

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

<b>In the Matter of the</b>	)	<b>CG Docket No. 02-278</b>
	)	
<b>Rules and Regulations Implementing</b>	)	
	)	
<b>the Telephone Consumer Protection</b>	)	
	)	
<b>Act of 1991</b>	)	

**Comments of the National Association of Consumer Advocates**

These comments are submitted by the National Association of Consumer Advocates (NACA).<sup>1</sup> They are in response to the February 16, 2012 Notice for Comments on Soundbite Communications, Inc’s (herein Soundbite) petition<sup>2</sup> for Expedited Declaratory Ruling that sending a one-time text message confirming a consumer’s request that no further text messages be sent in the future is not a violation of the Telephone Consumer Protection Act (TCPA)<sup>3</sup> or Section 64.1200 of the Commission’s rules.<sup>4</sup>

NACA cautions the FCC that, without clear express consent, these one-time confirmatory text messages are indeed a violation of the TCPA and of the Commission’s rules; no clarification is necessary. Soundbite’s petition is unnecessary because the law on this issue is clear; consistent with the TCPA and Commission’s rules, consumer consent should always be obtained

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<sup>1</sup> The National Association of Consumer Advocates (NACA) is a non-profit association of consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA’s members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

<sup>2</sup> See *Soundbite Communications, Inc.*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Feb. 16, 2012) (*Petition*) (noting that several companies including Soundbite are the subject of multi-million dollar class action lawsuits based on one-time confirmation messages sent to consumers who have opted out of receiving future text messages).

<sup>3</sup> Codified as 47 U.S.C. § 227.

<sup>4</sup> 47 C.F.R. § 64.1200.

before sending a text message, even if they are confirmatory and may be helpful to the consumer.<sup>5</sup> Additionally, consistent with the objectives of the Communications Act of 1934<sup>6</sup> as well as the goals identified in the FCC's 2006-2011 Strategic Plan, if there is a conflict between industry guidelines, the law and implementing rules, the law and Commission's rules should not be changed to conform to industry best practices. Instead, industry best practices – which are designed to facilitate business practices - should, and in this instance 'could', be modified to conform to the law such that no action on the FCC's part is necessary. Soundbite could both obtain consumer consent and send a confirmatory text without violating the TCPA while complying with industry guidelines.

### **Text Messages Are Calls under the TCPA**

The TCPA makes it unlawful “for any person within the United States, or any person outside the United States if the recipient is within the United States” – (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice – ... (iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call [.]<sup>7</sup> Thus, under the TCPA, text messages are calls for which there are two exemptions: (1) where prior express consent has been

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<sup>5</sup> Soundbite asserts that wireless operators, aggregators, and CTIA – The Wireless Association require Soundbite to follow the Mobile Marketing Association (MMA) best practices before they will enable and allow text messaging campaigns on wireless networks.

<sup>6</sup> 47 U.S.C. §151, The Act provides that the FCC was created "for the purpose of the national defense" and "for the purpose of promoting safety of life and property through the use of wire and radio communications."

<sup>7</sup> See 47 U.S.C. § 227(b) (1) (A) (iii).

obtained; or, (2) calls are made for an emergency purpose.<sup>8</sup> Confirmatory text messages sent without first obtaining consumer consent do not fit in either exemption and are therefore in violation of the TCPA and Commission rules.

The TCPA applies with equal force to the making of text message calls as it does to the making of voice calls to cellular telephones.<sup>9</sup> The TCPA<sup>10</sup> states that, “[A] system need not actually store, produce, or call randomly or sequentially generated telephone numbers, [and] it need only have the capacity to do it.”<sup>11</sup> If, as Soundbite claims, it does not have the capacity to “actually store, produce, or call randomly or sequentially generated telephone numbers,<sup>12</sup>” the TCPA does not apply to Soundbite and there is no need for Soundbite’s objections.

### **The Sending of a “Confirmatory” Text Message Violates the Plain Language of the TCPA**

The Sending of a “confirmatory” text message violates the TCPA and is contrary to the FCC’s 2008 ruling. “Express consent is ‘consent that is clearly and unmistakably stated.’”<sup>13</sup> Courts have consistently ruled that a confirmatory text message violates the plain language of the TCPA. In *Ryabyshchuk v. Citibank (South Dakota) N.A.*, 2011 U.S. Dist. LEXIS 136506 (S.D.

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<sup>8</sup> Section 227(b)(1)(a) of the Telephone Consumer Protection Act provides:

b) *Restrictions on use of automated telephone equipment.*

(1) *Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States--*

(A) *to make any call (**other than a call made for emergency purposes or made with the prior express consent of the called party**) using any automatic telephone dialing system or an artificial or prerecorded voice--*

<sup>9</sup> *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. Cal. 2009).

<sup>10</sup> 47 U.S.C. § 227(a)(1)

<sup>11</sup> *Satterfield*, 569 F.3d at 951

<sup>12</sup> *See Petition at 6.* (“[t]he Soundbite system has absolutely no capacity to store, look-up, or dial in any random or sequential order – there is only a precise, one-time response to an individual subscriber’s opt-out text message request that goes only to the specific device through which the opt-out request was made”).

<sup>13</sup> *Satterfield*, 569 F.3d at 955 (quoting Black’s Law Dictionary 323 (8th ed. 2004)) (plaintiff’s consent to receiving promotional material from Nextones or their affiliates and brands did not amount to express consent to receiving a text message from the defendant company, which was not owned or controlled by Nextones nor was its subsidiary).

Cal. 2011) the court recognized and denied Citibank’s motion to dismiss on allegations that the second message, consisting of a confirmatory text message, from Citibank was also “unsolicited” and was sent to his cellular phone without prior express consent.<sup>14</sup> Moreover, in the Ryabyschchuk matter, the consumer/plaintiff asserts that whatever consent might have existed initially, he effectively revoked it by replying “STOP” to Citibank’s first message.<sup>15</sup> The court denied Citibank’s motion to dismiss these allegations involving violations of the TCPA.

**Soundbite’s petition is unnecessary.**

In its petition, Soundbite asserts that the consumer will not know they will not receive any additional unwanted text messages without the confirmatory text. However, the consumer will know they will not receive additional unwanted texts by simply not receiving any additional texts. Additionally, there are other ways in which Soundbite could send a confirmatory text without violating the TCPA and Commission rules.

Even if it could be demonstrated that that consumers wanted or benefitted from one-time confirmatory text messages, Soundbite could offer these messages now, in compliance with current law and in conformity with industry guidelines. All they need to do is obtain consent. Instead of sending a confirmatory text message, which is a message sent after the consumer has already indicated that the messages are unwanted, Soundbite need only ask for consent in the initial message. Thus, any subsequent confirmatory message sent by Soundbite to the consumer is with clear consent. Instead of always sending confirmatory messages without first obtaining consent, the initial message could say, for example, “Reply ‘STOP’ to end these messages immediately or reply ‘CONFIRM’ to end these messages and receive a confirmation.” Thus,

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<sup>14</sup> Id. ¶¶ 16-18, 22.

<sup>15</sup> Id. ¶¶ 12, 15.

after obtaining consent in the initial message, Soundbite could obtain consent to send a confirmatory message that complies with MMA guidelines.<sup>16</sup>

Instead, of finding ways to obtain consent, however, the fact that Soundbite is asking the FCC to intervene in this matter is a clear attempt to circumvent Congress, the TCPA, and the public, and again accomplish, at least in part, what could not be accomplished previously. Congress has already soundly rejected a similar attempt (H.R. 3035, The Mobile Informational Call Act) to allow messages to be sent to consumers at the consumers' expense. When this same industry tried to get Congress<sup>17</sup> to change the law on this issue by focusing on "snow closings," and "the public good," the public was understandably outraged by that attempt, and 49 state attorneys generals opposed<sup>18</sup> such an attempt as well. Congress wisely decided not to pursue such legislation. However, now these same forces hope to obtain similar access to consumer cell phones by asking the FCC to do, in part, what Congress was unwilling to do.

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<sup>16</sup> See, Mobile Marketing Association's, U.S. Consumer Best Practices, Version 6.1, March 2011, Sections: 1.6-1 – "Content providers must offer subscribers the opportunity to cancel the service at anytime. The following rules [of Section 1.6-2] govern program opt-out: - A subscriber must be able to stop participating and receiving messages from any program by sending STOP to the short code used for that program.

- END, CANCEL, UNSUBSCRIBE or QUIT should also be opt-out key words for all programs; however, content providers should feature the word STOP in their advertising and messaging.
- The opt out keyword STOP sent by the subscriber cannot be case sensitive
- The STOP keyword must work in the native language of the program. In a non-English program, the English keyword must not return an error message.
- Short code programs must ignore subsequent non-keyword text included in STOP MOs.
- Short codes running MMS programs should handle the STOP keyword correctly, regardless whether the subscriber sends the keyword via MMS or SMS.
- When sent, these words cancel the subscriber's previous opt-in for messaging.

<sup>17</sup> The Mobile Informational Call Act of 2011: Hearing on HR 3035 before the Subcommittee on Communications and Technology, House Energy and Commerce Committee, 112<sup>th</sup> Congress (2011).

<sup>18</sup> See letter to Congress signed by 54 states Attorneys General asking Congress to reject legislation allowing robocalls to consumer cell phones. [http://signon.s3.amazonaws.com/20111207.signon.Final\\_HR3035\\_Letter.pdf](http://signon.s3.amazonaws.com/20111207.signon.Final_HR3035_Letter.pdf)

**There is nothing in MMA guidelines that actually prohibits or limits Soundbite from complying with current law, Commission rules while following the MMA guidelines.**

According to section 1.6 of the MMA guidelines (“Program Termination, STOP and Opt Out”), the only clear requirements for a content provider, in this case Soundbite, are to:

1. Offer content subscribers (consumers) the opportunity to cancel at any time through sending the word “STOP” or any additional acceptable codes<sup>19</sup>; and, where a consumer chooses to opt out:
2. Send a confirmatory, mobile terminating (MT), message to the subscriber.<sup>20</sup>

These requirements, as noted above, do not preclude Soundbite from obtaining consent before sending an additional confirmatory message regarding termination.

**There is no guarantee that these confirmatory messages will not cost consumers.**

NACA acknowledges that there may be some instances when a “confirmatory text message” may be appropriate and even helpful to consumers. However, the fact that text messages cost consumers hundreds of thousands, and perhaps millions of dollars, every year means that extreme caution is warranted when opening up consumer cell phones to commercial messages. Most mobile phone carriers charge for all messages sent by and to a consumer even if a message is not actually received. Thus, consumers should only receive messages on their cell phones that they have actually consented to receive. The fact that these confirmatory messages

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<sup>19</sup> Id.

<sup>20</sup> See, Mobile Marketing Association’s, U.S. Consumer Best Practices, Version 6.1, March 2011, Section: 1.6-4. “When STOP, or any of the opt-out keywords above, is sent to a program, the program must respond with an MT message, whether or not the subscriber is subscribed to the program.”

could cost consumers money while it makes Soundbite – and other content providers - a similar amount of money contravenes the intent of the TCPA and Commission rules. Allowing confirmatory text messages to be sent to consumer cell phones without first obtaining consumer consent would cost consumers a great deal.

**The “Confirmatory” Text Message is not Benign and the MMA guidelines do not reflect what is truly in the consumer’s best interest.**

The sending of a confirmatory text message is not simply a confirmation that the consumer requests that further receipt of text messages stop; rather, it is a further invasion of a consumer’s right to privacy after receiving express and explicit instructions to “Stop” and an opportunity for the consumer to incur additional messaging and data charges for the additional confirmatory text.

As an example, in *Gutierrez, et al. v. Barclays*, the series of text messages were as follows:

FREE alert:

Courtesy reminder for your Juniper  
Bank MasterCard. Please press SEND  
866-740-4298 to speak to us.  
Reply STOP to end messages.

Thereafter, the consumer replied “STOP” in response to receiving this text message. A plain language reading of the law and the consumer response is that no further messages are to be received. Instead of complying with this request after any argument of “prior express consent” was removed, Barclays Bank sent a “confirmatory” text message (through Soundbite), the content of which was:

You will no longer receive text alerts from Barclaycard to this number. If you have questions, call 866-408-4070.

This was not a mere “confirmation” that no additional text messages would be forthcoming, but an additional attempt to have the consumer change their mind through providing additional contact information for Barclays and either reinstitute the receipt of text messages or to contact Barclays Group concerning the consumer’s account. This is all at potential added cost to the consumer as nowhere in the message does the supposedly ‘helpful’ confirmatory text notify consumers that normal text and data charges could apply to both messages.<sup>21</sup> Barclays Group masqueraded behind the false claim that the Mobile Marketing Association somehow required the sending of this “confirmation,” while flying the face of the plain language of the TCPA and the FCC’s January 2008 Declaratory Ruling<sup>22</sup>. As a result, Barclays Group settled the class allegations and no longer sends confirmatory text messages through its provider, Soundbite.

The fact that Barclays Group made the request, which Soundbite complied with, demonstrates that the MMA does not “require” the sending of these confirmatory text messages and that it is completely possible and the true “best practice” not to send these confirmatory text messages.

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<sup>21</sup> Note, section 1.6-3 of the MMA guidelines do not require consumers to be informed that additional text message and data charges could apply for receipt of the confirmatory text. Specifically: “To ensure subscribers also have a way to opt-out of all programs within this menu, STOP ALL must be added to the menu choices. The stop menu message does NOT need to contain

i) “**Msg&Data Rates May Apply**”

ii) Sponsor contact information.

2) Or if the subscriber sent STOP or STOP ALL to the short code, they are opted out of all programs they were enrolled in on that short code.

<sup>22</sup> FCC January 2008 ruling – “No person or entity may initiate **any telephone call** (other than a call made for emergency purposes or made with the **prior express consent** of the called party) using an automatic telephone dialing system . . . (iii) to any telephone number assigned to a paging service, **cellular telephone service**, specialized mobile radio service, or other radio common carrier service, **or any service for which the called party is charged for the call.**” 47 CFR 64.1200(a)(1)

As a further example, Soundbite lists the filing of Holt v. Redbox for this same proposition. In this case, a consumer can sign up for text message alerts on Redbox's website by entering their cellular telephone number. The content of the advertisement sent in confirmation of a consumer signing up reads:

Reply Y to sign-up for Redbox mobile alerts.

You'll receive monthly freebie & Redbox news!

Up to 2 msg/wk. Msg&data rates may apply.

Txt HELP 4info, STOP 2end

If a consumer grows tired of receiving these weekly updates and solicitations or the cost of the data transmission becomes an issue, the consumer has a right to withdraw their consent by replying STOP.

Instead of receiving no further text messages, the consumer receives one additional solicitation through two text messages, which reads:

1/2 You will receive no further alerts from

REDBOXALERTS, sorry to see you go. For help, reply

HELP. For more info, visit [HTTP://IX.LY/727272](http://IX.LY/727272).

Msg&data rates 2/2 may apply.

There is simply no need to send two additional text messages "confirming" the fact the consumer has withdrawn prior express consent in receiving any text messages. Further, as shown in the above example, these text messages often include an additional solicitation asking the consumer/subscriber to re-consent to the receipt of text message advertising. Thus, the confirmatory text (which Soundbite asserts is meant to confirm that no further additional texts will be sent) is now also being used as a second solicitation text. See specifically the language in

the second texts that reads, “For more info, visit [HTTP://IX.LY/727272](http://IX.LY/727272).” In essence the confirmatory text is now being used as a mechanism to solicit the consumer in a manner that the consumer wanted to stop. In the cumulative, nationwide, with major clients such as Redbox, and Gamestop, these confirmatory texts can generate millions of dollars every year.

Where Soundbite may have good intentions to comply with the guidelines and the law, there are other companies for whom these initial messages and subsequent confirmatory texts, which cost consumers, are additional opportunities at solicitation and marketing. If the FCC were to rule that confirmatory text messages were permissible, this would unleash other content providers and other entities - who are already violating the law by not obtaining prior consent and using these messages to solicit additional business – onto consumer cell phones. For example the text below from Best Buy, clearly leads a consumer to a perpetual string of marketing materials and does not clearly provide consumers with an option to stop receiving these messages.

You have been  
Selected to receive a FREE Best  
Buy gift card for \$1000. Just go  
to [1kgiftlink.com](http://1kgiftlink.com) (stop to  
end)

Still, other messages from other vendors below clearly do not close the door after a consumer has replied stop. The consumer receives additional confirmatory messages which additional solicitation and / marketing:

IKEA

Hurry in to save up to 20% on your

dream kitchen! This is a limited time offer, so get the savings while they're hot! See store for details

Confirmation after "Stop"

You have been removed from the IKEA Mobile messaging list. Rejoin anytime by texting JOIN to 62345

Fandango.com

Hop to it! Fill your Easter baskets with the gift of movies before Sunday.

Buy Fandango Bucks gift certificates

<http://fandan.co/eastergifts>

Confirmation after "Stop"

You have been unsubscribed from Fandango Movie Alerts and will not receive any more messages.

Msg&data rates may

apply. For questions visit  
Fandango.com/mobile

### **Confirmatory Messages Extract Additional Revenue from the Consumer and/or Corporate Client in Sending an Additional Text**

The content of the text messages that are sent by Soundbite and other content providers demonstrate that the receipt of text messages are not free and an FCC rule permitting these confirmatory messages would increase costs for consumers. In the Soundbite text messages above, confirmatory or not, Soundbite discloses that message and data rates apply.<sup>23</sup> The sending of an additional, unneeded and unwanted “confirmatory” text message results in the consumer being charged an additional amount and allows Soundbite or any entity to charge its corporate client for one additional text message. The sending of one last text message to each consumer that withdraws its prior express consent is simply a way for Soundbite, the transmitter, to add to its bottom line by billing the consumer and Soundbite’s client for the sending of one additional text message.

### **Conclusion**

In conclusion, NACA thanks the FCC for the opportunity to comment in this matter and urges the FCC to consider this matter carefully before changing well established laws and Commission rules. NACA acknowledges that confirmatory messages – where a consumer clearly consents to receive one – may be helpful and even appropriate. However, no action is presently needed from the FCC, in order for Soundbite to comply with the law and send a confirmatory

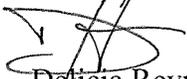
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<sup>23</sup> See MMA Guidelines, Section 1.6-3. “Msg & date rates may apply.”

text message. Soundbite and any other entity can merely change the way it does business by including an opportunity for the consumer to provide express consent to accomplish what it claims it is trying to accomplish. Furthermore, if the FCC rules that these confirmatory texts are permissible, the FCC will be doing what Congress very recently decided not to do; circumvent the TCPA at the expense of consumers, for the benefit of Soundbite and other content providers.

Thank you for the opportunity to comment on this petition.

Respectfully,



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