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ALERT

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FCC Rules Texts Confirming Opt-Out Do Not Violate TCPA

The Federal Communications Commission has ruled that a one-time confirmatory text message sent to acknowledge that a consumer has opted out of receiving further text messages does not violate the Telephone Consumer Protection Act, as long as the text message meets certain criteria, including that the text message only confirms the opt-out and does not include any additional marketing or promotional language, that the recipient had previously given the organization sending the message (or for which the message was sent) express permission to send text messages, and that the confirmatory text message is the only message sent after receipt of the consumer's opt-out text.

In its [Declaratory Ruling](#), the FCC stated that if a consumer previously consented to receive text messages and then opts out, the consumer's prior express consent reasonably can be construed to include consent to receive a one-time confirmatory text message, allowing organizations to continue "a widespread practice ... which many parties in this proceeding, including a consumer group, assert is good consumer policy."

SoundBite Communications, Inc., a company that sends text messages to wireless subscribers on behalf of a number of companies, filed a petition for an expedited declaratory ruling with the FCC. In the petition, SoundBite asserted that wireless carriers, aggregators, and the CTIA require it to follow the Mobile Marketing Association's best practices before they will enable and allow text message campaigns on wireless networks and that these best practices include sending a text message confirming receipt of a subscriber's request to opt-out of receiving further text messages. SoundBite sends the one-time confirmatory text within minutes of receiving the opt-out request and only to those consumers who opt out.

The FCC based its ruling not on SoundBite's arguments but on its conclusion that a consumer's prior express consent to receive text messages from an organization reasonably extends to include the final text message confirming that the consumer is revoking that consent. Noting that neither the language of the TCPA nor its legislative history directly addressed the circumstances under which prior express consent is deemed revoked, the FCC reasoned that confirmatory texts are appropriately considered part of the opt-out process, informing consumers that "a service was scheduled or performed" and are normal communications "expected or desired" between consumers and the entities to which they provided prior express consent to receive text messages.

Only texts that meet the FCC's express criteria are exempt from the prohibitions under the TCPA. Confirmatory texts sent within five minutes of the consumer's opt-out text are presumed to fall within the consumer's prior express consent. If the sender takes longer to send a text, however, it will have to make a showing that the delay was reasonable – and the longer the delay, the more difficult it will be for the sender to demonstrate that text messages fall within the original prior consent. In addition, prior consent is limited to a confirmatory text that confirms receipt of the consumer's opt-out request, and does not contain marketing, solicitation or promotional language. Texts may include contact information or instructions as to how the consumer can opt back in to receive text messages, but may not include language attempting to convince the consumer to reconsider opting out. Texts that encourage consumers to call or otherwise contact the sender in an attempt to market – including texts with appropriate language that then leads to a marketing message if the consumer contacts the sender – are also

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likely beyond the scope of the consumer's prior consent, according to the FCC. The Commission intends to review "questionable" confirmatory texts on a case-by-case basis, and texts that deviate in material ways from the FCC's express criteria are unlikely to be encompassed by the consumer's prior consent.

In a statement accompanying the declaratory ruling, Commissioner Ajit Pai noted that many companies were facing class action lawsuits for "innocuous conduct" and expressed hope that the FCC's order would "end the litigation that has punished some companies for doing the right thing, as well as the threat of litigation that has deterred others from adopting a sound marketing practice." In two recent decisions, the District Court for the Southern District of California has held that sending a single text message to confirm a subscriber's opt-out request, when the subscriber voluntarily opted in to receive text messages, does not violate the TCPA. *Ryabyshchuk v. Citibank*, 2012 U.S. Dist. LEXIS 156176 (S.D. Cal. Oct. 30, 2012); *Ibey v. Taco Bell Corp.*, 2012 U.S. Dist. LEXIS 91030 (S.D. Cal. June 18, 2012).

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