

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

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

Petition for Declaratory Ruling of  
Milton H. Fried, Jr., and Richard Evans  
On Autodialer Issue

CG Docket No. 02-278

**COMMENTS OF THE  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

CCIA respectfully submits these comments on the Petition for Expedited Declaratory Ruling filed by Petitioners Milton H. Fried, Jr. and Richard Evans.<sup>1</sup> CCIA is an international nonprofit membership organization representing companies in the computer, Internet, information technology, and telecommunications industries. Together, CCIA's members employ more than 600,000 people and generate annual revenues in excess of \$465 billion. CCIA promotes open markets, open systems, open networks, and full, fair, and open competition in the computer, telecommunications, and Internet industries.<sup>2</sup>

**I. Summary**

Sensia Salon ("Sensia") currently faces a TCPA class action<sup>3</sup> accusing it of sending text messages using an automatic telephone dialing system ("ATDS"). Like many other companies,

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<sup>1</sup> *Petition for Expedited Declaratory Ruling on Autodialer Issue*, CG Docket No. 02-278 (filed May 27, 2014) ("Petition"); see also *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling from Milton H. Fried, Jr. and Richard Evans*, Public Notice, CG Docket No. 02-278, DA 14-977 (rel. July 9, 2014).

<sup>2</sup> A list of CCIA's members is available online at <http://www.ccianet.org/members>.

<sup>3</sup> *Fried v. Sensia Salon, Inc.*, 2013 WL 6195483 (S.D. Tex. Nov. 27, 2013).

Sensia contracts with vendors who use technology to allow Sensia to communicate with its customers. Petitioners seek to expand the statutory definition of an ATDS under §227(a)(1) of the TCPA<sup>4</sup> to include electronic transmissions that do not dial numbers.

CCIA urges the Commission to deny the Petition because businesses and other organizations need clarity that terms in the TCPA will not be retroactively re-interpreted to include emerging technologies not contemplated by the statute. Retroactive re-interpretation of the TCPA's terms would stifle innovation and impede businesses' ability to communicate with their customers.

## **II. An ATDS Must Dial Numbers**

For a customer communications system to be considered an ATDS, the system, taken as a whole, must be able to (i) store or produce telephone numbers to be called, using a random or sequential number generator; and (ii) dial such numbers.<sup>5</sup> If a message is sent without “dialing” a number to make a “call,” by definition, that message cannot be autodialed.<sup>6</sup> To determine otherwise would be to redefine the verb “dial.”<sup>7</sup>

Modern phones bear little resemblance to phones at the time the TCPA was introduced. Mobile phones were far less common, and smartphone technology, which is reliant on open socket data connections, was over a decade away. The Supreme Court recently observed that modern mobile smartphones are more akin to computers than traditional telephones.<sup>8</sup> SMS technologies have changed in tandem. Modern text apps permit messages longer than the initial 160 characters, and transmit messages over open socket data connections, such as WiFi. Under

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<sup>4</sup> See 47 U.S.C. § 227.

<sup>5</sup> *Id.* § 227(a)(1).

<sup>6</sup> “Autodialer systems ‘dial’ telephone numbers in order to transmit content by simulating typical telephones to access the public switched telephone networks.” *Fried v. Sensia*, *supra* note 3, Declaration of Harvey Scholl.

<sup>7</sup> Merriam-Webster’s online dictionary defines dial (verb) as “to select (a series of numbers) on a telephone by turning a dial or pushing buttons.”

<sup>8</sup> *Riley v. California*, 134 S. Ct. 2473, 2489 (2014) (“The term ‘cell phone’ is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone.”).

such conditions, a phone number serves as an electronic address to which a message can be sent over non-telephonic channels. “Dialing” over public telephone networks need not be involved. To redefine “dial” to include the initiation of communications over any network connection risks over-breadth in interpretation and application of the TCPA. Potentially any communication with a mobile device—be it a laptop, mobile phone, or tablet—could be subject to liability under the TCPA, as all are capable of receiving electronic transmissions over a network, and thus capable of being “dialed” under the petitioners’ expansive construction. This interpretation could potentially include non-telephonic communications such as email, which are specifically covered under another statute, the CAN-SPAM Act,<sup>9</sup> passed by Congress a decade after the TCPA.

CCIA urges the Commission to clarify that the statutory definition of an ATDS does not apply to communications that are not “dialed,” and that dialing does not include transmission of messages over open socket data connections.

### **III. SMS Are Not “Calls” for the Purposes of the TCPA**

SMS technology was in its infancy when the TCPA was enacted. The determination that SMS constitutes a call was introduced by the courts, and not Congress.<sup>10</sup> Moreover, the Commission remains divided on the application of the TCPA to text messages.<sup>11</sup> As mentioned above, SMS messages today more closely resemble emails than calls, as they are messages sent to an electronic address, often over non-telephonic networks. That this electronic address

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<sup>9</sup> 15 U.S.C. §§ 7701–13.

<sup>10</sup> *See, e.g., Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953-54 (9th Cir. 2009).

<sup>11</sup> *Re: Cargo Airline Association Petition for Expedited Declaratory Ruling; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; *Re: GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (rel. Mar. 27, 2014) (Concurring Statement of Commissioner Michael O’Rielly) (“I was not at the Commission when it decided that the TCPA does apply to text messages, and I may have approached it differently. It would have been better if the Commission had gone back to Congress for clear guidance on the issue. I will look for opportunities, like the ones presented here, to ensure that our rules do not stand in the way of innovation and certainty that benefits consumers and businesses alike.”).

happens to be a phone number should not be sufficient to automatically define an SMS as a phone call.

As recent technological developments have significantly affected how text messages are transmitted to a range of new devices, CCIA urges the Commission to reconsider its position on defining SMS messages as phone calls under the TCPA.

#### **IV. Conclusion**

For the reasons described above, CCIA respectfully urges the Commission to clarify: (1) that the statutory definition of an ATDS does not apply to communications that are not “dialed,” and that dialing does not include transmission of messages over open socket data connections; and (2) whether the TCPA should apply to text messages.

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Respectfully submitted,

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