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FCC CLARIFIES THAT EQUIPMENT REQUIRING MANUALLY DIALED CALLS OR TEXTS IS NOT AN AUTODIALER

On June 25th, the Federal Communications Commission (“FCC”) issued a declaratory ruling under the federal Telephone Consumer Protection Act (“TCPA”) that clarified three points regarding (i) the parameters to determine whether equipment is an autodialer under the TCPA and (ii) what constitutes prior express consent under the TCPA. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, P2P Alliance Petition for Clarification, No. 02-278, Declaratory Ruling (June 25, 2020).*

First, the FCC clarified that if a calling or texting platform is not capable of originating a call or sending a text message without a person actively and affirmatively manually dialing each call or text message, the platform is not an autodialer subject to TCPA restrictions. Equipment is not an autodialer if it lacks the capacity to transmit more than one message without a human manually dialing each recipient’s number according to the FCC.

Second, the FCC stated that the fact that a call platform or other equipment is used to make calls or send text messages to a large volume of telephone numbers if not probative of whether the equipment is an autodialer under the TCPA. Whether equipment is an autodialer depends on whether it is capable of dialing random or sequential telephone numbers without human intervention. This clarifying point likely was a response to the National Consumer Law Center’s comment on the petition for clarification that the massive numbers of text messages sent through the platforms described in the petition in a short period of time indicates that human involvement may be so small that the platforms meet the definition of autodialer.

Finally, the FCC has repeatedly confirmed that “persons who knowingly release their telephone numbers for particular purposes have in effect given their invitation or permission to be called at the number which they have given for the purpose, absent instructions to the contrary” and the caller that receives such numbers from a called party has obtained prior express consent for purposes of the TCPA.

The FCC’s declaratory ruling stemmed from a petition for clarification filed in May 2018 by a coalition of providers and users of

peer-to-peer text messaging services for schools, non-profits and other groups that asked the FCC to clarify whether certain TCPA restrictions applied to text messages sent through a particular type of platform. According to the petition, the platform enables two-way text communication, requires a person to manually send each text message one at a time and enables senders to exercise discretion regarding the content and other features of the text message. The petition claimed that the platform is not an autodialer under the TCPA because it does not include the capacity to store or produce telephone numbers to be called, using a random or sequential number generator. The FCC declined to rule on whether the type of text messaging platform described in the petition is an autodialer because the record lacked sufficient detail of how the platform actually worked.

In a footnote, the FCC noted that its declaratory ruling is based on the statutory definition of autodialer and not on its prior rules since the definition of autodialer under the rules remains pending in the wake of the 2018 decision by the U.S Court of Appeals for the D.C. Circuit in *ACA International v. FCC*, which vacated part of a 2015 FCC TCPA Declaratory Ruling and Order. In 2018, the FCC sought renewed comments on the definition of autodialer under the TCPA, but has not decided the issue. Until the issue is decided, the FCC said it will rely on the statutory definition of autodialer. □

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