

## Publications

### *Client Alert: Five Minutes That May Save Your Text Message Program Millions*

**CLIENT ALERT** | 12.10.2012

On November 29<sup>th</sup>, the Federal Communications Commission (FCC) granted a request for declaratory ruling filed by Soundbite Communications Inc. (Soundbite). The FCC held that a one-time text message confirming a consumer's request to opt-out of receiving text messages, if it meets specific requirements, does not violate the Telephone Consumer Protection Act (TCPA).<sup>[1]</sup> The FCC considered what consumers would believe was within the scope of the original consent given to receive text messages. It determined that the original consent would include the opt-out confirmation if it does not contain any marketing or promotional information and is sent within five minutes of the consumer's opt-out request. The FCC's ruling became effective upon its release.

Soundbite argued that it did not use an automatic telephone dialing system, as defined under the TCPA, to send the opt-out confirmations. This was based on the software used to send the confirmation texts, which does not have the capacity to store or produce telephone numbers. Soundbite also suggested that as with telemarketing calls, there should be a grace period to effectuate an opt-out. Rather than accept the proposed positions of Soundbite, the FCC instead reviewed the issue of when the prior express consent is revoked. It noted that the TCPA is silent regarding revocation of prior express consent and "[w]here a statute's plain terms do not directly address the precise question at issue and the statute is ambiguous on the point, the Commission can provide a reasonable construction of those terms."<sup>[2]</sup>

#### **Marketers' Predicament**

The Ruling is welcome relief to a predicament text message marketers were in as a result of guidelines they are required to follow from the Mobile Marketing Association (MMA). The MMA U.S. Consumer Best Practices require marketers to send a confirmation message anytime a consumer sends "STOP" to opt-out of its text program.<sup>[3]</sup> Failure to comply with the MMA guidelines can result in suspension of the marketer's text message program or being blacklisted by wireless carriers.

Sending the confirmation message, however, was argued by some plaintiffs as violating the TCPA because the confirmatory message was sent after consent to receive text messages had been revoked. The TCPA provides that it is unlawful to make a "call" to a cell phone using any automatic telephone dialing system without prior express consent. There are also statutory damages of \$500 per violation or \$1,500 per willful violation under the TCPA<sup>[4]</sup> and plaintiffs typically seek recovery of attorneys' fees as well. A "call" under the TCPA has been broadly construed by the FCC and the courts to include text messages.<sup>[5]</sup> As a result, sending opt-out confirmation messages in order to comply with the MMA guidelines put companies in the position of being exposed to significant liability. For example, in the fall of 2011, Barclays Group agreed to pay a class of people who had received opt-out confirmation texts over \$8 million to settle a class action suit alleging TCPA violations.<sup>[6]</sup>

Prior to the FCC's Ruling, one district court ruled that a single opt-out confirmation does not violate the TCPA.<sup>[7]</sup> The FCC's Ruling provides significant additional support. Because the FCC was providing a reasonable construction to an ambiguous provision of the TCPA, this construction is entitled to deference unless it is "arbitrary, capricious, or manifestly contrary to the statute."<sup>[8]</sup> In this regard, the FCC cited to the legislative history of the TCPA, which indicates that the TCPA is not intended to apply to "normal business communications that are expected or desired between businesses and their customers" as support that its Ruling is consistent with the goals and objectives of the TCPA.<sup>[9]</sup> Given this, it will be difficult for plaintiffs to argue that the FCC's Ruling is arbitrary, capricious or contrary to the TCPA.

## Steps to Take

To make the best use of this Ruling, when planning and implementing a text message marketing campaign, the following should be considered:

1. Always get prior express consent to send text messages, whether it is a marketing or merely a transactional message.
2. When receiving a response to a STOP message, a confirmation text is a good practice and required by the MMA.
3. No marketing information can be included in the opt-out confirmation, but must only confirm the opt-out.
4. Contractually require your vendor to send the opt-out confirmation within 5 minutes of receipt of the opt-out.
5. No further text messages should be sent after the opt-out confirmation unless new express consent is obtained.

For more information regarding the FCC's Ruling, how to obtain consent and structure your text message marketing program or other contractual considerations with text message vendors, please contact:

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<sup>[1]</sup> FCC Declaratory Ruling in response to SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling, FCC 12-143, Nov. 29, 2012, available at <http://www.fcc.gov/document/declaratory-ruling-re-soundbite-tcpa-petition>.

<sup>[2]</sup> FCC Declaratory Ruling, *supra* note 1, at ¶18.

[3] Mobile Marketing Association, U.S. Consumer Best Practices, Version 6.0, § 1.6-4, available at <http://www.mmaglobal.com>.

[4] 47 U.S.C. § 227(b)(1)(A).

[5] See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14092, ¶ 165 (2003); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009).

[6] *Gutierrez v. Barclays Group*, No. 10-cv-1012-DMS-BGS (U.S. Dist. Court S.D. Cal. Oct. 11, 2011). The settlement included up to \$1.58 million in attorneys fees, \$10,000 for the two lead plaintiffs, and up to \$125 for each of the estimated 67,500 class members.

[7] *Ibey v Taco Bell Corp.*, No. 12-CV-0583-IEG-(WVG), 2012 U.S. Dist. LEXIS 91030, 2012 WL 2401972 (U.S. Dist. Court S.D. Cal. June 18, 2012).

[8] *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d at 952 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

[9] FCC Declaratory Ruling, *supra* note 1, at ¶18 (internal quotations removed). The FCC also cited evidence that sending one-time opt-out confirmation messages is a widespread practice expected by consumers and noted that the FCC has not received any consumer complaints about receiving opt-out confirmation texts. *Id.* at 9.