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FCC Rules Peer-to-Peer Text Messaging Platform Does Not Violate the TCPA

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On June 25, 2020, the Federal Communications Commission (FCC) issued a [Declaratory Ruling](#) directly addressing, for the first time, peer-to-peer text messaging in the context of the Telephone Consumer Protection Act (TCPA). Peer-to-peer (P2P) text messaging is a communications technology that enables organizations to use either an online platform or a mobile application to send text messages to recipients from a single sender to a single recipient to initiate a two-way communication. The Ruling was made in response to a 2018 petition filed by the P2P Alliance (the “Alliance”), a coalition of providers and users of P2P text messaging services for schools, non-profits, and other groups. The Ruling signifies a win for P2P messaging platforms that lack the capacity of an autodialer as defined by the TCPA, as well as a caution to those platforms that possess such capacity and thus bear the accompanying risk of violating the TCPA.

Background

The Alliance sought to clarify whether texts sent via its P2P messaging platform are subject to the TCPA's restrictions on calls to wireless numbers. The TCPA and its implementing rules prohibit autodialed, prerecorded, or artificial voice calls or text messages to wireless telephone numbers without the prior express consent of the called party, unless the call is an emergency or one of the TCPA's other limited exceptions applies. Parties who send text messages or make calls that violate the TCPA risk potentially costly litigation and liability.

Under the TCPA, an autodialer is defined as “equipment which has the capacity –(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”

47 U.S.C. § 227(a)(1). This threshold statutory definition has been hotly debated before the FCC and the courts over the past few years.

In its petition, the Alliance claimed that its text messages do not involve the use of an autodialer as defined in the TCPA, stating that its platform “does not include 'the capacity to ... store or produce telephone numbers to be called, using a random or sequential number generator.'” Instead, the platform “requires a person to actively and affirmatively manually dial each recipient's number and transmit each message one at a time.” Users may also choose to send a message from a prepared script, to modify the script before sending, or draft unique message content.

The Ruling

In its ruling, the FCC first clarified “that the fact that a calling platform or other equipment is used to make calls or texts to a large volume of telephone numbers is not determinative of whether that equipment

constitutes an autodialer under the TCPA.” Instead, whether the calling platform or equipment is an autodialer under the TCPA “turns on whether such equipment is capable of dialing random or sequential telephone numbers without human intervention.” Thus, “[i]f a calling platform is not capable of dialing such numbers without a person actively and affirmatively manually dialing each one, that platform is not an autodialer and calls made using it are not subject to the TCPA’s restrictions.”

To the extent the P2P texting platform advocated by the Alliance is not capable of sending texts without a person actively and affirmatively manually dialing each number, the FCC determined that it is not an autodialer as defined by the TCPA.

The FCC’s ruling was based on the plain language of the statute. It explained that, in light of the statute’s definition of an autodialer, “only technology that has the capacity to store and produce numbers to be called using a random or sequential generator, and to dial such numbers is deemed to be an autodialer.” The FCC also relied upon its long-held view that the basic function of an autodialer is to “dial numbers without human intervention” and that “manually placed text messages are permissible without prior express consent.”

Lastly, the FCC addressed the Alliance’s argument that even if its P2P technology were an autodialer, recipients of certain text messages using the P2P texting technology have indicated their consent to receive such messages by providing a contact number to which such messages are delivered. The FCC reiterated that TCPA’s restrictions do not apply if the caller obtains the recipient’s prior express consent. It also noted its repeated position that “persons who knowingly release their telephone numbers’ for a particular purpose ‘have in effect given their invitation or permission to be called at the number which they have given’ for that purpose, absent instructions to the contrary.” For these reasons, the FCC concluded that where P2P calls are made to parties whom have knowingly released their number to the caller for a particular purpose, then “calls within the scope of that consent do not run afoul of the TCPA regardless of whether the caller used an autodialer.”

Key Takeaways

Although the FCC did not rule on whether any particular P2P text platform is an autodialer, the Ruling is a significant win for P2P platforms, providing critical guidance to providers and users of such platforms, including these key takeaways:

- The ability to make a large number of calls or send a large number of text messages is not dispositive of whether a certain platform is an autodialer. Rather, whether a platform is an autodialer depends on its capacity to store or produce numbers to be called using a random or sequential number generator and to dial such numbers.
- P2P platforms that possess this capacity are at risk of being deemed an autodialer and thereby providers and users of such platforms are subject to the TCPA’s restrictions and potential

liability.

- P2P platforms that do not, and instead require human intervention to manually send each text message, will not be subject to the TCPA's restrictions.

In the wake of the P2P Alliance Ruling, human intervention and manual processes remain powerful arguments against a platform or system being held to be an autodialer under the TCPA and thus at risk of TCPA liability.

Derek Kearl is a partner in the Salt Lake City office of Holland & Hart LLP. His practice includes counseling clients on all aspects of compliance with the TCPA.