

Morrison & Foerster Client Alert.

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Direct Marketers Take Note: FTC Announces First Action Targeting the Delivery of Text Messages

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On February 22, 2011, the Federal Trade Commission (FTC) announced that it had asked a federal judge to shut down an operation that allegedly delivered millions of unsolicited text messages to consumers.¹ This is the first time the FTC has targeted the delivery of marketing via text message. It brought the enforcement action not pursuant to any law or rule specific to text messages – unlike the Federal Communications Commission (FCC), the FTC enforces no such law or rule² – but, rather, using its unfairness authority under Section 5 of the FTC Act. An act or practice is “unfair” under Section 5 if it causes substantial injury to consumers, which consumers could not reasonably avoid, and it does not have countervailing benefits to consumers or competition.³ Here, the FTC has charged that the defendant’s alleged delivery of unsolicited text messages was unfair because it imposed substantial costs on recipients (depending on their plan, either they had to pay a fee to receive the message or their receipt of it reduced their monthly message allotment), which they could not reasonably avoid because the defendant allegedly continued to send messages to those who had requested that he stop.

The facts in this action are egregious. They include allegedly deceptive text message content, as well as violations of other laws. Nonetheless, the action puts all marketers on notice that they expose themselves to potential FTC enforcement – in addition to enforcement by the FCC, states, and private plaintiffs under FCC rules – if they do not conduct their text messaging campaigns with appropriate consents. Specifically, businesses that use text

¹ The press release, with a link to the complaint, is available at <http://www.ftc.gov/opa/2011/02/loan.shtm>.

² FCC rules require prior express consent for the autodialed delivery of calls (including text messages) to cell phones. 47 C.F.R. § 64.1200(a)(iii). The FCC has proposed to require signed, written consent for the delivery of such messages. It is currently reviewing comments received in response to its proposal. See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-295839A2.pdf.

³ The FTC’s Policy Statement on Unfairness is available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>.

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messages to communicate with individuals should:

- **Deliver text messages only with the prior express informed consent of the intended recipient.** Because of the costs imposed on recipients, this requirement applies regardless of whether the message contains marketing content. When obtaining consent, tell proposed recipients how many messages they can expect to receive so that they understand the potential cost and are able to provide informed consent.
- **Give the recipient a way to opt out of receiving further messages, and honor those requests.** Each message should include instructions, such as “Reply STOP to end.”

These pointers are consistent with widely followed industry self-regulatory guidelines issued by the Mobile Marketing Association.⁴ Compliance with those guidelines can help a company avoid running afoul of state and federal unfair and deceptive practices laws.

For more information on this and other direct marketing topics, please contact [Reed Freeman](#) or [Julie O'Neill](#).

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

⁴ The guidelines are updated from time to time and are available at <http://mmaglobal.com/bestpractices.pdf>.