

November 17, 2012

Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Reply to Comments, CG Docket No. 02-278

Dear Ms. Dortch:

I am an attorney, but I am writing to the Commission in my personal capacity as a consumer. Like many consumers, I have received unsolicited and unwanted text messages and other automated calls on my cellular phone. Because I carry my cellular phone on my person, each of these calls is an unavoidable and annoying intrusion of my privacy. Therefore, in support of many of the comments filed by other consumers, I respectfully request that the Commission resist any attempt to weaken the protections provided consumers by the Telephone Consumer Protection Act ("TCPA"). Specifically, I respectfully ask that the Commission confirm the judicial opinions which have already found that an automated telephone dialing system ("ATDS") is an ATDS under the TCPA even if it routes telephone calls, including text messages, through the Internet to the cellular telephones of consumers.

"The purpose and history of the TCPA indicate that Congress was trying to prohibit the use of ATDSs to communicate with others by telephone in a manner that would be an invasion of privacy." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009); *also see* 47 U.S.C. § 227 (Congressional Findings); *Mims v. Arrow Fin. Services, LLC*, 132 S. Ct. 740, 745, 132 L.Ed. 2d 881 (2012). In this context, the Commission has determined that the TCPA's regulation of ATDSs to make calls "encompasses both voice calls and text calls to wireless numbers". *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* (herein "*TCPA 2003 Rules*"), 18 F.C.C.R. 14014, 14115 (2003). Federal courts have enforced the Commission's determination, affirming "that a voice message or a text message are not distinguishable in terms of being an invasion of privacy." *Satterfield*, 569 F.3d at 954. It is this same privacy interest which compels the conclusion that the use an ATDS to make unsolicited calls violates the TCPA no matter how calls are routed to cellular phones.

The Commission has defined ATDSs to include predictive dialers. *See TCPA 2003 Rules*, 18 F.C.C.R. at 14091-93; *also see In the Matter of Rules and Reg. Implementing the Tel. Consumer Prot. Act of 1991, Request of ACA Int'l for Clarification and Declaratory Ruling* (herein "*TCPA 2008 Declaratory Ruling*"), 23 F.C.C.R. 559, 565 (2008) ("In this Declaratory Ruling, we affirm that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA's restrictions on the use of autodialers."). In ruling that a predictive dialer is an ATDS, the Commission

acknowledged that businesses "use predictive dialers to call specific numbers provided by established customers". See *TCPA 2008 Declaratory Ruling*, 23 F.C.C.R. at 566. "As one commenter points out, the evolution of the teleservices industry has progressed to the point where using lists of numbers is far more cost effective. The basic function of such equipment, however, has not changed—the *capacity* to dial numbers without human intervention." *TCPA 2003 Rules*, 18 F.C.C.R. at 14092. Importantly, the Commission has recognized that it expects "automated dialing technology to continue to develop." *TCPA 2008 Declaratory Ruling*, 23 F.C.C.R. at 566. "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 to technologies." *TCPA 2003 Rules*, 18 F.C.C.R. at 14092. Thus, at the enactment of the TPCA in 1991, Congress contemplated that ATDSs might someday take advantage of new technology (i.e., email and the Internet) to make calls to the cellular telephones of consumers.

Relying on guidance provided by the Commission, courts have already concluded that an ATDS is regulated by the TCPA even if it takes "advantage of Internet-to-phone SMS technology [i.e., email]--technology that guaranteed its computer generated text messages would be delivered to [the consumer's] cellular telephone. By pairing its computers with SMS technology, [the defendant] did what the TCPA prohibits. It used an automated telephone dialing system to call a telephone number assigned to a cellular telephone." See *Joffe v. Acacia Morg. Corp.*, 211 Ariz. 325, 333, 121 P.3d 831, 839 (Ct.App.Ariz. 2005), *after citing TCPA 2003 Rules*, 18 F.C.C.R. at 14092; *also see Satterfield v. Simon & Schuster*, C06-2893, 2007 WL 1839807, *2 (N.D.Cal. June 26, 2007) (ATDS was a computer that sorted and transmitted text messages), *reversed on other grounds in Satterfield*, 569 F.3d 946.

The TCPA is intended to protect the privacy of consumers like me. To effect this purpose, the TCPA allows for the technology it regulates to evolve. Therefore, I respectfully request that the Commission confirm that any technology used as an ATDS is regulated by the TCPA no matter how the technology routes its calls to the cellular phones of consumers.

Sincerely,



Albert H. Kirby