

CDT, Common Cause Urge Clarification of Text Spam Laws

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A week before the 2012 presidential election, a marketing firm called ccAdvertising launched a political outreach campaign via text message. In and of itself, this was nothing unusual. What was different, however, was that consumers had never signed up to receive these messages. [The firm simply used wireless telephone numbers it had collected](#) [1] and effectively “cold texted” consumers with criticisms of President Obama’s agenda and an exhortation to vote against him on Election Day.

This incident [sparked a nationwide media response](#). [2] Several months earlier, Revolution Messaging (RM) had [filed a petition](#) [3] with the Federal Communications Commission (FCC) addressing this exact issue. RM asked the FCC to clarify that the [Telephone Consumer Protection Act \(TCPA\)](#) [4] prohibits the type of text messaging technology that was later used by ccAdvertising. The TCPA prohibits noncommercial solicitations through automatic dialing systems, artificial or prerecorded voicemails, text messages, and fax machines, except in case of emergency or if the caller has received prior consent. However, companies like ccAdvertising have been taking advantage of an arguable loophole in the law by using internet-to-phone text messaging to reach consumers, a technology which did not exist when the TCPA was enacted.

RM [asked](#) [3] that this technology be addressed as soon as possible in light of the upcoming election season, when there is a significant increase in unsolicited noncommercial text message spam. The petition was accepted on January 19, 2012, but the FCC did not solicit public comment on the matter until October 23, 2012. CDT submitted [joint comments](#) [5] with the nonprofit organization Common Cause urging the FCC to act on RM’s petition and declare that the TCPA applies to internet-to-phone text messages. FCC action is needed to ensure that consumers are not bombarded with unsolicited text messages, resulting in millions of dollars of unwanted and unavoidable charges.

How it works

Internet-to-phone text messaging is accomplished through collecting cellular telephone numbers and using Simple Mail Transfer Protocol (SMTP) to transmit a text message to the recipient’s cellular phone. 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. [555555555@sprint.messaging.net](#) [6] or [555555555@tmobile.messaging.net](#) [7]). Usually the consumer’s mobile carrier cannot be identified, so the company creates multiple email addresses using domain names from each carrier and sends messages to all of them, 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, the URL for Aicett.com simply [directed users to a blank page](#). [2]

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 an unlimited number of unsolicited noncommercial text messages. To an ordinary consumer, the internet-to-text communications are indistinguishable from other text messages; the only difference is that the “from” field of the text lists an email address instead of a telephone number, such as ccAdvertising’s [SMS@Aicett.com](#) [8]. 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. Furthermore, these texts may result in direct costs to the text message recipient. In August 2011, Public Knowledge [reported](#) [9] that consumers who opt not to purchase a monthly text plan face fees of \$0.15-.20 per message. Many customers have limited text messaging plans or no text messaging plan at all, and could face significant charges from receiving these text messages.

Why the TCPA applies

In our comments, we argue that the TCPA should be interpreted to prohibit internet-to-phone text messaging technology. 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. As noted in our comments, a text message is considered a “call” in this instance. 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.”

Internet-to-phone text messaging technology clearly meets the first element of the definition. Collection and storage of cellular phone numbers are necessary for the email addresses to be produced. 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 TCPA, but the FCC is given the flexibility to consider what rules should apply to future technologies as well as existing technologies.” 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. The Commission has recognized this authority to regulate technological advances that did not exist at the time of the TCPA enactment.¹

The Commission should clarify the definition of “to dial” accordingly to include any transmission of text messages. A narrow definition will encourage the use of non-traditional methods of “dialing,” as has been demonstrated by the use of email addresses.

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. The definition of “automatic telephone dialing system” logically applies to this technology and should be interpreted accordingly, and 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. This clarification is necessary for the TCPA and related rules to serve their full purpose of ensuring individual privacy rights and protecting consumers from unsolicited spam communications.

The FCC is soliciting another round of reply comments. If you are interested in weighing in, perhaps in response to ccAdvertising’s [defense](#) [10] that internet-to-text messaging should be outside the scope of the TCPA, the FCC is taking submissions until December 10, 2012.

1. ¹ 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.”).

- [TCPA](#)

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