



## I. FACTUAL BACKGROUND

Club Texting provides a self-service text message marketing service by licensing its clients to use a software platform that they can use to contact their target audience via text message. Clients include but are not limited to institutions such as state governments, which typically use the platform to provide residents with urgent tsunami or tidal warnings; schools, which typically use the platform to provide students, faculty, and staff with emergency and closure information; and businesses, which typically use the platform to send marketing and promotional information to customers. Club Texting's software platform allows message recipients to subscribe to—and unsubscribe from—a client's distribution list by texting that client's unique keyword from their cell phone.<sup>2</sup> The platform also allows clients to build their subscriber databases using an HTML widget on their website, organize their subscribers into lists and groups, track sign up information to refocus customer targeting, and send text message alerts, either at pre-set times or manually. Using Club Texting's application programming interface ("API") support feature, clients can even integrate the platform into their own software to send automatic messages as dictated by that software. For example, a client could integrate the platform to weather software to send automatic warnings when dangerous weather conditions are detected. The system also makes a wide audience possible by delivering clients' messages to all major cell phone carriers, including AT&T, Verizon Wireless, T-Mobile, Sprint, Nextel, Boost, Virgin Mobile, Alltel, US Cellular, Dobson Wireless, Midwest Wireless, Cricket, Cellular South, and others.

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<sup>2</sup> Club Texting alerts clients to the restrictions of the TCPA and further requires clients to affirmatively certify that they have received consent from all text message recipients.

Club Texting, which began operations in 2006, is merely one of a number of text broadcasters that have in recent years emerged to provide text message marketing tools and services to a wide variety of clients and audiences. Though this industry is fairly new, it is growing rapidly as businesses and other institutions increasingly recognize the efficiency and effectiveness of using text messaging to reach their audiences. For example, and as was widely reported in the press, President Obama made broad and effective use of text messaging during the 2008 campaign to communicate with voters and supporters.<sup>3</sup> Club Texting, like many of the vendors that have entered this new market, provides its clients with access to a powerful communication tool over which the clients retain control, both with regard to the construction and maintenance of subscriber lists and the content and frequency of messages. As use of these services has become more ubiquitous, so too have questions regarding the respective liability under the TCPA of vendors and clients for the sending of unsolicited text message advertisements.

To resolve this uncertainty, Club Texting requests that the Commission clarify that text broadcasters are not “senders” of text messages under the TCPA.<sup>4</sup> As explained in greater detail

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<sup>3</sup> Americans were invited to “Join the Movement” on the campaign’s website by signing up to receive text updates. See *Organizing for America*, <http://www.barackobama.com/mobile/> (last visited Aug. 13, 2009); see also Anne E. Kornblut & Ed O’Keefe, *Tale of the Obama Text Message*, *Washington Post* (Aug. 23, 2008), available at [http://voices.washingtonpost.com/44/2008/08/23/tale\\_of\\_the\\_obama\\_text\\_message.html](http://voices.washingtonpost.com/44/2008/08/23/tale_of_the_obama_text_message.html).

<sup>4</sup> Because the phrasing of the TCPA focuses on prohibited acts, rather than the parties responsible for those acts, its phrasing is confusing. The FCC has construed the TCPA’s prohibition on unsolicited telemarketing calls, Section 227(b)(1)(A), to include text messaging. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 03-153, ¶ 165 (July 3, 2003); see also *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009). The party responsible for initiating an unsolicited call under 227(b)(1)(A) is the “person” that “make[s] any call.” *Id.* § 227(b)(1)(A). Within the same TCPA subsection – §227(b)(1) – the party responsible for initiating an unsolicited fax is described as the “sender.” 47 U.S.C. §§ 227(b)(1)(C)(i) and (ii). For simplicity sake, and because the phrasing is more natural with respect to text messaging, the party responsible for initiating an unsolicited text message is referred to herein as the “sender” rather than the “party” that “make[s] any call.”

below, such a clarification would be consistent with longstanding Commission precedent and is necessary to resolve uncertainty and ensure proper enforcement of the TCPA.

**II. THE FAX BROADCASTER TCPA EXEMPTION ARISES FROM LONGSTANDING FCC POLICY THAT COMMUNICATION CONDUIT PROVIDERS ARE NOT RESPONSIBLE FOR THE CONTENT OF COMMUNICATIONS.**

The Commission's fax broadcaster exemption is a recent reaffirmation of the Commission's policy, grounded in first principles of common carrier regulation, of not holding communication conduit providers liable for the content of communications on their networks. This longstanding policy in no way insulates wrongdoers from liability. Instead, it attaches liability to the party responsible for the content of a communication and protects innocent third-party intermediaries who provide only transmission services. Experience with the fax broadcaster exemption demonstrates that it has not undermined, and instead has advanced, the underlying objectives of the TCPA.

Enacted in 1991, the TCPA regulates telemarketing activities in the interests of protecting privacy and reducing potential risks to public safety. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 F.C.C.R. 8752, 8753 (1992) ("*1992 TCPA Order*"); *see* 47 U.S.C. § 227. The Act restricts the use of automatic telephone dialing systems, prohibits the sending of artificial voice or prerecorded messages to specified classes of recipients, largely prohibits unsolicited prerecorded messages to residential numbers, and prohibits the sending of unsolicited fax advertisements. *See 1992 TCPA Order*, 7 F.C.C.R. at 8753. Congress established various remedies for violations of these provisions, and further directed the Commission to establish rules designed to protect the interests and privacy of those telephone subscribers who do not wish to receive unsolicited advertisements. *Id.* at 8753-54. In complying with this directive, the Commission explained that its "task . . . is to implement

the TCPA in a way that reasonably accommodates individuals' rights to privacy as well as the legitimate business interests of telemarketers." *Id.* at 8754.

Implementation of the TCPA compelled the Commission to decide the scope of activities to which the TCPA's liability provisions—including significant financial penalties which may be enforced by a private right of action—attached. In its *1992 TCPA Order*, the Commission determined that providers of fax transmission services would not be liable for sending unsolicited fax advertisements “[i]n the absence of a ‘high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions.’” *Id.* at 8780 (quoting *Use of Common Carriers*, 2 F.C.C.R. 2819, 2820 (1987)). The Commission later clarified that its rules impose liability for unsolicited fax advertisements upon the party on whose behalf they are sent, while exempting “fax broadcasters” that act merely as a conduit by providing the necessary transmission services:

We clarify that the 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 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.

*In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 F.C.C.R. 12391, 1407 (1995) (“*1995 TCPA Order*”).

This interpretation of the TCPA is rooted in the Commission's longstanding treatment of the liability of communication conduit providers for the content of their clients' communications. The treatment of fax broadcaster liability established in the *1992 TCPA Order* was merely an extension of the principle of common carrier liability previously articulated in the Commission's 1987 *Use of Common Carriers Order*, see 2 F.C.C.R. at 2820. See *1992 TCPA Order*, 7 F.C.C.R. at 8780. In *Use of Common Carriers*, the Commission explained that multipoint

distribution service (“MDS”) common carriers “will not generally be liable for illegal transmissions [of obscene materials] unless it can be shown that they knowingly were involved in transmitting the unlawful material.” 2 F.C.C.R. at 2820. The Commission explained that this approach was supported by judicial precedent, *see id.* (citing *Sable Commc’ns of California v. Pac. Tel. & Tel. Co.*, No. 84-469 (C.D. Cal. Feb. 13, 1984)), and avoided forcing common carriers to endure the “uncertain predicament” of closely monitoring the content of the material sent by their clients, *id.* Such “uncertainty and expense are clearly not in the public interest,” *id.*, explained the Commission, because the burden would interfere with the ability of common carriers to offer transmission services to the many senders of lawful communications.

These fundamental common carrier policy considerations have motivated the Commission to consistently adhere to its original interpretation of the TCPA as it applies to fax broadcasters. *See, e.g., In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 F.C.C.R. 14014, 14132 (2003) (“2003 TCPA Order”) (“We reiterate here that that if a common carrier is merely providing the network over which a subscriber (a fax broadcaster or other individual, business, or entity) sends an unsolicited facsimile message, that common carrier with not be liable.”). Thus, in 2003, the Commission amended its regulations to specify that liability for unsolicited messages attaches to a fax broadcaster only “if there is a high degree of involvement or actual notice on the part of the broadcaster.” *2003 TCPA Order*, 18 F.C.C.R. at 14131; *see* 47 C.F.R. § 64.1200(a)(3)(vii). This amendment codified the Commission’s earlier rulings, which “clearly indicate that a fax broadcaster’s exemption from liability is based on the type of activities it undertakes.” *Id.* at 14131. Where a fax broadcaster acts only as a conduit and transmission provider, liability does not attach. But the exemption is defeated by a “high degree of involvement or actual notice” of

unlawfulness. *Id.* at 14131. Thus, “if the fax broadcaster supplies the fax numbers used to transmit the advertisement,” “determin[es] the content of the faxed message,” or is engaged in “any other close involvement,” the fax broadcaster will be liable for any unsolicited message(s) sent. *Id.* And “where both the fax broadcaster and advertiser demonstrate a high degree of involvement, they may be held jointly and severally liable for violations of the unsolicited facsimile provisions.” *Id.* In addition, the Commission amended its rules to distinguish between the activities of fax broadcasters and marketers and to specify that marketers, not fax broadcasters, are the “senders” for purposes of the TCPA. *See* 47 C.F.R. § 64.1200(f)(8) (defining “sender” as “the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement”).

The Commission’s approach to fax broadcaster liability well serves the goals of the TCPA. First and foremost, it imposes liability upon the party “in the best position to ensure that recipients have consented to receive the faxes,” and thereby promotes compliance with the Act. *2003 TCPA Order*, 18 F.C.C.R. at 14131. Second, explicitly defining the scope of fax broadcaster liability complies with Congress’s directive that the Commission “implement the TCPA in a way that reasonably accommodates individuals’ rights to privacy as well as the legitimate business interests of telemarketers.” *1992 TCPA Order*, 7 F.C.C.R. at 8754. It did so by reducing uncertainty regarding the Act’s application to the variety of parties affected by fax advertisements: the rule “better inform[s] the business community about the prohibition on unsolicited fax advertising and the liability that attaches to such faxing,” and also “better serve[s] consumers who are often confused about which party is responsible for unlawful fax advertising.” *2003 TCPA Order*, 18 F.C.C.R. at 14131. Indeed, the only court to evaluate the Commission’s fax broadcaster liability rule as implemented by the *2003 TCPA Order* has

concluded that the rule represents a reasonable construction of the Act that is entitled to judicial deference. *See Kopff v. Battaglia*, 425 F. Supp. 2d 76, 92 (D.D.C. 2006).

**III. THE COMMISSION SHOULD CLARIFY THAT TEXT BROADCASTERS, LIKE FAX BROADCASTERS, ARE NOT “SENDERS” FOR TCPA PURPOSES.**

Text messaging is a powerful tool that institutions and businesses are increasingly using to communicate quickly and efficiently with their members and audiences. As occurred with fax communication, innovative companies like Club Texting have emerged to provide text message transmission services to those seeking to communicate with large audiences. But as these services have grown, so too has uncertainty as to the liability of text broadcasters under the TCPA’s prohibition on the sending of unsolicited advertisements. Club Texting urges the Commission to resolve this uncertainty by clarifying that the text broadcasters, like fax broadcasters, are not “senders” under the TCPA.

Aside from the technological characteristics of the medium with which they work, companies like Club Texting are in all material respects identical to fax broadcasters. That is, they are “person[s] or entit[ies] that transmit[] messages to [mobile telephones] on behalf of another person or entity for a fee.” 47 C.F.R. § 64.1200(f)(6). And the clients served by companies such as Club Texting likewise conform to the Commission’s concept of a “sender,” *i.e.*, they are “person[s] or entit[ies] on whose behalf a[text message] unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.” *Id.* at 64.1200(f)(8). The straightforward applicability of these definitions to text broadcasters and their clients counsels in favor of equivalent treatment with respect to liability, *i.e.*, text broadcasters should not be liable for unsolicited messages when they provide only transmission services just as fax broadcasters are not.

Clarifying that text message broadcasters are not “senders” under the TCPA would in no way insulate bad actors from liability for sending unsolicited text messages. Indeed, consistent with the Commission’s traditional “focus[] on the nature of an entity’s activity rather than on any label that the entity may claim,” *2003 TCPA Order*, 18 F.C.C.R. at 14131, text broadcasters, like fax broadcasters, would avoid TCPA liability only to the extent they act as a conduit provider offering transmission services. Application of the Commission’s existing rules would appropriately provide for TCPA liability to attach if a text broadcaster “demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such [text message] transmissions.” 47 C.F.R. § 64.1200(a)(3)(vii). As with fax broadcasters, this standard would impose liability upon a text broadcasters that “supplies the fax numbers used to transmit the advertisement,” “determin[es] the content of the . . . message,” or is engaged in “any other close involvement.” *2003 TCPA Order*, 18 F.C.C.R. at 14131. The result would thus be a policy wholly consistent with the Commission’s long-standing and reasonable construction of the TCPA. *See Kopff*, 425 F. Supp. 2d at 91-92.

Finally, the requested clarification is necessary to effectuate the principles and policies underlying the TCPA. Clarifying that text broadcasters are not “senders” for TCPA purposes would promote compliance with the Act by imposing liability upon the party “in the best position to ensure that recipients have consented to receive the [messages].” *2003 TCPA Order*, 18 F.C.C.R. at 14131. And by explicitly defining the scope of text broadcaster liability, the Commission would reduce the now-growing uncertainty of both businesses and consumers regarding the liability of text broadcasters for the transmission of unsolicited text advertisements, *see id.*, thereby fulfilling the Commission’s duty to “implement the TCPA in a way that reasonably accommodates individuals’ rights to privacy as well as the legitimate business

interests of telemarketers.” 1992 TCPA Order, 7 F.C.C.R. at 8754. Finally, the requested clarification would vindicate established principles of common carrier liability and protect the public interest by ensuring that text broadcasters do not face the “uncertain predicament” of closely monitoring the content and recipients of their clients’ texts. See *Use of Common Carriers*, 2 F.C.C.R. at 2820.

### CONCLUSION

For the foregoing reasons, the Commission should specify that text broadcasters, like fax broadcasters, are not “senders” under the TCPA. Such a clarification is supported by the Commission’s longstanding treatment of common carrier liability and existing precedent interpreting the term “sender” as used in the TCPA. Moreover, it is necessary to ensure liability appropriately attaches to parties in the best position to ensure that text recipients have consented to receive the messages. Such a clarification would eliminate growing confusion regarding the extent of text broadcaster liability under the TCPA and advance the public interest.

Respectfully submitted,

By: 

**Club Texting, Inc.**  
Shane Neman  
President  
244 5th Avenue, Ste A224  
New York, NY 10001  
(212) 255-4262

**Wiley Rein LLP**  
Scott D. Delacourt  
Emily F. Schleicher  
1776 K Street, NW  
Washington, DC 20006  
(202) 719-7000

*Counsel to Club Texting, Inc.*

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