



Demystifying Text Marketing, Text-Based Support and "Double Opt-In" ...



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Using SMS text messages to interact with your customers and prospective customers via mobile devices (such as for marketing, promotions, and customer service) is a compelling digital marketing and consumer interaction method. According to [IDC Research](#), 344.7 million smartphones were sold in the second quarter of 2016. That's an average of **157,830 smartphones every hour, 24 hours a day, for 3 months**. A [Pew Research Center](#) study found that 97% of smartphone owners use text messaging at least once a day. A 2013 [ConnectMogul](#) study found that 90% of all text messages are read within 3 minutes of delivery. [Frost & Sullivan](#) reported that Millennials and Gen Yers want omni-channel support (including text-based support), and prefer text-based

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support over traditional phone tree (IVR) support. Given all this, it's not surprising that text messaging has become an essential component of, and channel for, many companies' customer engagement strategies. Many others are considering or planning on diving in as well. Entering the world of text-based consumer marketing and support campaigns poses many challenges given the myriad of laws, rules and guidelines to follow, and stringent compliance requirements such as "double opt-in." However, it isn't really as daunting as it seems.

The Many Rules of Text Messaging



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- Text messages are communications distributed over cellular phone networks, and therefore fall under the laws, rules and regulations governing wireless carriers and mobile phone calls. This includes the [Telephone Consumer Protection Act \(TCPA\)](#). The **Federal Communications Commission (FCC)** enforces the TCPA.
- [CAN-SPAM](#), the law and associated rules that govern commercial email messages, also governs commercial emails sent to a mobile phone, e.g., 9521234567@vtext.com. The **Federal Trade Commission (FTC)** enforces CAN-SPAM, as well as laws and rules governing deceptive and unfair trade practices which apply to all marketing.
- **Mobile carriers** can have their own rules around commercial text messaging through their systems.
- CTIA, the wireless trade association which operates the "Short Code" system used by many companies for text marketing (the "12345" in "Text ABC to 12345"), publishes the [Short Code Monitoring Handbook](#). The Handbook contains rules governing SMS marketing campaigns that use Short Codes. SMS marketers found to be in violation of CTIA rules may be reported to wireless carriers by CTIA, potentially resulting in temporary or permanent suspension of the ability to run text marketing campaigns through those carriers.
- Industry groups such as the Mobile Marketing Association (MMA) have published [best practice guidelines](#) for companies engaged in text marketing. (One MMA guide you may find online is the MMA's [Consumer Best Practices for Messaging](#); while useful, this guide has not been updated since 2012, and the MMA's website directs people to the CTIA.)
- Don't forget that **other laws regarding marketing, privacy and personal information**, such as COPPA's rules regarding collection of personal information from children under 13, apply

in the world of text messaging just like everywhere else.

The consequences for failing to follow these laws, rules and regulations can be very severe. They include potential fines and penalties of up to \$1,500 **per text message per recipient**; expensive consumer class action lawsuits; revocation of your right to send text marketing messages through mobile carriers; and damage to your company's brand and reputation.

Why is Text Messaging Different?

Compared to email marketing or even print marketing, the rules governing commercial text messaging can seem downright draconian. For example, In US email marketing under CAN-SPAM, you can market to someone who hasn't opted-in as long as you follow CAN-SPAM's rules, including offering them the right to unsubscribe from further marketing emails, and consent for CAN-SPAM purposes can be oral or written. In the US, to send a commercial text message to a mobile device you must have the **unambiguous prior written consent of the mobile device owner**, and "written" means "documented and saved." This applies even if you have a pre-existing business relationship, and the consent can be revoked by the device owner at any time. In email marketing, you can purchase opt-in lists; in text marketing, **purchasing opt-in lists is not allowed**.

There are three primary reasons why text marketing is different than other forms of marketing. *First*, unlike marketing emails, **text messages aren't free**. Consumers directly pay for text messaging services, regardless of whether it's a flat monthly fee or a per-message charge. Consumers don't directly pay to receive email marketing messages (the cost of Internet access is an indirect cost). *Second*, text messages are viewed as **more personal** than other types of digital communications such as email, as they come right to a consumer's mobile device and not to a device-independent email account. *Third*, text messages are **sent through already heavily-regulated cellular phone networks**, and fall under many of the same stringent requirements that have been adapted or expanded to cover SMS – they're considered on par with (and just as regulated as) a phone call. Keeping spam and other unwanted communications off the cellular phone networks has been a long-time focus of the FCC and mobile carriers.

Double Opt-In

One of the more misunderstood concepts in text marketing is "**double opt-in.**" Many believe that written consent from a consumer on a paper or web form is all that's needed to send commercial text messages to that consumer. However, remember that in text marketing, you need the unambiguous written consent of a mobile device owner before sending text marketing messages to that mobile device. Don't just focus on the **consent** being unambiguous – **the consent must be unambiguously provided by the mobile device owner.** If the device's phone number is reassigned to a new owner, the consent is no longer valid - it's a consent from the device owner, not from the device number.

- If you get written consent via an SMS text via a mobile device itself (a "device opt-in"), since it came from the mobile device itself it's pretty clear for consent purposes that the mobile device owner gave the consent. (You still have to send a welcome email with certain information, such as message frequency and how to stop future text messages.)
- However, if you obtain written consent through another method, such as a paper or web form (a "non-device opt-in"), it's **not clear** that the person giving consent is the mobile device owner, even if the consent given is unambiguous. Even a statement on the paper or web form that "I own the device associated with this mobile number" is likely not sufficient since you can't demonstrate conclusively that it's true. With a non-device opt-in, you don't have unambiguous written consent **unambiguously provided** by the mobile device owner, and that's where a second (double) opt-in enters the picture.

The CTIA and MMA rules require that in addition to a non-device opt-in, a marketer must send a single text message to the mobile number provided through the non-device opt-in, asking the mobile device owner to text a response to start receiving marketing text messages for a campaign (e.g., "text 'Y'"). If the mobile device owner sends the correct reply text ("Y"), he/she is confirming they want to receive marketing text messages (you still have to then send the welcome email noted above). This confirmation – the "**double opt-in**" – removes any ambiguity around who provided the original non-device opt-in, turning it into unambiguous written consent unambiguously provided by the mobile device owner. The double opt-in isn't to confirm the initial consent is valid – **it's to unambiguously confirm that the mobile device owner was the one that gave the consent.**

It's important to note that double opt-in is also a *recommended best practice* for device opt-ins.

Practical Tips & Tricks

If you're thinking about adding text messaging to your company's marketing and customer/consumer communications strategy, be sure to consider these tips and tricks:

- Inventory your marketing and legal department's experience with text marketing. If it's light, consider bringing in a contractor with text marketing experience to help develop good processes and strategies and/or make text marketing experience a skill requirement for open marketing positions, and identify outside counsel with text messaging experience who can help you establish compliant approaches which achieve business objectives. Determine who will be responsible for managing text marketing campaigns on behalf of the company.
- Form an internal working group within your company (including sales, marketing, and legal) to map out how text messages will be used in marketing and customer interactions. Consider approaches such as click-to-text to make it easier for your customers to contact you via text message. Map out in advance how text marketing CTAs (Calls To Action) will be displayed; how the opt-in and opt-out process will work; whether a campaign will be one-time or recurring; and when a new consent may be required (e.g., when a subscriber changes carriers). Consider using "swim lanes" to see how the text messaging process flows between the company, the recipient, your text messaging service provider, and any other involved parties. This working group should meet regularly to review current and planned text campaigns and programs. Understanding the big picture, and involving legal as a partner early on, will help you formulate strategies that balance compliance with performance and ensure your messaging and disclosures are properly constructed.
- Partner with a reputable and knowledgeable text messaging service provider to help you get off the ground. Spend time creating your opt-in, STOP, HELP and other messages to make them specific to your business - don't just go with a default. Consider adding a little humor to your messaging within the character limits. Avoid text shorthand as the unprofessional look likely outweighs the character savings. Ensure your campaigns provide value to the consumer and include the right disclosures (and the right messaging frequency), to avoid consumers opting out before giving you a chance. If your company decides to use a dedicated short code, start the process of obtaining one well in advance to ensure it is ready when you are ready to launch your campaign.
- If you are sending texts to Canadian consumers, the rules are different in some respects -- talk to your marketing counsel first.
- **Always follow the rules regarding text messaging to your customers and consumers.** Clearly and conspicuously disclose all required information about your text messaging

program or campaign, such as program name, description, message frequency, terms and conditions and privacy policy URLs (use URL shorteners such as [goo.gl](#) or [bit.ly](#) to save characters), opt-out instructions, help instructions, and carrier cost disclosures (e.g., "Msg & Data rates may apply"). Immediately honor opt-out requests (there is no period to opt them out such as with CAN-SPAM). Retain documented and saved opt-in consent records, either directly or through your text messaging provider. Remember to "say what you do and do what you say" with respect to text messaging.

The laws, rules and requirements around text marketing can seem daunting, but the potential rewards and ROI from well-executed text marketing and support campaigns can be quite significant for businesses. Many service providers provide turnkey text messaging solutions designed for compliance with the various rules, regulations and Guidelines. Partnering with a digital marketing attorney focused on helping you achieve your business objectives while managing legal risk can help ensure you are on the right path as you move through the thicket of text messaging in business.

An earlier version of this post first appeared on my blog, [Notes from the Trenches](#).

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Check it out for the lowdown on risks of SMS marketing. Great post from Eric Lambert again!

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