

# FCC Makes the Call: Click-to-Text Is Not an Automatic Dialer



**BY MICHELE SHUSTER**  
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Peer-to-peer texting has become very popular with auto dealers looking for efficient and effective marketing technology.

P2P platform services give dealerships the ability to quickly send individual texts to large groups of recipients.

The typical dealership application is an employee who uses a computer to draft a template for a marketing or informational text message, selects contacts from a list then clicks a keyboard button for each individual contact to quickly send individual texts.

From a compliance perspective, there has long been a legal debate about whether P2P platforms are Automatic Telephone Dialing Systems as defined by the Telephone Consumer Protection Act.

If P2P platforms are ATDS, then before sending a text using a P2P platform, a dealer would be required to obtain prior consent to lawfully send the text.

The Federal Communications Commission recently answered that question when it issued a declaratory ruling reaffirming that a click-to-text system requiring human intervention for each individual text message is not an ATDS.

The petitioner, P2P Alliance, argued its P2P texting platform requires a human to “actively and affirmatively manually dial each recipient’s number and transmit each message one at a time.”

The P2P platform cannot store, produce or dial random or sequential numbers. Rather, the sender dials a number and may choose to send either a pre-scripted or unique text message to begin a two-way text conversation.

Consumer groups opposed the petition by arguing P2P platforms like P2P Alliance’s can send vast amounts of text messages in a short time with minimal and meaningless human participation. But the FCC reiterated that the relevant question is not whether many calls or texts can be made in short time – it’s whether the platform can store, produce and dial random or sequential numbers without human intervention.

As the FCC noted, “The TCPA does not and was not intended to stop every type of call. Rather, it was limited only to calls made using an autodialer or an artificial or prerecorded voice.”

The FCC’s ruling confirmed that human intervention remains the key to ATDS analysis. “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,” the commission said, “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.”

The FCC’s interpretation is consistent with the trend of past cases analyzing click-to-dial systems and will bring much needed comfort to dealerships using those types of telephone systems.

Specifically, it’s an important ruling if your dealership or company uses one of the popular P2P platforms like Twilio, because if a P2P system is by default an ATDS, your dealership would be required to maintain records of written consent before using the system to send text messages.

Marketing texts would have required “prior express written consent,” while non-marketing text would have needed “prior express consent.”

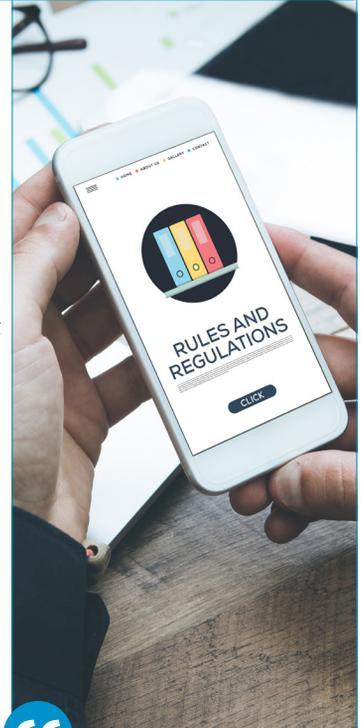
According to the TCPA, prior express written consent requires a written signed agreement from the text recipient that must include a clear and conspicuous disclosure that the text recipient is authorizing autodialed telemarketing or advertising texts, and is not required to sign the agreement as a condition of purchasing any property, goods or services.

For non-marketing texts, prior express consent is required. The FCC said that is done by the texted party “giving prior express oral or written consent or, in the absence of instructions to the contrary, giving his or her wireless number to the person initiating the autodialed or prerecorded” text.

While companies can implement processes to obtain the requisite consent, the concern has been that the TCPA is a popular weapon for attorneys to file class-action lawsuits against businesses – including car dealerships.

Class actions are expensive to defend and frequently lead to costly settlements or judgments. The FCC’s ruling means dealerships will no longer be required to keep records of consent to text using a P2P platform.

It’s still important to be cognizant of federal and state do-not-call laws and advertising laws that mandate specific disclosures. As always, we recommend that prior to initiating calls or texts to consumers and



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customers, dealerships have their campaigns reviewed by competent telemarketing compliance counsel.

This is an area where an ounce of prevention is worth a pound of cure.