

FCC Clears the Way for Businesses to Send Confirmation Texts to Consumers Opting Out of Receiving Text Messages

By Lauren Lynch Flick and Andrew D. Bluth

FCC ruling sets out standards businesses must follow to avoid being labeled spammers and to reduce the risk of class action lawsuits under the Telephone Consumer Protection Act.

In a ruling watched closely by retailers, marketers, the wireless industry, and many others who communicate with consumers via text messaging, the Federal Communications Commission (“FCC”) has ruled that sending a one-time text message confirming a consumer’s request to opt-out of future text communications is not a violation of the Telephone Consumer Protection Act (“TCPA”). The FCC’s action comes after numerous companies have faced class action litigation over the generally accepted practice of confirming to consumers that their request to opt-out has been received and acted on. In response to concerns raised by class action litigants that such texts are really unwanted marketing messages and can cost consumers money to receive, the FCC set out fairly rigorous standards for what information a confirmation message can contain and the timeline in which it can be delivered.

Background

The TCPA makes it unlawful to make a non-emergency “call” using an automatic telephone dialing system (“ATDS”) or prerecorded voice to, among other things, a mobile telephone (47 U.S.C. § 227(b)(1)(A)), without prior express consent of the recipient. The TCPA was enacted in 1991, before the proliferation of text messaging as a means of communication, and was generally directed towards telemarketing to mobile phones. The FCC’s rules define a “call” to include not only a voice call, but text messages as well. In addition, in 2009 the U.S. Court of Appeals for the Ninth Circuit, in *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009), held that text messages are “calls” under the TCPA.

When a consumer or subscriber requests to opt-out of future text messaging (thereby revoking their prior consent), wireless carriers, the mobile marketing trade associations, and retail trade associations include as part of their customer best practices the practice of immediately sending a one-time reply confirming receipt of the opt-out request. This kind of one-time text became the subject of numerous class action

lawsuits alleging violations of the TCPA on the theory that the texts are sent after consent is withdrawn and, as a result, violate the TCPA.

SoundBite Communications, Inc. is a mobile marketing company that sends text messages to consumers on behalf of companies that have obtained consent from their customers to send marketing or informational text messages to those customers' mobile devices. In February, SoundBite filed a petition with the FCC seeking a ruling that confirmation texts were permissible under the TCPA.

The SoundBite Ruling

In the SoundBite ruling, the FCC held that one-time confirmation texts do not violate the TCPA, provided certain criteria are met by the confirming text. In so doing, the FCC noted that it has never received a complaint from a consumer about the practice, but it has received complaints from consumers whose opt-out requests were not acknowledged. While the FCC was fairly dismissive of the claim that consumers do not consent to confirmation text messages when they agree to a text service or to opt out of it, the FCC did set out specific requirements that such messages must meet to be considered permissible under the TCPA.

As a preliminary matter, the party receiving the one-time text must have previously provided its express consent to receive the sender's text messages.

Next, the one-time text must meet the following requirements: (1) the text must only confirm the consumer's opt-out request and can include no marketing or promotional information; and (2) the text must be the only additional message sent to the consumer after receipt of the opt-out request.

Finally, the timing of the one-time text will factor into whether it violates the TCPA. **If the one-time confirmation text is sent within five minutes of receipt of the opt-out request, it will be presumed to fall within the consumer's prior express consent.** If it takes longer, the sender will be required to demonstrate that the delay was reasonable. The FCC made clear that the longer the delay, the more difficult it will be to demonstrate that the message falls within the original prior consent.

The FCC also provided mobile marketers and others who communicate with consumers via text with guidance as to what content would be permissible in a one-time confirmation text. Specifically, the FCC said that the text message must not contain any marketing, solicitation, or attempt to convince consumers to reconsider their opt out decision. The FCC clarified, however, that the message can contain contact information or instructions as to how a consumer can opt back in to receiving the company's text messages. While that does provide some flexibility for senders, the text message cannot encourage consumers to contact the sender if such contact will lead to future marketing messages. Entities that send opt-out confirmation texts will bear the burden of showing that their messages are consistent with the requirements outlined by the FCC. The FCC also stated that any one-time confirmation of a consumer's opt-out must be made via text message and that confirmation voice calls to the consumer's mobile device are not permissible.

Conclusion

The SoundBite ruling will impact virtually all entities that interact with consumers via mobile devices. Those entities that follow the industry best practice of sending confirmation texts and, as a result, found themselves at risk of facing class action lawsuits, now have the ability to rely on the FCC's SoundBite ruling affirming the legitimacy of that practice. However, entities that send opt-out confirmation texts must

review the content and circumstances under which those texts as sent and the procedures used in sending them, to ensure the texts comply with the FCC's order.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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