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NEWSLETTER

Major TCPA Updates with Implications for Political Callers: FCC Weighs In on P2P Texting Platforms; Supreme Court Invalidates Narrow TCPA Exception and Agrees to Consider 'Autodialer' Definition

July 2020

June and July have been marked by major Telephone Consumer Protection Act (TCPA) news.

- On June 25, the Federal Communications Commission's (FCC) Consumer and Governmental Affairs Bureau (Bureau) issued a Declaratory Ruling (P2P Declaratory Ruling) that supports a narrow construction of the "automatic telephone dialing system" (ATDS or autodialer) definition and is a significant win for peer-to-peer (P2P) platforms, which are used by a variety of entities and organizations, including campaigns.
- On July 6, the U.S. Supreme Court decided *Barr v. American Association of Political Consultants, Inc.*, a closely watched case brought by political callers questioning the constitutionality of the TCPA's government-debt-collection exception. The Supreme Court invalidated the narrow exception because it unconstitutionally favored debt-collection speech over political and other speech, but the Court found the provision severable and thus upheld the remainder of the statute.
- Finally, on July 9, the Supreme Court granted a petition for certiorari to consider the scope of the TCPA's threshold autodialer definition. The Court will consider that case, *Facebook v. Duguid*, next term.

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Accordingly, for this election cycle, the TCPA largely still stands, meaning that campaigns and other political callers must get consent before they reach out to voters' wireless numbers using autodialers. The FCC has partially clarified the definition of 'autodialer,' determining that P2P texting platforms that require human intervention to dial numbers are squarely outside of the reach of the TCPA. For next election cycle, the Supreme Court's forthcoming decision on the scope of the autodialer definition will have significant impacts on all callers, including political callers.

The P2P Declaratory Ruling Supports a Narrow Reading of the Term 'Autodialer' and Is a Win for Organizations Utilizing Peer-To-Peer Platforms

The Bureau's P2P Declaratory Ruling was issued in response to a May 2018 Petition for Clarification filed by the P2P Alliance, which, among other things, asked the Commission to clarify that P2P text messaging platforms are not autodialers. The ruling is significant not simply because it addresses how the TCPA may apply to a specific messaging platform, but also because it opines on the hotly contested scope of the term 'autodialer.' Political callers placing calls or texts using any modern calling equipment – including but not limited to P2P platforms – should take note.

The threshold definition of autodialer under the TCPA is the subject of much debate. The TCPA makes it unlawful to initiate any non-emergency call to wireless numbers using an ATDS without the consent of the called party. Because TCPA liability – which triggers infamously steep penalties – often hinges on whether the equipment used to place calls or texts is an autodialer, the scope of the definition is highly litigated.

The FCC itself has contributed to the legal uncertainty surrounding the term 'autodialer.' In 2015, the FCC put forth an extremely broad interpretation of ATDS, which was subsequently vacated by the D.C. Circuit in *ACA International v. FCC*. Since the D.C. Circuit's decision, the FCC has sought comment – on multiple occasions – on the autodialer definition. Curiously, the P2P Declaratory Ruling does not resolve the broader, still-open autodialer proceeding, explaining that "[t]he details of the Commission's interpretation of the autodialer definition remain pending[.]" However, as a matter of black letter law, the construction of ATDS adopted in the P2P Declaratory Ruling is now binding on the agency unless and until it is modified or overturned by the full Commission.

Even though the P2P Declaratory Ruling does not resolve the broader autodialer definition issues arising from the D.C. Circuit decision, it is significant because it sheds light on the Bureau's current position on the scope of ATDS. The P2P Declaratory Ruling construes the term 'autodialer' much more narrowly than the Commission did in 2015. In the P2P Declaratory Ruling, the Bureau:

clarif[ies] that the fact that a calling platform or other equipment is used to make calls or send texts to a large volume of telephone numbers is not probative [sic] of whether that equipment constitutes an autodialer under the TCPA. Instead, [it] make[s] clear that if a calling platform is not capable of originating a call or sending a text without a person actively and affirmatively manually dialing each one, that platform is not an autodialer and calls or texts made using it are not subject to the TCPA's restrictions on calls and texts to wireless phones.

. . .

If a text platform is not capable of storing or producing numbers to be called using a random or sequential number generator and dialing such numbers automatically but instead requires active and affirmative manual dialing, it is not an autodialer and callers using it are, by definition, not "evading" the TCPA.

The ruling leaves open several questions – including what "manually dialing" entails and what it means to "be capable of" meeting the definition of autodialer. But the Bureau's reasoning is consistent with a narrow interpretation of the statutory definition of ATDS.

More specifically, the P2P Declaratory Ruling addresses the question of whether "texts sent via a particular type of peer-to-peer messaging platforms are not subject to the TCPA's restrictions." The Declaratory Ruling does not green light *all* P2P platforms – explaining that it "do[es] not rule on whether any particular P2P text platform is an autodialer because the record lacks a sufficient factual basis for [the Bureau] to confirm (or for commenters to assess) whether any particular P2P text platform actually works as claimed in the *P2P Alliance Petition*." However, it does explain that "if a texting platform actually requires a person to actively and affirmatively manually dial each recipient's number and transmit each message one at a time and lacks the capacity to transmit more than one message without a human manually dialing each recipient's number, as suggested in the *P2P Alliance Petition*, then such platform would not be an 'autodialer' that is subject to the TCPA."

In short, leaving the open question of the scope of the word "capacity" aside, the Bureau granted the P2P Alliance Petition to the extent that P2P platforms require human intervention to dial numbers. This is a significant win for P2P platforms, which are used by a variety of entities and organizations, including nonprofits and campaigns.

The Supreme Court's Decision in Barr v. Association of Political Consultants, Inc. Invalidates a Narrow TCPA Robocall Exception, But Upholds the Broader TCPA

Barr v. American Association of Political Consultants, Inc. was a closely watched case involving the First Amendment, robocalling regulations under the TCPA, and severability. Chagrined that their political calls were regulated, the American Association of Political Consultants and three other organizations that participate in the political system filed a declaratory judgment action, claiming that 47 U.S.C. § 227(b)(1)(A)(iii) – an exception to TCPA liability for calls "made solely to collect a debt owed to or guaranteed by the United States" – violated the First Amendment. In the end, as predicted in Wiley's analysis of the oral argument, the Court found a First Amendment violation but declined to strike down the entire TCPA, instead severing the government-debt provision from the statute. Going forward, calling parties need to be careful in their calling campaigns.

The issues before the Court were whether the TCPA's preferential treatment was a content-based regulation of speech, what level of scrutiny applied if it was, and whether the TCPA's broad robocalling restrictions had to be invalidated if the exception violated the First Amendment. The Court found that Section 227(b)(1)(A)(iii)'s

robocall restriction, with the government-debt exception, is content-based because it favors speech made for the purpose of collecting government debt over other speech. As Justice Kavanaugh wrote for a plurality:

Under §227(b)(1)(A)(iii), the legality of a robocall turns on whether it is "made solely to collect a debt owed to or guaranteed by the United States." A robocall that says, "Please pay your government debt" is legal. A robocall that says, "Please donate to our political campaign" is illegal. That is about as content-based as it gets.

Accordingly, six Justices found that the TCPA violated the First Amendment by "impermissibly favor[ing] debt-collection speech over political and other speech, in violation of the First Amendment." Justice Kavanuagh, Chief Justice Roberts, and Justices Thomas, Alito, and Gorsuch all applied strict scrutiny. Justice Sotomayor came to the same conclusion applying intermediate scrutiny.

However, the Court upheld the remainder of the TCPA. Justice Kavanaugh, Chief Justice Roberts, and Justices Alito and Sotomayor found that the government debt exception was severable from the rest of the statute, despite the First Amendment violation. Justice Breyer, joined by Justice Ginsburg and Justice Kagan, would have upheld the government-debt exception, but given the contrary majority view, agreed that the provision was severable from the rest of the statute. In dissent, Justices Gorsuch and Thomas would have enjoined enforcement of the entire statute against the plaintiffs.

Many Court watchers were worried about the severability issue, fearing the entire TCPA could be invalidated if the debt collection exception was struck down. The majority refused to undermine the TCPA, spurring an important doctrinal debate, which will continue to be disputed.

From a practical perspective, the TCPA lives on. Accordingly, for now and importantly for this election cycle, the TCPA still imposes restrictions on political callers.

Next Up: The Supreme Court Will Consider the Scope of the Autodialer Definition

Just days after issuing its much-anticipated decision in *Barr v. American Association of Political Consultants, Inc.*, the Supreme Court on July 9 agreed to hear a case that will significantly impact the reach of the TCPA. The Court will take up Facebook's challenge to a Ninth Circuit TCPA ruling that broadly defined what qualifies as an ATDS under the TCPA. Specifically, the Court will consider "[w]hether the definition of ATDS in the TCPA encompasses any device that can 'store' and 'automatically dial' telephone numbers, even if the device does not 'us[e] a random or sequential number generator.'" This question is at the heart of a circuit split, which has resulted in disparate and inconsistent rulings across jurisdictions. A range of stakeholders should pay attention to this case in light of the central role that the ATDS definition plays in TCPA application and litigation. Given that the Supreme Court's action may further discourage the FCC from weighing in on the ATDS issues pending before it, the cert grant presents an opportunity for stakeholders to engage on ATDS at the Court to resolve uncertainty that chills communication.

In the case that Facebook is challenging, *Duguid v. Facebook*, the plaintiff alleged that Facebook sent unsolicited security alerts via text message using an ATDS. Facebook argued that its equipment was not an ATDS because it stored numbers to be called only "reflexively" in response to "outside stimuli" such as a suspicious login. Because this equipment did not "use a random or sequential number generator," Facebook argued that it should not be considered an ATDS.

Facebook's argument stems from the ambiguous wording of the statute, which defines ATDS 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." Some courts – such as the Eleventh Circuit – have interpreted this definition to mean that the phrase "using a random or sequential number generator" modifies both "store" and "produce." Under these courts' reading, equipment cannot be an ATDS unless it uses a random or sequential number generator.

The Ninth Circuit disagreed with Facebook and these other courts. It interpreted ATDS to include equipment that stores numbers for purposes other than calling – specifically, "the equipment need only have the 'capacity' to store numbers to be called." The Ninth Circuit held that the phrase "using a random or sequential number generator" modified only the word "produce," *not* the word "store." Under this reading, equipment meets the first prong of the ATDS definition if they either (i) "produce" numbers using a random or sequential number generator *or* (ii) merely "store" numbers. Other courts, such as the D.C. Circuit, have noted that this interpretation would encompass every smartphone in America – as smartphones can "store" numbers – which would give the statute an "eye-popping sweep."

Facebook filed its petition for certiorari in October 2019 asking the Court to consider the ATDS definition, as well as whether the TCPA's prohibition on calls made using an ATDS is an unconstitutional restriction of speech. After months of waiting, the Court granted cert on the definition of ATDS.

A Supreme Court ruling could bring much-needed guidance. In the absence of a definitive decision from the expert agency, federal courts have inconsistently interpreted ATDS. As Facebook detailed in a supplemental brief filed in the wake of the Supreme Court's TCPA decision in *Barr v. American Association of Political Consultants, Inc.*, there is an "irreconcilable conflict on an important and oft-litigated question that dictates whether the statute reaches specialized robocalling equipment or every modern smartphone." In short, the Second and Ninth Circuits have interpreted ATDS more broadly, while the Third, Seventh, Eleventh, and D.C. Circuits have taken a narrower approach. Given the central role of the ATDS definition under the TCPA, the Court's decision on this split will have profound implications for a range of stakeholders and will influence TCPA litigation for years.

The case will be argued and decided as part of the October Term 2020, which makes it likely a decision will come in 2021, after the election. The cert grant may make FCC action on numerous pending petitions unlikely, so interested parties should weigh in with the Court. The Supreme Court rarely takes TCPA cases, so addressing the statute twice in a month is remarkable.

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As political callers know well, the TCPA is a high-stakes area, and the issues at play in these three recent TCPA items are of critical importance. While the Bureau's P2P Declaratory Ruling sheds some light on the definition of autodialer, the Commission has otherwise declined to more fully address the meaning of ATDS, despite years of opportunity and plenty of activity on unwanted and illegal robocalling. If additional relief is to come to political callers on this issue, it may be from the Supreme Court and not the FCC.