage of cellular phone numbers are necessary for the email addresses to be generated. This technology also meets the second requirement of the definition, as by transmitting text messages to specific cellular phone numbers, the sender is “dialing” these numbers. Congress provided no definition of “to dial” in the

⁵ Michael Weinberg, *Public Knowledge*, “AT&T Quadruples Text Messaging prices, Insist Consumers Demand it,” 18 August 2011, <<http://www.publicknowledge.org/blog/att-quadruples-text-messaging-prices-insists->>.

⁶ In the Matter of Rules and Regulations the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling, 23 FCC Rcd 559, 565, para. 11 (2008); In Re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003).

⁷ 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1).



TCPA, so the Commission should interpret it based on congressional intent. It was stated during the floor discussion of the bill that, “[t]he FCC is not limited to considering existing technologies. The FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies.”⁸ It is the responsibility of the FCC to apply this bill to technologies that did not exist at the time of enactment of the law, yet should be included in order for the law to achieve its objectives.

Clearly, internet-to-email texts are designed to generate massive quantities of text messages to consumers’ cell phones. The Commission should no more ignore this behavior merely because it utilizes an internet protocol any more than it would ignore the abuse of push-button telephone technologies because they do not utilize a traditional phone “dial.” The Commission has recognized this authority to regulate technological advances that did not exist at the time of the TCPA enactment.⁹ The Commission should clarify the definition of “to dial” accordingly to include any transmission of text messages. A narrow definition will simply encourage the use of non-traditional methods of “dialing” merely to avoid the application of the statute, as has been demonstrated by the use of email addresses.

Finally, we agree with Revolution Messaging’s analysis with regard to the CAN-SPAM Act of 2003, which restricts “mobile service commercial messages”: that law does not apply to noncommercial text messages (which are at issue in this petition) and besides was implemented to specifically not preempt anything in the TCPA.¹⁰

It is clear that unsolicited text messages delivered as emails should be treated like all other unsolicited auto-dialed text messages under the TCPA. The only difference is that the messages are being transmitted from a domain name instead of a phone number. From an ordinary consumer’s perspective, the messages are precisely the same. The definition of “automatic telephone dialing system” logically applies to this technology which is designed solely to contact wireless phones’ text messaging applications and should be interpreted accordingly. The rule should be clarified to address this loophole and explain that any unsolicited commercial content received as text messages are prohibited. These messages should be opt-in only, and violators who do not respect consumer preferences should be subject to FCC sanctions. Recipients of such messages should be entitled to the same restitution they are under current policy. This clarification is necessary for the TCPA and related rules to serve their full purpose of

⁸ 137 Congo Rec. S18781-02 at S18784 (1991).

⁹ 2003 TCPA Order, 18 FCC Rcd at 14092, para. 132 (“It is clear from the statutory language and the legislative history that Congress anticipated that the FCC, under its TCPA rulemaking authority, might need to consider changes in technologies.”)

¹⁰ 2004 CAN-SPAM Implementation Order, 19 FCC Rcd 15927.



ensuring individual privacy rights and protecting consumers from unsolicited text communications.

We are happy to answer further questions regarding internet-to-text messaging and its inclusion in the TCPA and related rules.

For more information, please contact Meredith Whipple, 202.637.9800