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November 26, 2013

**ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

Re: Petition for Declaratory Ruling filed by Club Texting, Inc.  
CG Docket No. 02-278.  
**Notice of Ex Parte Presentation**

Dear Ms. Dortch:

On Wednesday, November 20, 2013, the undersigned and Genevieve C. Schmitt of this law firm, and Anthony C. Kolker of Dialing Services, Inc. met with Holly Saurer, Legal Advisor to Commissioner Jessica Rosenworcel, to discuss pending issues Dialing Services has with the Enforcement Bureau.

During the meeting, we also discussed the Petition for Declaratory Ruling filed by Club Texting, Inc., CGB Docket No. 02-278 (“Petition”) that is presently before the Consumer and Government Bureau. During the meeting, we expressed support for the position set forth in Club Texting’s petition, namely that operators of hosted messaging/broadcasting platforms should be shielded from liability for violations of the Telephone Consumer Protection Act (“TCPA”) committed by their clients (i.e., those parties using the platform to transmit a message).

We discussed our opinion that Congress did not intend to saddle operators of messaging/broadcasting platforms with liability arising out of their clients’ use of their platforms. We also discussed the similarities between hosted messaging platforms and fax broadcasters, and we discussed the Junk Fax Protection Act of 2005 and the Commission’s implementing regulations. We noted how in the Commission’s regulations implementing the Junk Fax Protection Act of 2005, the Commission specifically opted to shield broadcasters from liability for the actions of their clients provided they do not demonstrate a high degree of involvement in, or actual notice of, the unlawful activity and fail to take steps to prevent such violations. This is the protection that the Club Texting petition seeks and Dialing Services supports this position.

Marlene H. Dortch, Secretary  
Federal Communications Commission  
November 26, 2013  
Page 2

Finally, we discussed the illogical consequences that would follow if voice message broadcasters/platform providers are held liable for violations of the TCPA by their clients. Such liability would likely extend to do-not-call violations, time of day restrictions, caller identification requirements, etc. Additionally, it will expose operators of hosted messaging/broadcasting platforms to the increasing amount of class action litigation pertaining to the TCPA. We left behind the attached presentation.

Very truly yours,



Mitchell N. Roth

Enclosure

MNR/gcs

cc: Holly Saurer, Legal Advisor

Dialing Services, Inc.  
*Ex Parte* Presentation  
Docket 02-278

Mitchell N. Roth, Esq.

Genevieve C. Schmitt, Esq.

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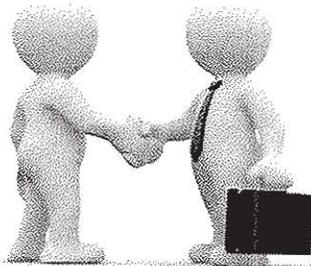
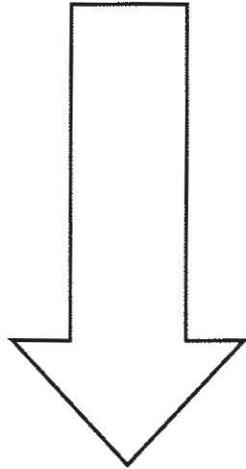
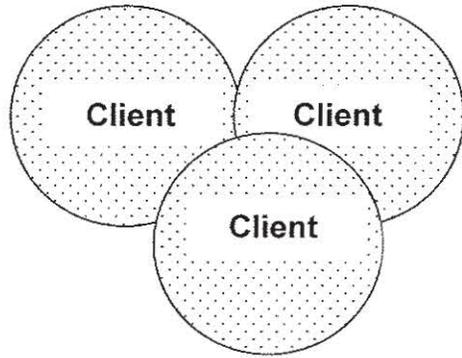
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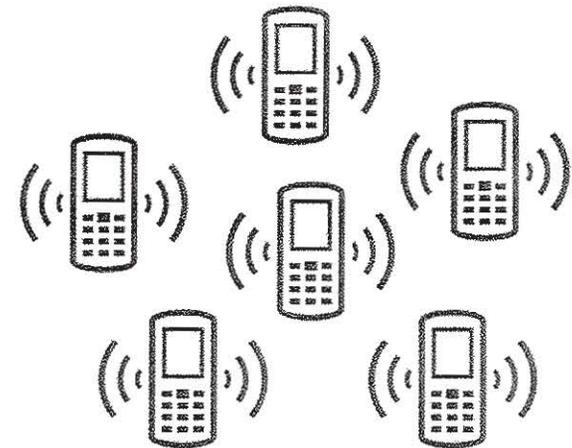
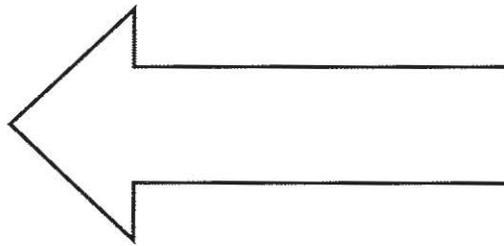
# Dialing Services, Inc.

- What is Dialing Services, Inc.?
  - Dialing Services is a web-based, hosted platform
    - Whose clients tend to be political campaigns and non-profits;
      - Legitimate purposes that the TCPA contemplates.
    - Dialing Services has absolutely no involvement in the design, development, and execution of calling campaigns.

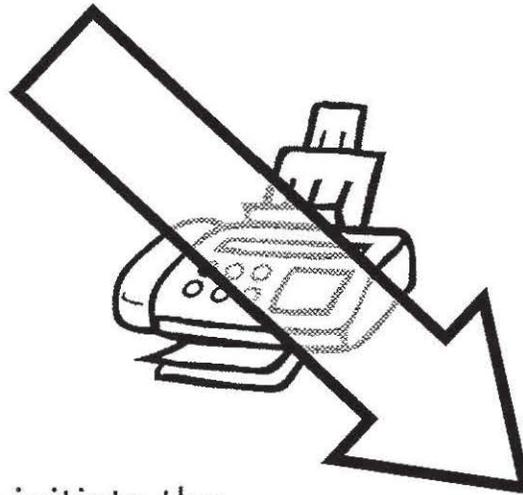
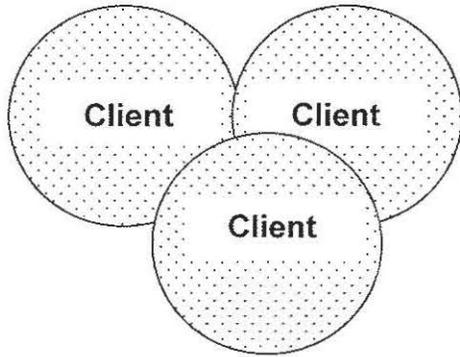
# Dialing Services, Inc.



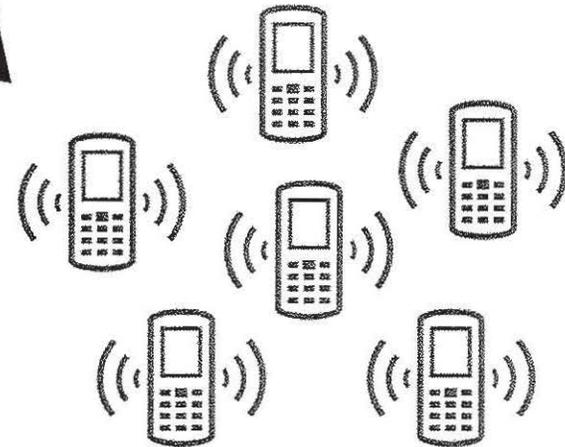
The privity, or consensual relationship, is between Dialing Services' clients and their members, consumers, volunteers, etc.; Dialing Services has no role in the formation of this privity or relationship.



# Dialing Services, Inc.



Dialing Services' clients initiate the calls through Dialing Services' hosted, web-based technology.



# The Enforcement Bureau & Dialing Services

- 2007 Citation and Order following LOI (EB-07-TC-566)
  - Dialing Services Petitioned for Reconsideration, still Pending
- 2013 Citation and Order following LOI (EB-TCD-12-00001812)
  - Enforcement Bureau agreed to stay certification of compliance
  - Dialing Services Petitioned for Reconsideration, still Pending
- 2013 LOI (EB-TCD-12-00001812)
  - NAL expected per meeting with Enforcement Bureau

# The 2013 Citation & Order

- Prerecorded calls to cell phones without prior express consent
- Failure to make proper identification information in the prerecorded messages

# Dialing Services' Position

- FCC TCPA Regs: No person or entity may: . . . *initiate* any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using . . . an artificial or prerecorded voice . . . to a [cell phone].
  - 47 CFR 64.1200(a)(1)(iii)
- Dialing Services, a web-based, hosted platform does not “initiate” calls

# Dialing Services Position, cont'd

- Dish Network Opinion defines “initiate”:
  - “a person or entity ‘initiates’ a telephone call when it takes the steps necessary to physically place a telephone call.”
    - Reliance on Dish Network is out of context.
    - Even assuming it applies, the definition supports Dialing Services’ position:
      - Dialing Services hosts technology – which its clients use to take steps necessary to physically place the calls. It does not “initiate” the calls.

# Dialing Services Position, cont'd

- This issue is also squarely before CGB in the Club Texting Petition proceedings:
  - The Petition seeks an FCC ruling stating that text broadcasters are not “senders” of text messages, which, it argues, is consistent with the treatment of fax broadcasters.
  - Cites to 1995 Memorandum Opinion & Order: “We clarify . . . that fax broadcasters are not liable for compliance with this rule. This interpretation is consistent with the TCPA’s legislative history, and with our finding in the Report and Order that carriers will not be held liable for the transmission of a prohibited message.”

# Dialing Services Position, cont'd

- Parallel Regulation with respect to Fax Broadcasters:
- “A facsimile broadcaster will be liable for violations of paragraph (a)(4) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.”
  - 47 C.F.R. 64.1200(a)(4)(vii)

# Dialing Services Position, cont'd

- It is important to acknowledge that the industry has moved to utilizing hosted platforms, rather than maintaining their own dialers on the physical premises.
  - There would be significant industry-wide ramifications if Dialing Services is issued a NAL:
    - Creates a disincentive for technology innovation by holding the innovators strictly liable for the behavior of its users.

# Dialing Services Position, cont'd

- Is the Enforcement Bureau regulating without authority?
  - At the very least, it is unclear and ambiguous whether a hosted platform providing technology to callers “initiates” calls
    - Creating policy by and through enforcement proceedings will force an entire segment of hosted platform businesses operating similarly (and legitimately) to either stop business or risk forfeitures without providing the public an opportunity to comment.
  - Legislative Intent
    - The first time Congress was faced with a similar issue, it carved out a shield from liability for the fax broadcasters

# Dialing Services Position, cont'd

- If liable for the lack of prior express consent, where does liability of a hosted platform end?
  - What kind of consent... and how accomplished... and how to show to Enforcement Bureau?
    - Non-Solicitation calls to cell phones (prior express), prerecorded solicitations to cell phones (prior express written), prerecorded solicitations to residential telephone numbers(prior express written)?
  - Opt-out?
  - Day and time restrictions?
  - Message Content?
  - Caller I.D.? Whose number for call-back and whose name?
  - DNC?
  - Setting standard for states' regulations?

# Dialing Services Position, cont'd

- An NAL to Dialing Services will not only set a precedent, without the proper process, within the F.C.C. but will subject Dialing Services (and other hosted platforms) to class action litigation.