

Beginning of a TCPA Clean-Up? FCC Sets Another Robocall Blocking Item for Vote While Addressing Two of Nearly Three Dozen Pending Petitions

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June 26, 2020

On the same day that the FCC set a call blocking declaratory ruling for vote at its [July 2020 Open Meeting](#), the FCC's Consumer and Governmental Affairs Bureau issued rulings in two long-pending petitions for clarification of the requirements of the Telephone Consumer Protection Act ("TCPA"). Although these clarifications do not address the core questions regarding the definition of an autodialer and consent requirements that were remanded two years ago in *ACA International v. FCC*, they may signal an effort to clean up TCPA issues in what is expected to be the waning months of FCC Chairman Pai's tenure at the Commission.

In the first ruling, [P2P Alliance](#), the Bureau ruled that an automatic telephone dialing system ("ATDS") is not determined by whether the equipment has the capability to send a large volume of calls or texts in a short period of time. Instead, the Bureau, while recognizing that the Commission's interpretation of the ATDS definition remains pending, ruled that "whether the calling platform or equipment is an autodialer turns on whether such equipment is capable of dialing random or sequential telephone numbers without human intervention." The Bureau also provides an illuminating discussion of the so-called "human intervention" element of prior FCC statements regarding autodialers.

In the second ruling, [Anthem, Inc.](#), the Bureau denied a petition to exempt certain healthcare-related calls from the TCPA's consent requirements. In this order, the Bureau breaks less new ground and instead reiterates that prior express consent must be obtained before a call (or text) is made and that the supposed value or "urgency" of the communication does not necessarily make it permissible.

Besides these two petitions, the Commission has nearly [three dozen petitions](#) pending before it on a variety of matters relating to exemptions from the TCPA's consent requirements, the collection and revocation of consent, the "junk fax" provisions, and other questions raised by the flood of TCPA class action litigation in the last five years. If the FCC begins addressing these other pending petitions, the course of TCPA class action litigation could change significantly.

In March 2018, the United States Court of Appeals for the D.C. Circuit [issued a landmark rebuke](#) of the FCC's interpretation of the TCPA. The case, *ACA International v. FCC*, reviewed a 2015 Omnibus

Declaratory Ruling on a variety of matters, the most notable of which was the FCC's expansive interpretation of an "automatic telephone dialing system" ("ATDS"), the use of which triggers the TCPA's prior express consent requirements and private right of action provisions. In *ACA International*, the court found the FCC's interpretation "impermissibly broad" and remanded the case to the FCC for further consideration.

Since that time, the FCC has taken comment twice on the *ACA International* remand, but FCC Chairman Pai has focused the agency's efforts on identifying and [reducing illegal robocalls](#) rather than addressing the remand. Chairman Pai has repeatedly said that unwanted automated calls is a top consumer complaint and he has pursued a multi-faceted approach to preventing or blocking those calls before they reach consumers.

The Commission has

- authorized voice service providers to block incoming calls that "reasonable call analytics" identify as likely illegal calls,
- mandated that service providers implement a [call authentication framework](#) to prevent unlawfully spoofed calls,
- [directed specific service providers](#) to block certain calls or have their own calls blocked by other providers,
- proposed multiple fines exceeding [\\$100 million each](#) for illegally spoofed calls, and
- authorized a [comprehensive database](#) to identify when telephone numbers have been reassigned from a subscriber who may have given consent to a new subscriber.

Indeed, on the same day as the rulings we will discuss, the Commission set for a vote a proposal to provide a safe harbor for voice service providers that erroneously block calls in good faith and to establish protections against blocking critical calls by public safety entities. According to an FCC staff report issued the same day, these actions are helping to reduce illegal robocalls.

The Anthem and P2P Alliance Rulings

Against this backdrop, the flood of TCPA class action cases has powered a rising tide of petitions for declaratory rulings addressing specific aspects of the TCPA's requirements, from when consent is needed, how it may be obtained, and how it may be revoked. At Kelley Drye, we have chronicled these developments in our monthly [TCPA Tracker](#) and its accompanying [FCC Petitions Tracker](#) of the nearly three dozen pending petitions. The total number of petitions has risen slightly over time, as new petitions have modestly outnumbered decisions issued by the Commission.

P2P Alliance Petition (Two-Way Texting With Manual Intervention). In May 2018, the P2P Alliance, a group that represents providers and users of "peer to peer" text messaging services, sought a declaratory ruling that peer to peer messaging services did not involve an ATDS and thus were not subject to the restrictions on ATDS calls/texts contained in the TCPA. The petition sought a ruling with respect to text messaging services that enable two-way text communication, requiring a person to manually send each message. Although the Bureau declined to rule with respect to any specific platform – citing a lack of sufficient evidence regarding the how the platforms operate – the Bureau issued a ruling with several important clarifications.

First, the Bureau ruled that the ability of a platform or equipment to send "large volumes of

messages” is not probative of whether that platform or equipment constitutes an ATDS under the TCPA. The Bureau declared that “whether the calling platform or equipment is an autodialer turns on whether such equipment is capable of dialing random or sequential telephone numbers without human intervention.”

This conclusion effectively puts to rest ambiguous statements in some prior orders that TCPA plaintiffs had argued brought any high-volume calling platform within the scope of the TCPA. Furthermore, the Bureau’s conclusion appears most consistent with decisions by several U.S. Courts of Appeal that have ruled an autodialer must employ a random or sequential number generator to meet the TCPA’s definition of an ATDS. The Bureau noted, however, that the “details” of the interpretation of an ATDS were before the Commission in *ACA International* so, until the Commission addressed that issue, the Bureau was relying solely on “the statutory definition of autodialer.”

The Bureau’s ruling contains an illuminating discussion of the so-called “human intervention” element of prior FCC statements regarding autodialers. Per the Bureau’s ruling, “If 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.” The Bureau explained the “actively and affirmatively” dialing standard as requiring a person to manually dial each number and send each message one at a time. Use of such technologies is not an “evasion” of the TCPA, the Bureau commented, because the TCPA “does not and was not intended to stop every type of call.”

Thus, while the full contours of the ATDS definition are still to be defined by the Commission, the Bureau’s *P2P Alliance* ruling helps to clarify that an “active and affirmative” manual process for sending calls or messages removes a platform or piece of equipment from the ambit of the TCPA. This ruling could buttress many district court rulings that have found sufficient human intervention in the operation of many calling or texting platforms.

Anthem Petition (Prior Express Consent for Healthcare-Related Calls). The Anthem petition addressed by the Bureau was filed in June 2015, one month before the FCC released the Omnibus Declaratory Ruling addressed in *ACA International*. (Anthem has a more recent petition addressing post-Omnibus order issues that remains pending.) In the June 2015 petition, Anthem asked the Commission to create an exemption for informational healthcare-related calls/texts initiated by healthcare providers and sent to existing patients, arguing that such communications were beneficial to patients and could be protected by an opt-out process it believed the Commission was then considering for ATDS calls. The Commission received limited comment in September 2015 (while the *ACA International* appeal was being litigated) and has received virtually no filings discussing the petition since that time.

In the ruling, the Bureau denied virtually all of Anthem’s requests, emphasizing instead the TCPA’s requirements for prior express consent for ATDS calls. Specifically, the Bureau ruled that “makers of robocalls generally must obtain a consumer’s prior express consent *before* making calls to the consumer’s wireless telephone number.” (emphasis in original). It rejected Anthem’s request for an exemption permitting such calls, subject to opt-out, and repeated that the “mere existence of a caller-consumer relationship” does not constitute consent. Importantly, however, the Bureau affirmed prior statements that a consumer who has knowingly released their phone number for a particular purpose has given consent to receive calls at that number.

To the extent that the Anthem petition sought an exemption based on the “urgency” of healthcare-related communications, the Bureau declined to create such an exception, emphasizing, however, that the “emergency purposes” exception could apply to the extent the calls/texts satisfied the

Commission's rules and its recent [COVID-19 Declaratory Ruling](#).

In the end, the ruling likely will not change the status quo for calls and texts being made today. The Bureau emphasized previous rulings requiring prior express consent and endorsed previous statements about how such consent may be obtained. Further, the Bureau affirmed the "emergency purposes" exception, although declining to expand its scope. Thus, entities making calls or texts following prior FCC guidance should not need to make any changes as a result of the Anthem ruling.

Looking Ahead

These decisions are not the broad rulings that many hoped for when *ACA International* was remanded to the FCC in March 2018. Chairman Pai was highly critical of the 2015 Omnibus order from the FCC (from which he dissented) and welcomed the *ACA International* decision. He has focused the agency on reducing unwanted calls prior to addressing the legal interpretations called for by the remand. Now, however, with those actions at an advanced stage and with his expected time as Chairman of the FCC about to end, many are wondering if the Pai Commission will revisit the ATDS definition, revocation of consent, and safe harbor questions remanded to it. Even if it does not, however, the Commission has nearly three dozen other petitions still pending, which could provide needed guidance on discrete issues that have arisen in TCPA litigation.

We don't know at this time which way the FCC is likely to go, or even if it will address more TCPA issues during Chairman Pai's tenure, but enterprises and service providers should watch the FCC closely over the next few months.