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# Attentive's Compliance Features and Two-Tap Validated by Florida Federal Court



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*Disclaimer: the materials in this article are for informational purposes only, and not for the purpose of providing legal advice. You should contact your legal counsel to obtain advice with respect to any particular issues or problems.*

*This content references Case No. 22-60443 (S.D. Fla. June 6, 2022)*

SMS is a highly regulated channel with specific rules and requirements that you must comply with, including federal law, state law, and carrier guidelines. Failure to comply with these requirements risks high damages, and potentially having your SMS marketing program shut down.

When you're choosing an SMS vendor, it's especially important to vet how they approach compliance, and make sure they're able to provide you with guidance at every step.

A federal court in Florida recently validated many of Attentive's compliance features and templates, including our patented two-tap mobile technology. In this post, we'll walk through what the court said about our compliance features, and how you can incorporate them into your SMS program, using Attentive's template language and sign-up units as a starting point.

## 1. Validated Attentive's two-tap, double opt-in process

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After a potential subscriber visits your website on a mobile device, and they're shown Attentive's two-tap sign-up unit, they'll be prompted to sign up for your text messaging program. After they tap the button to sign up, a pre-populated text message will appear in their text message composer. They simply press send to opt in and begin receiving messages from your brand.

In this lawsuit, the plaintiff claimed that they hadn't affirmatively agreed to the company's messaging terms, but didn't dispute that they ① "tapped" the mobile submission button, and ② sent the pre-populated message to the company's short code.

As the court concluded: "There can be no question, considering the 'double opt-in' process that required Plaintiff's affirmative response in the form of a text, that Plaintiff understood the legal significance of her actions and agreed to the Text Terms and the Arbitration Provision within the Text Terms."

A best practice for any SMS sign-up method is to enable double opt-in. This reaffirms the subscriber's consent to receive messages, and helps validate that the person signing up has access to the phone number provided.

After a potential subscriber has provided their phone number (through a web form, by sending you a Text-to-Join keyword, or on your mobile site), they should be automatically prompted to

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send a message (e.g., reply "Y") from that phone number to confirm they want to be subscribed.

With Attentive's patented two-tap mobile technology, the double opt-in is seamless. The subscriber only needs to hit send on a pre-populated text (rather than wait for, and manually type a response to, a "reply Y" message). As the court found in this case, this process clearly communicates to subscribers the "legal significance" of signing up for your text message program.

## 2. Endorsed Attentive's template sign-up unit




The court also endorsed compliance features of Attentive's template sign-up unit, including the placement of legal language above a submission button that specifically references signing up for text messages.

*First*, Attentive's template sign-up units include recommended legal disclosure language. That language is placed *above* the call to action. On a mobile sign-up unit, for example, you would place your legal language above the submission button.

The court agreed that placing the legal language above th button "clearly" and "adequately" explained the "legal

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significance" of clicking that button:

"Statements immediately above the button clearly explain the legal significance of clicking the button by stating that '[b]y signing up via text, you agree to receive recurring automated promotional and personalized marketing text messages (e.g., cart reminders) from [Company] at the cell number used when signing up.' Statements immediately above the button further invite Plaintiff to view additional terms and policies. As such, the legal significance of clicking on the button was adequately explained on the button and in the statements immediately preceding the button."

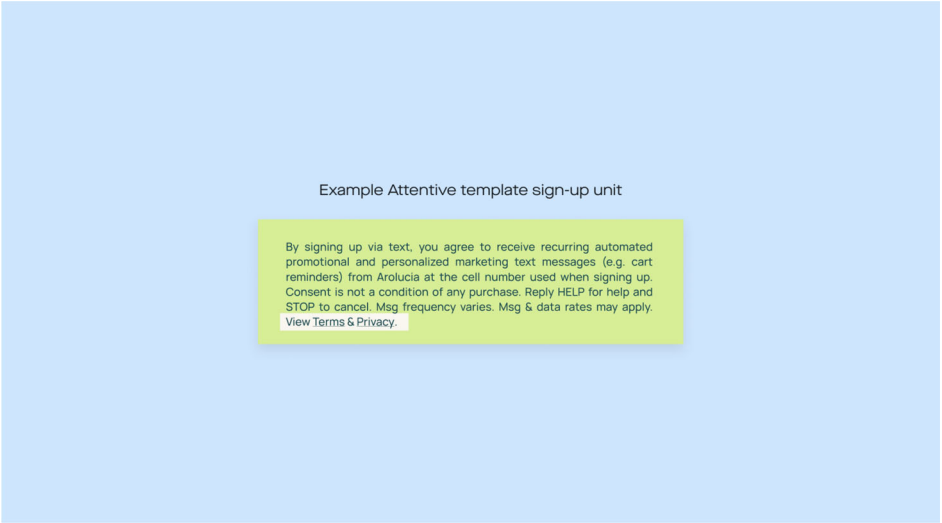
*Second*, Attentive's template sign-up units specifically reference signing up for SMS in the call to action itself. On a mobile sign-up unit, for example, you'd specifically call out signing up for text messages on the submission button.

The court also approved of this feature: "[T]he button itself contains the statement that Plaintiff can get free shipping if and when Plaintiff chooses to 'sign up for email and texts,' indicating that by clicking on the button, Plaintiff would be agreeing to get free shipping and to receive emails and texts."

SMS marketers must make it clear to potential SMS subscribers that, by joining your text program, they're agreeing to receive recurring automated marketing text messages from you. For this reason, Attentive template sign-up units place the recommended legal language immediately above the call to action, and the call to action itself clearly discloses that subscribers are agreeing to receive text messages from you.

## 3. Enforced arbitration provision in Messaging Terms, preventing class action

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The court also enforced the arbitration provision in the company's messaging terms, preventing a class action.

The company included a link to their messaging terms in the legal language, which was placed directly above the call to action button. Those terms included a dispute resolution calling for arbitration of any dispute between the subscriber and the company relating to the SMS program.

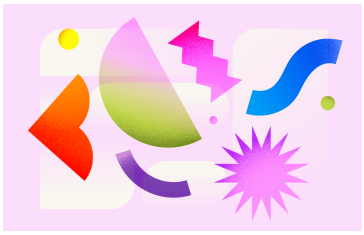
The court found that, by completing Attentive's patented two-tap mobile technology, the plaintiff agreed to the company's messaging terms. As a result, although the case was filed in court as a class action, it was referred to arbitration as an individual action.

Consistent with carrier and other requirements—and consistent with the court's ruling—clearly labeled Terms & Conditions and Privacy Policy links should be displayed in the sign-up unit. With Attentive's template, the recommended legal language includes underlined Terms and Privacy links directly above the call to action. You should consult your own counsel about the specific terms appropriate for your messaging program.

Learn more about TCPA, CTIA, and ADA requirements in our guide to SMS compliance.

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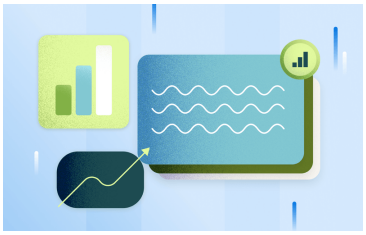
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