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March 19, 2021

Steve Cortez
Arch Telecom d/b/a ArchAgent
3103 Bee Caves Road, Suite 221
Austin, TX 78746

VIA E-MAIL stevec@archtelecom.com

Re: Application of the Telephone Consumer Protection Act to your dialing system

Dear Steve:

You have requested that we update our opinion letter from February 5, 2019, on whether your dialing system is an “automatic telephone dialing system” (“ATDS”) under the Telephone Consumer Protection Act (“TCPA”).

The TCPA defines an 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”. 47 U.S.C. § 227(a)(1).

It is important that the ArchAgent dialer not be classified as an ATDS as the TCPA prohibits any person from making any call using an ATDS or prerecorded message to any cell phone or other service for which the called party is charged without the prior express consent of the called party. *Id.* at (b)(1). TCPA violations can result in penalties of up to \$500 per violation, or up to \$1,500 per violation if done willfully or knowingly. *Id.* at (b)(3). There is no cap on damages and thousands of violations can result in significant penalties.

Based on your explanation, my review of your dialer, and the sources cited below, it is my opinion that the equipment is not an ATDS. My opinion is based on the facts as you described them to me and could change if those facts change. Third parties or courts could disagree with my opinion which could also change based on further court or agency action.

On March 16, 2021, you provided me an explanation of the equipment which we discussed over the phone. Our conversation confirmed that (a) the equipment employed by Arch Telecom does not work in concert with any other equipment, whether owned by Arch Telecom, its affiliates or any third party, which individually or taken as a whole, would have any present or future capacity to store or produce, and dial random or sequential numbers, even if not presently used for that purpose, including when calling a set list of consumers, and (b) the equipment described in this letter and employed by Arch Telecom cannot be used to dial any numbers without material human intervention.

Specifically, human intervention is required for each telephone call as each agent is required to log onto the system with a username and password. After selecting the assigned project name, the screen presents the telephone number of the recipient and the agent must manually click “send” on the screen to dial each individual recipient. Agents can make only one call at a time.

The equipment cannot send prerecorded messages to any emergency telephone line (including any “911” line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency); to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States (live answer or voicemail).

In July 2015, the Federal Communications Commission (“FCC”) issued additional protections for consumers designed to prevent unwanted “robocalls”. See *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling*, 30 FCC Rcd 7961 (FCC July 10, 2015) (“2015 Report”).

The 2015 Report concluded that the equipment (e.g. hardware or other physical components of a system) of a calling platform is what determines whether it is an ATDS as that term is defined in the TCPA. Thus, if a system of equipment generally has the capacity to store or produce, and dial random or sequential numbers, without human intervention, even if not presently used for that purpose, including when calling a set list of consumers, then that system is an ATDS.

The FCC cautioned that entities cannot avoid the classification of equipment as an ATDS by dividing ownership of equipment that work in concert among multiple entities and that capacity is not limited to the current configurations of equipment but also includes a wide range of potential functionalities. This system of equipment is an ATDS even if the software associated with it would need to be added to or modified for it to have the capacity to dial without human intervention.

In March 2018, the District of Columbia Circuit Court of Appeals struck down the FCC’s definition of an ATDS in *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). The court in *ACA* noted that the expansive regulatory definition set by the FCC would include any smartphone, and Congress could not have intended hundreds of millions of smartphones and billions of calls to be banned by the TCPA. It held that the FCC’s definition was arbitrary and capricious and therefore unenforceable.

Several appellate cases have also ruled inconsistently regarding this definition: *King v. Time Warner Cable Inc.*, 894 F.3d 473 (2d Cir. 2018); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116 (3d Cir. 2018); *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018); *Glasser v. Hilton Grand Vacations Co., LLC*, Nos. 18-14499, 18-14586, 2020 U.S. App. LEXIS 2481 (11th Cir. Jan. 27, 2020); *Gadelhak v. AT&T Servs.*, No. 19-1738 (7th Cir. Feb. 19, 2020).

On December 8, 2020, the Supreme Court heard oral argument for *Facebook, Inc. v. Duguid*, No. 19-511, 2020 U.S. LEXIS 3559 (July 9, 2020), to determine whether the definition of ATDS

Steve Cortez
March 19, 2021
Page 3 of 3

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.” Until *Duguid* is decided, the above advice is conservative and compliant with the TCPA with regard to express consent and ATDS definitions.

Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

A handwritten signature in black ink that reads "William E. Raney". The signature is written in a cursive style with a large, stylized initial "W".

William E. Raney
For the Firm

WER/kmb