



MEMORANDUM REGARDING TEXTING WITH CLIENTS AND SAMPLE TEXT MESSAGING OPT-IN FORM AND TERMS & CONDITIONS

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This memorandum is not intended to provide specific advice about individual legal, business, or other questions. It was prepared solely as a guide, and is not a recommendation that a particular course of action be followed. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional, such as an attorney, should be sought.

- **Informational Memorandum: Page 1**
- **Sample Opt-in Form (to provide to client for signature): Page 4**
- **Sample Text Messaging Terms and Conditions (to post to agency website): Page 6**

In recent years, text messaging has moved quickly into the professional setting, providing independent agents with a quick and simple way to communicate with clients. The expansion of text messages to and from independent agents brings challenges along with the opportunities. The challenges include developing proper workflows and policies for text messaging, properly preserving text messages in the agency's management system, potential E&O exposures related to text messaging, and meeting the legal requirements for text messaging. This memorandum focuses on just one of these challenges – *i.e.*, how to meet the legal requirements for text messaging.

Why Should An Agency Ensure Its Clients Opt In to Text Messaging?

An agency may ask why it should require clients to opt in to text messaging and provide clear terms and conditions, particularly if the agency communicates via text only with existing or prospective clients.

As background, the Federal Communications Commission ("FCC") has broadly interpreted the Telephone Consumer Protection Act ("TCPA") to prohibit commercial text messaging (aka, short message service or SMS) on any device that qualifies as an "automatic telephone dialing system" (ATDS) or "autodialer" absent an emergency or prior express consent. Unlike the rules for some commercial communications, the TCPA does not provide an exemption for an existing business relationship. Moreover, the FCC has found a consumer may generally revoke consent to texting using "any reasonable manner that clearly expresses his or her desire not to receive further calls."

The FCC's broad interpretation of the TCPA could potentially cover all commercial text messages sent on equipment that has the "potential ability" to dial numbers "without human intervention." Under such an expansive definition, using a platform that is merely capable of bulk messaging, such as an agent's personal iPhone, arguably could have triggered the TCPA's regulations even if the bulk messaging function is not used. Expressing concern that the TCPA could be "read to

render every smartphone an ATDS” in a 2015 decision, the D.C. Circuit struck down the FCC’s broad guidance on the definition of ATDS. After the D.C. Circuit decision, the landscape remained murky, and a split arose in federal circuit courts. While some circuits held that an ATDS required a random or sequential number generator, others found that a device could qualify as an ATDS if it merely had the capacity to store and automatically dial or text numbers.

In April 2021, the Supreme Court brought some clarity to the issue in the case of *Facebook v. Duguid*. The Court ruled that a device must have the capacity to either store or produce a telephone number using a random or sequential number generator, as opposed to merely having the capacity to store and dial numbers automatically. While this is an important and helpful decision that should help curb TCPA litigation in the future, there are some caveats. Indeed, plaintiffs’ attorneys may still argue that the capacity to use a random or sequential number generator could still qualify a device as an ATDS subject to the TCPA’s restrictions. The Supreme Court’s decision expressly raised this as a possibility in a footnote, suggesting that a device might qualify if it uses a random number generator to determine the order of dialing from an existing list. Plaintiffs may also still try to raise claims under state unfair and deceptive trade practice laws.

Therefore, even if an agency does not have any current plans to text with certain clients, it is strongly recommended that an agency require its clients to sign or decline an opt-in form at the beginning of the relationship, and ideally, each year thereafter for several reasons. First, while the *Facebook* decision may reduce some exposure, the risk of litigation and enforcement remains. Second, the FCC or Congress may attempt to broaden the scope of the TCPA’s definition in response to the Supreme Court’s decision. Third, ensuring your agency is not engaging in unwanted texting is also a good business practice.

Also outside of the legal context, national phone carriers like T-Mobile, AT&T and others are implementing their own policies for text messages sent via A2P (application-to-person) using 10-digit long code (10DLC) phone numbers (i.e. that include a local area code). The phone carriers will begin requiring businesses to register their texting campaigns and follow opt-in protocols, among other things, in an attempt to combat spam. Businesses may be subject to large fines and penalties for non-compliance. For more on this, see “Changes to Business Texting with the Introduction of 10DLC Policies.” <https://blog.hawksoft.com/10dlc-policies-introduction>.

What Should An Agency Do to Obtain and Renew the Client’s Prior Express Written Consent?

An agent should obtain and renew the client’s prior express written consent before sending commercial text messages. The agency may obtain the client’s prior express written consent by providing the client with an opt-in form to sign and return to the agency if the client wants to communicate with the agency via text message.

The opt-in form should refer to and include a copy of the terms and conditions applicable to the agency’s text messaging. Following the agency’s receipt of the signed opt-in form, the agency should send a text message asking the client to confirm or deny the client’s consent with a yes or no response. The agency should retain either a paper or electronic copy of all signed opt-in forms and a list of mobile numbers for clients that have opted in. Various products and vendors are

available to streamline the opt-in process and to manage mass marketing via text message. Agents should also train their employees and independent producers not to text with any client or prospect, particularly mass marketing texts, until that individual has opted in.

It is also recommended that agents renew consent by obtaining a new opt-in form annually, e.g. when the agency meets with the client to review coverages prior to renewal. Indeed, sometimes mobile phone numbers are disconnected and reissued to a new consumer. The prior user's consent is inapplicable when a mobile phone number is transferred to a new user. While the TCPA provides a limited safe harbor for one text message after a number transfer, the FCC generally did not require a new user notify the sender of the change before filing a complaint.

Practical Considerations

Many agents ask whether the opt-in process and terms and conditions discussed in this Memorandum are necessary for text messaging directly related to a client's account, especially when the client initiates the texting or has provided consent orally. First, although recent precedent may reduce future TCPA litigation, there remains significant risk associated with commercial text messaging as it is an area that has yielded and remains susceptible to significant lawsuits and fines. Second, although TCPA compliance may appear daunting, it can often be accomplished as a regular part of the agency's intake and renewal processes with additional links on an agency's website. Finally, sending unwanted texts can simply prove to be bad business if it annoys your clients or attracts unwanted attention or even litigation, no matter if it is a weak claim or not.

Resources Made Available to Big "I" Members

The Big "I" Office of General Counsel and the Agents Council for Technology are pleased to make available to members a sample opt-in form, attached as Exhibit A, and sample terms and conditions for text messaging, attached as Exhibit B.

The sample opt-in form is a one-page document that can be tailored to collect client consent to text messaging on a regular basis. The sample terms and conditions are longer and intended to be communicated to clients less regularly as they are geared more generally toward meeting the requirements of the federal Telephone Consumer Protection Act. Additionally, the sample terms and conditions contain other terms and conditions that may reduce the agent's liability in the event of a claim relating to text messaging.

It is our hope that agencies will find this memorandum and the sample opt-in form and terms and conditions to be useful tools when developing policies and procedures for text messaging. However, please note that the sample terms and conditions do not ensure compliance with all applicable laws and regulations, particularly on the state level. Therefore, agencies should review their own policies and practices and other applicable state laws and regulations – and consult with an attorney as needed – to ensure compliance.

Any questions regarding this memorandum or the sample terms and conditions should be directed to [Scott Kneeland](#) or [Ron Berg](#).

EXHIBIT A

SAMPLE OPT-IN FORM FOR TEXT MESSAGING

IMPORTANT DISCLAIMER. THIS DISCLAIMER MUST BE READ BEFORE YOU USE THE SAMPLE.

This sample opt-in form (“Sample”) has been prepared for IIABA member agencies for general information purposes only. This Sample may assist agencies that communicate with clients via text messaging, as well as those agencies that wish to do so, in meeting the requirements of the federal Telephone Consumer Protection Act. The agency should make its terms and conditions available to the client at the same time it requests the client’s consent to text messaging. The purpose is to ensure that the client has an opportunity to review the terms and conditions before agreeing to communicate with the agency via text message.

By providing this Sample to member agencies, IIABA does not intend to provide, and is not providing, a legal opinion or legal advice, and it should not be acted upon or relied upon as such. The states where your agency conducts business and the carriers with which your agency transacts business may have legal, regulatory, contractual, or other requirements that provide for additional or different disclosures. Moreover, this Sample includes only general information and comments, and is not intended to provide specific advice about individual legal, business, or other questions. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional, such as an attorney, should be sought.

[Please see next page for sample form.]

AGENCY OPT-IN FORM FOR TEXT MESSAGING

The undersigned client (“You”) consents to receive text messages from (the “Agency”) or others acting on the Agency’s behalf. As part of this consent, You represent and warrant the following:

- (1) The Agency or others acting on the Agency’s behalf may send text messages in various formats and with various contents, including but not limited to, text messages about insurance policies and other transactions initiated by You or marketing the products and services offered by or through the Agency.
- (2) You are the owner or authorized user of the mobile phone number identified below. You will notify us immediately if you are no longer the owner or authorized user of the mobile phone number identified below.
- (3) You are solely responsible for any message and data charges associated with such text messages.
- (4) The Agency has made its Text Messaging Terms and Conditions (“Terms and Conditions”) available to You on its website, at _____ and will provide You with a hardcopy of the Terms and Conditions upon request. By signing this opt-in form, You agree to the Terms and Conditions.
- (5) If you sign this opt-in form, You will receive an initial text message to the mobile phone number below asking You to confirm your consent with a yes or no response.

If You do not wish to receive text messages from the Agency or others acting on the Agency’s behalf, or do not agree to the Terms and Conditions, You should not sign this form.

Printed Name

Signature

Mobile Phone Number

EXHIBIT B

**IMPORTANT DISCLAIMER. THIS DISCLAIMER MUST
BE READ BEFORE YOU USE THE SAMPLE.**

These sample Texting Messaging Terms & Conditions (“Sample”) have been prepared for IIABA member agencies to use as a template for general information purposes only. This Sample may assist agencies that communicate with clients via text messaging, as well as those agencies that wish to do so, in meeting the requirements of the federal Telephone Consumer Protection Act. The agency should make its terms and conditions available to the client at the same time as it requests the client’s consent to text messaging. The purpose is to ensure that the client has an opportunity to review the terms and conditions before agreeing to communicate with the agency via text message.

By providing this Sample to member agencies, IIABA does not intend to provide, and is not providing, a legal opinion or legal advice, and it should not be acted upon or relied upon as such. The states where your agency conducts business and the carriers with which your agency transacts business may have legal, regulatory, contractual, or other requirements that provide for additional or different disclosures. Moreover, this Sample includes only general information and comments, and is not intended to provide specific advice about individual legal, business, or other questions. If specific legal or other expert advice is required or desired, the services of an appropriate, competent professional, such as an attorney, should be sought.

[Please see next page for sample form.]

SMS/Text Messaging Terms & Conditions

Please read these SMS/Text Messaging Terms & Conditions carefully. By completing the SMS/Text Messaging Opt-In Form, you expressly consent to receive non-marketing and marketing text messages from **AGENCY NAME** (“**AGENCY**”), including text messages made with an Autodialer, at the mobile phone number(s) you provide.

You may opt-out of these communications at any time by replying **STOP** to any text message from AGENCY or by otherwise contacting AGENCY as indicated below. You can receive help at any time by replying **HELP** to any text message from AGENCY or by otherwise contacting AGENCY as indicated below. Consent to receive non-marketing or marketing text messages is not required to purchase any products or services from AGENCY. Messaging and data rates may apply.

By completing the SMS/Text Messaging Opt-In Form, you also accept and agree to be bound by these SMS/Text Messaging Terms & Conditions and any other applicable terms and agreements related to your use of AGENCY services.

Program Description

AGENCY offers its text messaging program whereby AGENCY, and any applicable service providers, will text message you to provide you with information concerning your account activity with AGENCY and other AGENCY products, services, and promotions (all of the foregoing the “**AGENCY Program**”). AGENCY and its service providers may, from time to time, use standard or an automatic telephone dialing system (“**Autodialer**”) to deliver text messages to you under the AGENCY Program. You agree that you will not use the AGENCY Program for any illegal or unlawful purposes. No coverage may be bound or amended via text message or the AGENCY Program.

Message Frequency

Under the AGENCY Program, the number of AGENCY text messages that you receive may vary depending upon your account activity and your communication with AGENCY.

Cost

AGENCY does not impose a separate fee for sending AGENCY text messages under the AGENCY Program. However, standard message and data rates may apply to each text message sent or received in connection with the AGENCY Program, as provided in your mobile telephone service rate plan. Please contact your mobile telephone carrier for pricing plans and information.

Supported Carriers; Interruption

The AGENCY Program should be available through your equipment or mobile device when the equipment or device is within the operating range of your wireless service provider. The AGENCY Program may not be available on all equipment/mobile devices, or through all wireless carriers, and not all functionalities of the AGENCY Program are available on all equipment/mobile devices, or through all wireless carriers. AGENCY may, from time to time, in its discretion and without notice to you, limit the carriers that support the AGENCY Program. Certain other carriers may not support the AGENCY Program.

Delivery of information and content to your equipment/mobile device may fail due to a variety of circumstances or conditions. The AGENCY Program is subject to transmission limitation or interruption. You understand and acknowledge that mobile network services are outside of AGENCY's control, and AGENCY is not responsible or liable for issues arising therefrom, or the failure thereof, including, without limitation, technical, hardware, software, electronic, network, telephone or other communications malfunctions, errors or failures of any kind, errors in transmission, traffic congestion, lost or unavailable network connections, telephone connections, wireless phone connections, website, Internet, or ISP availability, unauthorized human intervention, traffic congestion, incomplete or inaccurate capture of entry information (regardless of cause) or failed, incomplete, garbled, jumbled or delayed transmissions which may limit or restrict your ability to receive or send a message, including any injury or damage to your or any other person's equipment/wireless device relating to or resulting from participating in or using the AGENCY Program. If the AGENCY Program is not available within your intended location, you agree that your sole remedy is to cease using the AGENCY Program.

How to Opt-In

To opt-in to receive text messages from AGENCY under the AGENCY Program, complete the SMS/Text Messaging Opt-In Form and submit it to AGENCY. AGENCY will then send you a text message asking you to confirm your enrollment in the AGENCY Program.

How to Opt-Out

To stop receiving text messages from AGENCY, text STOP to the ten-digit long code from which the text messages are being sent. You will then receive confirmation of your opt-out of the AGENCY text messaging program. You may also opt out by providing written notice to AGENCY at _____, by emailing AGENCY at _____, or calling AGENCY at _____.

Your Mobile Telephone Number

You represent that you are the account holder for the mobile telephone number(s) that you provide or that you have the account holder's permission to enter the mobile telephone number(s) that you provide and that you will not initiate messages to the mobile phone of any other person or entity. You agree to maintain accurate, complete, and up-to-date information with AGENCY regarding your use of the AGENCY Program, including, without limitation, notifying AGENCY in writing immediately if you change, or cease being the regular user of, your mobile telephone number. You agree to indemnify AGENCY in full for all claims, expenses, damages, and costs, including reasonable attorneys' fees, related to or caused in whole or in part by your failure to notify AGENCY if you change your telephone number, or cease being the regular user of, including, but not limited to, all claims, expenses, damages, and costs related to or arising under the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*

Privacy

AGENCY's privacy policy may be accessed at the following link:

_____.

Support/Help

To request more information, text **HELP** to the ten-digit long code from which the text messages are being sent. You may also receive help by providing written notice to AGENCY at _____, by emailing AGENCY at _____, or calling AGENCY at _____.

Eligibility

To receive AGENCY text messages or enroll in the AGENCY Program, you must be a resident of the United States, eighteen (18) years of age or older, authorized to enroll the mobile phone number in the AGENCY Program, and authorized to incur any mobile message or data charges incurred by participating. AGENCY reserves the right to require you to prove the foregoing to participate in the AGENCY Program.

Changes to These SMS/Text Messaging Terms & Conditions

AGENCY may revise, modify, or amend these AGENCY NAME SMS/Text Messaging Terms & Conditions at any time. Any such revision, modification, or amendment shall take effect when it is posted to AGENCY website. You agree to review these AGENCY SMS/Text Messaging Terms & Conditions periodically to ensure that you are aware of any changes. Your continued consent to receive AGENCY NAME text messages will indicate your acceptance of those changes.

Amendment; Termination of Text Messaging

AGENCY NAME may suspend or terminate your receipt of AGENCY NAME text messages if AGENCY NAME believes you are in breach of these AGENCY NAME SMS/Text Messaging Terms & Conditions. Your receipt of AGENCY NAME text messages is also subject to termination in the event that your mobile telephone service terminates or lapses. AGENCY NAME reserves the right to modify or discontinue, temporarily or permanently, all or any part of AGENCY NAME text messages and the AGENCY NAME Program, for any reason, with or without notice to you.

Release; No Warranties; Limitation of Liability

By participating in the AGENCY Program, you agree to release and hold harmless AGENCY and its representatives, agents, successors, assigns, employees, officers and directors, from any and all liability, for loss, harm, damage, injury, attorneys' fees, cost or expense whatsoever including without limitation, property damage, personal injury and death that may occur in connection with the AGENCY, or your use thereof, and for any claims, matters, or disputes based on violation of law or infringement or violation of any rights of any person or entity, including, without limitation, violation of publicity rights, defamation, or invasion of privacy.

THE AGENCY PROGRAM IS PROVIDED AS IS, WHERE IS AND WITH ALL FAULTS AND WITHOUT WARRANTY OF ANY KIND, EITHER EXPRESS, IMPLIED, WRITTEN, ORAL OR ARISING UNDER CUSTOM OR TRADE. AGENCY DISCLAIMS ALL WARRANTIES, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSES AND NON-INFRINGEMENT.

In no event shall AGENCY be liable to you, or to any third party, for any losses or damages whatsoever arising out of or resulting from the AGENCY Program, or your use thereof, regardless of the theory of recovery, including, without limitation, direct, indirect, consequential, incidental or special damages, lost profits, punitive damages, attorney's fees or any damages arising out of or resulting from a statutory or regulatory violation, negligence, gross negligence, strict liability, tortious conduct, willful misconduct or fraud, breach of contract, or breach of warranty. To the extent this damage waiver is contrary to applicable law, your or any third party's maximum recovery for any losses or damages whatsoever arising out of or resulting from the AGENCY Program, or your use thereof, regardless of the theory of recovery, is \$10.00.

Arbitration/Class Action Waiver

ALL DISPUTES, MATTERS, OR CLAIMS BETWEEN YOU AND AGENCY ARISING OUT OF OR RELATING IN ANY WAY TO THESE SMS/TEXT MESSAGING TERMS & CONDITIONS, ANY TEXT MESSAGES BETWEEN YOU AND AGENCY OR ANYONE ACTING ON YOUR OR AGENCY'S BEHALF, OR THE AGENCY PROGRAM, REGARDLESS OF THE THEORY OF LIABILITY OR RECOVERY, MUST BE RESOLVED SOLELY BY ARBITRATION CONDUCTED EXPEDITIOUSLY IN ACCORDANCE WITH THE AMERICAN ARBITRATION ASSOCIATION CONSUMER ARBITRATION RULES ("AAA RULES") BY A SOLE ARBITRATOR SELECTED BY THE PARTIES TO THE DISPUTE FROM THE NATIONAL OR [FILL IN YOUR PREFERRED LOCATION] PANEL OF ARBITRATORS. ALL DISPUTES, MATTERS, OR CLAIMS BETWEEN YOU AND AGENCY INCLUDES, WITHOUT LIMITATION, ANY ACTUAL OR ALLEGED STATUTORY OR REGULATORY VIOLATION, EQUITABLE CLAIM, NEGLIGENCE, GROSS NEGLIGENCE, STRICT LIABILITY, TORTIOUS CONDUCT, WILLFUL MISCONDUCT OR FRAUD, BREACH OF CONTRACT, BREACH OF WARRANTY, AS WELL AS ALL DISPUTES, MATTERS, OR CLAIMS ARISING OUT OF OR RELATING IN ANY WAY TO THE ARBITRATION/CLASS ACTION WAIVER PROVISION OR THE RELEASE; NO WARRANTIES; LIMITATION OF LIABILITY PROVISION.

This agreement to arbitrate is intended to be broadly interpreted, and expressly includes disputes, matters, or claims brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, or any other statute, regulation, or legal or equitable theory. THIS PROVISION MUST CONSTRUED IN ACCORDANCE WITH, AND THE ARBITRATION MUST BE GOVERNED BY, THE FEDERAL ARBITRATION ACT (9 U.S.C. § 1 *et seq.*). ANY JUDGMENT UPON THE DECISION RENDERED BY THE ARBITRATOR MAY BE ENTERED BY ANY COURT HAVING JURISDICTION. UNLESS OTHERWISE REQUIRED BY LAW, THE ARBITRATOR IS PROHIBITED FROM AWARDING DAMAGES IN EXCESS OF THE LIMITATIONS SET FORTH IN THESE SMS/TEXT MESSAGING TERMS & CONDITIONS.

ARBITRATION PROCEEDINGS MAY BE COMMENCED BY EITHER PARTY TO THIS AGREEMENT BY DELIVERING TO THE OTHER PARTY A WRITTEN NOTICE IN ACCORDANCE WITH THE AAA RULES. ANY ARBITRATION HEARING SHALL BE HELD IN [FILL IN YOUR PREFERRED LOCATION], UNLESS THE PARTIES TO THE DISPUTE AGREE OTHERWISE. ANY JUDGMENT RENDERED BY

ARBITRATION SHALL BE FINAL AND BINDING ON THE PARTIES, AND MAY BE ENTERED IN ANY COURT OF COMPETENT JURISDICTION. NOTWITHSTANDING ANY AAA RULES TO THE CONTRARY, THE AWARD OF THE ARBITRATOR MUST BE MADE NO LATER THAN THREE (3) MONTHS FOLLOWING THE DATE ON WHICH THE ARBITRATOR IS APPOINTED, UNLESS THE ISSUE IS THE SUBJECT OF LITIGATION BROUGHT BY A THIRD PARTY AND THE ARBITRATOR DEEMS IT APPROPRIATE TO DEFER ITS AWARD UNTIL THE LITIGATION IS RESOLVED.

The resolution of any claims, matters, or disputes must proceed solely on an individual basis without the right for any claims, matters, or disputes to proceed on a class action or collective basis or on bases involving claims, matters, or disputes brought in a purported representative capacity on behalf of others. The arbitrator's authority to resolve and make written awards is limited to claims, matters, and disputes between you and AGENCY alone. Claims, matters, or disputes may not be joined or consolidated unless agreed to in writing by all parties. No arbitration award or decision will have any preclusive effect as to issues, claims, matters, or disputes with anyone who is not a named party to the arbitration.

Attorney Fees

In the event of any claim, matter, or dispute between you and AGENCY arising out of or relating in any way to these SMS/Text Messaging Terms & Conditions, any text messages between you and agency or anyone acting on your or AGENCY's behalf, or the AGENCY Program, AGENCY, if it prevails, must be awarded all costs of bringing or defending the claim, matter, or dispute, including, without limitation, reasonable attorneys' fees and the ordinary costs and expenses incurred in resolving the claim, matter, or dispute, including, without limitation, all arbitration related fees and expenses.

Applicable Law

The law of the State of [select your preferred state], including its statutes of limitations and without reference to any conflict of laws principles, shall be applied to any claim, matter, or dispute between the parties or when governing, construing, or enforcing these SMS/Text Messaging Terms & Conditions, the AGENCY Program, or any text messages between you and AGENCY or anyone acting on your or AGENCY's behalf, or any of the rights, duties, or obligations of the parties arising from or relating in any way to the subject matter of these Terms & Conditions.

Contact Us

If you have questions regarding these SMS/Text Messaging Terms & Conditions, you may reach us by calling _____, by mail at _____, or by email at _____.