

# Client Alert.

December 7, 2012

## FCC Rules that Opt-Out Confirmation Text Messages Do Not Violate the TCPA

By Tiffany Cheung, Julie O'Neill and Matthew Galeotti

Waves of class actions have recently alleged that the delivery of an opt-out confirmation text message violates the Telephone Consumer Protection Act ("TCPA"). Thus, a Federal Communications Commission ("Commission") Declaratory Ruling finding that a single opt-out confirmation text does not violate the TCPA comes at a crucial time.<sup>1</sup> The Commission's decision, issued on November 29, 2012, is a welcome relief to companies facing these cases.

The TCPA generally permits the delivery of text messages to consumers after receiving prior express consent to do so. Numerous plaintiffs have taken the position that an opt-out confirmation message violates the TCPA because it is delivered after consent has been revoked. In its ruling, however, the Commission found that a consumer's prior express consent to receive a text message can be reasonably construed to include consent to receive a final, one-time message confirming that the consumer has revoked such consent. Specifically, delivery of an opt-out confirmation text message does not violate the TCPA provided that it: 1) merely confirms the consumer's opt-out request and does not include any marketing or promotional information; and 2) is the only message sent to the consumer after receipt of his or her opt-out request. In addition, the Commission explained that if the opt-out confirmation text is sent within five minutes of receipt of the opt-out, it will be presumed to fall within the consumer's prior express consent. If it takes longer, however, "the sender will have to make a showing that such delay was reasonable and the longer this delay, the more difficult it will be to demonstrate that such messages fall within the original prior consent."

The Commission's ruling brings the TCPA into harmony with widely followed self-regulatory guidelines issued by the Mobile Marketing Association, which affirmatively recommend that a confirmation text be sent to the subscriber after receiving an opt-out request.<sup>2</sup> The ruling also comes on the heels of, and is consistent with, at least two recent decisions in putative class action cases filed in the Southern District of California. In *Ryabyshchuck v. Citibank (South Dakota) N.A.*, the court held that Citibank did not violate the TCPA by sending a text message confirming that it had received the customer's opt-out request.<sup>3</sup> The court went as far as to say that "common sense renders the [opt-out] text inactionable under the TCPA." The court reasoned that the TCPA was intended to shield consumers from the proliferation of intrusive, nuisance communications, and "[s]uch simple, confirmatory responses to plaintiff-initiated contact can hardly be termed an invasion of privacy under the TCPA." Likewise, in *Ibey v. Taco Bell Corp.*, the court dismissed a lawsuit alleging that Taco Bell had violated the TCPA by sending an opt-out confirmation message.<sup>4</sup> Noting that the TCPA was enacted to prevent unsolicited and mass communications, the court held, "[to] impose liability ... for a single, confirmatory text message would contravene public policy and the spirit of the statute – prevention of unsolicited telemarketing in a bulk format."

<sup>1</sup> The Declaratory Ruling is available at <http://www.fcc.gov/document/declaratory-ruling-re-soundbite-tcpa-petition>.

<sup>2</sup> The guidelines are available at <http://www.mmaglobal.com/bestpractice>.

<sup>3</sup> *Ryabyshchuck v. Citibank (South Dakota) N.A.*, No. 3:11-cv-01236, 2012 WL 5379143 (S.D. Cal. Oct. 30, 2012).

<sup>4</sup> *Ibey v. Taco Bell Corp.*, No. 3:11-cv-01236, 2012 WL 2401972 (S.D. Cal. June 18, 2012).

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The Commission's ruling should bring an end to the rash of class actions brought in recent months challenging the legality of confirmatory opt-out messages.

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