

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of)	
1991)	CG Docket No. 02-278
)	
Club Texting, Inc. Petition for)	
Declaratory Ruling)	

**COMMENTS OF SOUNDBITE COMMUNICATIONS, INC. ON CLUB TEXTING,
INC.’S PETITION FOR DECLARATORY RULING**

Pursuant to the Public Notice issued by the Federal Communications Commission (“FCC” or “Commission”) in the above-captioned proceeding,^{1/} SoundBite Communications, Inc. (“SoundBite”) submits the following comments in response to the petition by Club Texting, Inc. (“Club Texting”). SoundBite agrees with Club Texting that the Commission should declare that entities that merely transmit text messages on behalf of others -- which Club Texting suggests should be called “text broadcasters” -- should, like similarly situated “fax broadcasters,” be liable for violations of FCC rules on delivery restrictions to mobile phones only when “it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such [violating] transmissions.”^{2/}

^{1/} *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 Club Texting, Inc. Petition for Declaratory Ruling*, CG Docket No. 02-278, Public Notice, DA 09-2387 (rel. Nov. 9, 2009) (“Notice”).

^{2/} 47 C.F.R. § 64.1200(a)(3)(vii).

I. OPERATIONAL SIMILARITIES BETWEEN FAX BROADCASTERS AND TEXT BROADCASTERS WARRANT SIMILAR REGULATORY TREATMENT

Since the time it first adopted rules governing transmission of unsolicited fax advertising messages, the FCC has maintained an exception for “fax broadcasters,” which the Commission defines as “a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.”^{3/} In a 1995 clarification of its 1992 order implementing the Telephone Consumer Protection Act (“TCPA”), the FCC found that “[t]he entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with the rule.”^{4/}

This exception was created for fax broadcasters because they merely “transmit messages on behalf of other entities to selected destinations and . . . do not determine either the message content or to whom they are sent.”^{5/} As the Commission has explained, “if the company whose products are advertised has supplied the list of fax numbers, that company is in the best position to ensure that recipients have consented to receive the faxes and should be liable for violations of the prohibition. Therefore, the fax broadcaster will not be responsible for the ads, in the absence of any other close involvement, such as determining the content of the faxed message.”^{6/}

^{3/} 47 C.F.R. § 64.1200(f)(6).

^{4/} *Rules and Regulations Implementing the Telephone and Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd. 12391, ¶ 35 (1995) (“*1995 TCPA Reconsideration Order*”).

^{5/} *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Order on Further Reconsideration, 12 FCC Rcd. 4609, n.7 (1997) (*1997 TCPA Reconsideration Order*).

^{6/} *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 02-278, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd. 17459, ¶ 195 (2003) (“*2003 TCPA Order*”).

As with fax broadcasters, the entity that employs the text broadcaster to transmit its message and provides the mobile phone numbers to which the text message is to be sent is “in the best position to ensure that recipients have consented to receive” the text messages as required by FCC rules.^{7/} Text broadcasters, which have no independent relationship with the persons being called, must rely upon the representations of the entities desiring to send the text messages that the numbers they provide are of persons who have consented to receive the messages. As is the case with fax broadcasters, it would be unreasonable to hold text broadcasters liable for TCPA violations when they are merely acting as a conduit transmitting messages composed by an unaffiliated entity to persons whom the other entity has identified as having given permission to receive the message.

Only where a text broadcaster “demonstrates a high degree of involvement” in violations of FCC rules should the text broadcaster be held liable. The FCC can apply the same standards for determining a high degree of involvement in text calling violations as it has applied in determining fax broadcaster involvement in facsimile advertising violations. Text broadcasters who provide wireless phone numbers to be called, rather than obtaining them from the calling party, or who determine the content of the text message can be held responsible for violations because of their “high degree of involvement” in the violations.^{8/} Similarly, text broadcasters who transmit messages they have knowledge are in violation of FCC rules can be held responsible, in the same way current rules do not protect fax broadcasters who knowingly violate the rules.^{9/} As Club Texting points out, adoption of an exception for text broadcasters would not

^{7/} See 47 C.F.R. § 64.1200(a) (prohibiting use of autodialing equipment to place a call to a mobile telephone, except for “emergency purposes” or “with the prior express consent of the called party”).

^{8/} See 2003 TCPA Order ¶ 195.

^{9/} See 47 C.F.R. § 64.1200(a)(3)(vii).

insulate bad actors from liability for their actions because text broadcasters who knowingly violate the rules or who are highly involved in activities that violate the rules would not be qualified for the limited exception Club Texting asks the Commission to adopt.

II. CONCLUSION

For the reasons explained above, the Commission should adopt the declaratory ruling requested by Club Texting to clarify that a text broadcaster is not liable for violations of the FCC rules at 47 C.F.R. § 64.1200(a)(1) except where the text broadcaster “demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps” to prevent it.

Respectfully submitted,

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