

MEMORANDUM

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Howard Waltzman and Mickey Leibner

T: +1 202 263 3848
hwaltzman@mayerbrown.com

BY EMAIL

TO: Redo Tech, Inc.

FROM: Howard Waltzman and Mickey Leibner

RE: Analysis of the Telephone Consumer Protection Act's Applicability to Redo's Checkout Abandonment Recovery Service

This memorandum provides an analysis of the applicability of the Telephone Consumer Protection Act ("TCPA")¹ to a text messaging service provided by Redo Tech, Inc. ("Redo"). The service, known as "Recover" (the "Service"), provides a human-assisted checkout abandonment recovery service for ecommerce providers.

As described below, based on the information you have provided about the Service, it does not involve an "autodialer," and therefore is not subject to the autodialer restrictions of the TCPA.²

Background on the TCPA

The TCPA generally prohibits a party from making a call or sending a text message using any "automatic telephone dialing system" or an artificial or prerecorded voice to any cellular telephone number,³ unless in the case of an emergency or if the caller has the prior express consent of the called party. Under the TCPA, an "automatic telephone dialing system" or "autodialer" is defined to mean:

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."⁴

¹ 47 U.S.C. § 227.

² See 47 U.S.C. § 227(b)(1)(A).

³ *Id.*

⁴ 47 U.S.C. § 227(a)(1).

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In 2020, the Federal Communications Commission (“Commission”) clarified the applicability of the TCPA to certain text messaging platforms. In particular, the Commission responded to a petition⁵ filed by the P2P Alliance regarding the applicability of the TCPA to peer-to-peer text messaging platforms that “enable two-way text communication, require a person to manually send each text message one at a time, and enable the sender to exercise discretion regarding the content and other features of the text messages.”⁶

In the Ruling, the Commission clarified that a call or text message platform is not an autodialer if it “is not capable of originating a call or sending a text without a person actively and affirmatively manually dialing each one.”⁷ As such, calls or texts made with such a platform “are not subject to the TCPA’s restrictions on calls and texts to wireless phones.”⁸

The Commission also noted that “whether a certain piece of equipment or platform is an autodialer turns on whether it is capable of performing those functions without human intervention, not whether it can make a large number of calls in a short time.”⁹

Instead, whether a platform is an autodialer depends on “whether such equipment is capable of dialing random or sequential telephone numbers without human intervention. 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”¹⁰ and is not subject to the restrictions of the TCPA.

In addition, the U.S. Supreme Court has further clarified that, in order to qualify as an autodialer, a piece of equipment must “have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator.”¹¹

Background on Redo’s Service

We understand and assume the following regarding the Service:

- The Service is intended to allow trained agents to provide transactional customer assistance via text messages (*e.g.*, answering customers’ questions about products, providing discounts, or assisting with completion of a pending order).

⁵ *Petition for Clarification of the P2P Alliance*, CG Docket No. 02-278 (filed May 3, 2018) (“Petition”).

⁶ Ruling at para. 2 (internal citations omitted).

⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, P2P Alliance Petition for Clarification*, CG Docket No. 02-278, Declaratory Ruling at para. 3, (June 25, 2020) (“Ruling”).

⁸ Ruling at para. 3.

⁹ Ruling at para. 9.

¹⁰ Ruling at para. 8.

¹¹ *Facebook, Inc. v. Duguid*, 592 U.S. 395, 399 (2021).

- Specifically, when using the Service, agents: (1) review a draft text message, (2) have the ability to edit, customize, or rewrite the content, and (3) must manually send each such message. These messages are sent to online customers who initiate, but do not complete, the checkout process. The Service also allows companies to send such text messages to customers who have completed the checkout process; we understand that agents also review and have the ability to edit, customize, or rewrite such messages, and must manually send each one.
- In all instances, texts sent using the Service are affirmatively sent by a single, live agent to a single customer.

Applicability of the TCPA to the Service

The Service appears to be the type of peer-to-peer, one-to-one text messaging service that the Ruling clarifies does not constitute the use of an autodialer, and is therefore not subject to the TCPA's restrictions on calls/texts made to wireless phone numbers.

Importantly, we understand that each text message sent using the Service is sent one at a time "from a single sender to a single recipient" in order to "initiate two-way conversation."¹² Because agents using the Service must manually send each text message, the Service is not capable of sending a text message "without a person actively and affirmatively" manually dialing each message. In other words, the Service "lacks the capacity to transmit more than one message without a human manually dialing each recipient's number."¹³ As such, it does not appear to involve an autodialer, and does not appear to be subject to the TCPA's restrictions.

¹² Ruling at para. 10 (internal citations omitted).

¹³ Ruling at para. 11.