

Insights

## NEW TCPA OPT-OUT RULES COMING AS FCC ADOPTS REPORT AND ORDER ON REVOCATION OF CONSENT

Feb 16, 2024

### SUMMARY

On February 15, 2024, the Federal Communications Commission (“FCC”) adopted the [Draft Report and Order and Further Notice of Proposed Rulemaking](#) (“Report and Order”)<sup>[1]</sup> that it released last month under the Telephone Consumer Protection Act (“TCPA”). The Report and Order, along with the new Rules, will have major impacts for senders of marketing text messages. Under the TCPA, businesses cannot text marketing messages, make marketing robocalls, or send fax advertisements to a consumer without having obtained their “prior express written consent.”<sup>[2]</sup>

The new ruling imposes strict requirements for revocation of consent. Businesses should take note and ensure their opt-out procedures comply with the new rules. Failure to do so may result in a class action lawsuit, as the TCPA provides for a private right of action with statutory damages of \$500-1,500 *per violation, per consumer*, with no requirement to prove actual injury.<sup>[3]</sup>

### THE NEED FOR CLARITY ON REVOCATION

In 2015, the FCC ruled that a consumer can revoke consent through “any reasonable method,” but this was not codified, and the meaning of “reasonable method” was frequently litigated.<sup>[4]</sup> Courts have been left to determine on a case-by-case basis whether the consumer’s means of revocation was reasonable. For example, in *Viggiano v. Kohl’s Department Stores, Inc.*, the plaintiff attempted to opt out of recurring texts by sending messages such as “I’ve changed my mind and don’t want to receive these anymore”; “Please do not send any further messages”; and “I don’t want these messages anymore. This is your last warning!”<sup>[5]</sup> The court held that her method of revocation was not reasonable because she had “adopted a method of opting out that made it difficult or impossible for Defendant to honor her request.”<sup>[6]</sup> Similarly, the court in *Epps v. Earth Fare, Inc.* held that a plaintiff who does not follow clear instructions to “Text STOP to end” but sends “verbose requests to terminate the messages” has not used a “reasonable method” to revoke consent.<sup>[7]</sup> And

the District of New Jersey found in *Rando v. Edible Arrangements International, LLC*, that it was not a reasonable means of revoking consent for a plaintiff who was “presented with the direction ‘Reply HELP for help. STOP to cancel,’” to send texts saying “Take my contact info off please,” “Thank you. I’d like my contact info to be removed”; “Checking in today to see if my information is removed”; “Haven’t heard from this service” “I want to confirm I have been removed off your contacts” “I asked to be removed from this service a few times. Stop the messages.”<sup>[8]</sup>

Commenters such as the American Bankers Association responded to the Proposed Rule with concern that plaintiffs’ attorneys will coach their clients to submit a revocation request that will likely be ignored, in the hopes that a court will hold this method to be “reasonable.”<sup>[9]</sup> For instance, the ABA reports that plaintiffs’ attorneys tell their clients to place a very brief call to the business with an expression of revocation, where they speak very quickly, so that the business cannot capture the phone number to effectuate the revocation.<sup>[10]</sup> Or the customer may write a revocation on social media “in a manner that prevents the business from conclusively identifying the phone owner and processing the revocation.”<sup>[11]</sup> Or the customer will send a revocation request to the business’s address that is not listed as an address to which a customer should send a revocation, with “a short statement of revocation buried in the middle of the letter[.]”<sup>[12]</sup> Subsequently the plaintiff will file a lawsuit alleging that they revoked consent via a reasonable method.<sup>[13]</sup> The ABA and other commenters had hoped the Report and Order would prohibit such practices, but it did not.

## THE REPORT AND ORDER

The Report and Order will codify the 2015 Ruling and make it “clear that consumers may revoke prior express consent for autodialed or prerecorded or artificial voice calls and autodialed texts in any reasonable manner that clearly expresses a desire not to receive further calls or text messages, and that callers may not infringe on that right by designating an exclusive means to revoke consent that precludes the use of any other reasonable method.”<sup>[14]</sup> “Allowing callers to limit revocation requests only to the specific means that they have designated potentially places a significant obstacle in the way of consumers who no longer wish to receive calls by limiting the methods available to revoke consent, which is inconsistent with the consumer privacy protections afforded under the TCPA.”<sup>[15]</sup>

Further, the Report and Order:

- Requires that companies honor opt-out requests within ten business days of receipt;
- Clarifies that companies are permitted to send a one-time text following an opt-out to confirm the scope of revocation (although there are very specific requirements around this single text);
- Mandates that texting STOP in response to a marketing message opts the consumer out of any further marketing calls or texts, and texting STOP in response to an informational

message opts the consumer out of **any** further calls or texts, excepting emergency ones.

## WHAT IS “OBJECTIVELY REASONABLE”?

The FCC stopped short of concluding that an unnecessarily verbose statement does not qualify as a “reasonable method,” but nonetheless provided some guidance as to what constitutes a reasonable method, agreeing that it should adopt “a standardized list of the specific words that may be used to revoke consent via a reply text message to ensure that automated systems can process such requests.”<sup>[16]</sup> Specifically, the FCC has “blessed” the words STOP, QUIT, END, REVOKE, OPT OUT, CANCEL, and UNSUBSCRIBE sent via reply text message as reasonable means to revoke consent.<sup>[17]</sup> The FCC cautioned that “[T]his does not preclude, however, the [consumer’s] use of other words and phrases to revoke consent.”<sup>[18]</sup> The FCC also stopped short of prohibiting consent revocation attempts like those expressed by the ABA, saying only that “[i]f the reply text contains words or phrases other than those listed above... the text sender... will have an opportunity to explain why the consumer’s use of alternative words or phrases does not constitute a reasonable means to revoke consent.”<sup>[19]</sup> Instead, either the FCC or the court will “conduct a totality-of-circumstances analysis to determine whether the request to revoke consent has been conveyed in a reasonable manner.”<sup>[20]</sup> Notably, although the FCC did not mention the *Viggiano*, *Rando*, and *Epps* rulings, these courts employed the totality of the circumstances approach to evaluating reasonableness. Thus, these decisions should continue to provide guidance as to whether a method of revocation is reasonable.

Notably, the FCC references the Cellular Telephone Industry Association’s (“CTIA”) Messaging Principles and Best Practices (“CTIA Principles”) when explaining that reply texts are generally a “reasonable and widely recognized means for text recipients to revoke prior consent to text messages.”<sup>[21]</sup> The CTIA requires that

opt-out requests with normal language (i.e., stop, end, unsubscribe, cancel, quit, “please opt me out”) should also be read and acted upon by a Message Sender except where a specific word can result in unintentional opt-out. The validity of a Consumer opt-out should not be impacted by any *de minimis* variations in the Consumer opt-out response, such as capitalization, punctuation, or any letter-case sensitivities.<sup>[22]</sup>

Given the FCC’s reliance on the CTIA Principles, a court would likely find these types of opt-out texts to be “objectively reasonable.” The FCC also codified that, when a consumer uses a method other than those described above to revoke consent, such as a “voicemail or email to any telephone number or address at which the consumer can reasonably expect to reach the caller but which has not been designated by the caller as a method to revoke consent, doing so creates a rebuttable presumption that the consumer has revoked consent, absent evidence to the contrary.”<sup>[23]</sup> The caller will then have the burden of showing that the chosen method was not reasonable.<sup>[24]</sup>

## TIMEFRAME FOR HONORING REVOCATION

The Report and Order also lays out the timeframe for honoring opt-out requests for both robocalls and robotexts that are subject to the TCPA. The new rules will require honoring a revocation request “as soon as practicable and in no instance later than 10 business days after receipt of the request.”<sup>[25]</sup> The original proposed rule would have required a business to honor an opt-out within 24 hours, but the FCC heeded commenters’ concerns that this timeframe was too tight, especially for smaller entities.<sup>[26]</sup> The FCC justified this timeframe saying that it “substantially reduces the maximum period allowed for honoring the revocation requests of consumers [which used to be 30 days] while allowing callers a reasonable opportunity to ensure that they can process requests made by any reasonable means.”<sup>[27]</sup> Note that a timeframe of 10 business days still may place quite a burden on businesses in the event that a brief phone call to company headquarters, or a letter addressed generically to the company, may be deemed to be objectively reasonable.

## SINGLE TEXT TO CONFIRM SCOPE OF OPT-OUT

In addition, the FCC Report and Order will codify the agency’s 2012 *Soundbite Declaratory Ruling*,<sup>[28]</sup> which concluded that companies may send a single text to confirm a consumer’s opt-out request without violating the TCPA, as long as the text does not include marketing material.<sup>[29]</sup> If this text message is sent within five minutes of receipt of the opt-out, it will be presumed to fall within the scope of the consumer’s consent.<sup>[30]</sup> However, if it takes longer, “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 a message falls within the original prior consent.”<sup>[31]</sup>

In this one-time confirmation text, senders can ask for clarification as to the scope of the opt-out.<sup>[32]</sup> This is helpful because in some cases, consumers may have consented to more than one type of text message – for example, fraud alerts as well as marketing messages.<sup>[33]</sup> Under the new rules, it will be permissible for a company to ask for a one-time clarification on the scope of the revocation – is the consumer opting out of fraud alerts, marketing messages, or both?<sup>[34]</sup> If the consumer fails to respond to the clarification text message, the company must treat the opt-out as applying to all text messages.<sup>[35]</sup>

Generally, if the consumer revokes consent with regards to telemarketing messages, a company can still send that consumer informational texts.<sup>[36]</sup> However, if the consumer sends an opt-out request in response to an informational message, that consumer has opted-out of both informational and marketing messages.<sup>[37]</sup> Finally, the FCC clarified that if a consumer revokes consent in any reasonable manner, “that revocation extends to both robocalls and robotexts [excepting emergency calls or texts] regardless of the medium used to communicate the revocation of consent.”<sup>[38]</sup>

## EFFECTIVE DATE

The amendments to the Rules will take effect six months following publication in the Federal Register, to ensure that companies have sufficient time to implement these changes.<sup>[39]</sup>

## TAKEAWAYS

The failure to honor opt-out requests is frequently litigated under the TCPA. Companies should become familiar with the new opt-out rules and consult with their TCPA counsel to ensure that their policies and procedures comply. Otherwise, they could find themselves on the wrong side of an expensive class action. As always, the best strategy in this arena is a robust compliance program, so companies can avoid becoming the proverbial low-hanging fruit.

## FOOTNOTES

[1] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order and Further Notice of Proposed Rulemaking, FCC-CIRC2402-02 (January 25, 2024) (“Report and Order”).

[2] 47 CFR § 64.1200(a)(2), (3).

[3] 47 USC § 227(b)(3).

[4] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7993-99, ¶¶ 55-70 (2015) (“2015 FCC Declaratory Ruling”)

[5] 2017 WL 5668000, at \*1 (D.N.J. Nov. 27, 2017).

[6] *Id.* at \*4.

[7] 2017 WL 1424637, at \*2, 5 (C.D. Cal. Feb. 27, 2017).

[8] 2018 WL 1523858, at \*6-7 (D.N.J. Mar. 28, 2018).

[9] [Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991](#), CG Docket No. 02-278, Comments of the American Bankers Association *et al*/to the Notice of Proposed Rulemaking , at 8-9 (July 31, 2023).

[10] *Id.* at 9.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Report and Order, FCC Fact Sheet.

[15] *Id.*

[16] *Id.* at ¶ 12.

[17] *Id.*

[18] *Id.* at ¶ 13.

[19] *Id.*

[20] *Id.*

[21] *Id.* at ¶14, n. 28 (citing CTIA, Messaging Principles and Best Practices 5.1.3 (May 2023)) (“CTIA Principles”)

[22] CTIA Principles at 13.

[23] Report and Order at ¶ 16.

[24] *Id.*

[25] *Id.* at ¶ 19.

[26] *Id.* at ¶ 21.

[27] *Id.* at ¶ 22.

[28] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Soundbite Communications, Inc.*, CG Docket No. 02-278, Declaratory Ruling, 27 FCC Rcd. 15391, 15394, ¶7 (2012) (*Soundbite Declaratory Ruling*).

[29] Report and Order at ¶ 24.

[30] *Id.*

[31] *Id.*

[32] *Id.* at ¶ 25.

[33] *Id.* at ¶¶ 25, 26.

[34] *Id.*

[35] *Id.* at ¶ 28.

[36] *Id.* at ¶ 30.

[37] *Id.*

[38] *Id.* at ¶ 31.

[39] *Id.* at ¶ 33.

## RELATED PRACTICE AREAS

- Data Privacy & Security

## MEET THE TEAM



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