

TCPA Guidelines For Automated Text Messaging

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Instant Census

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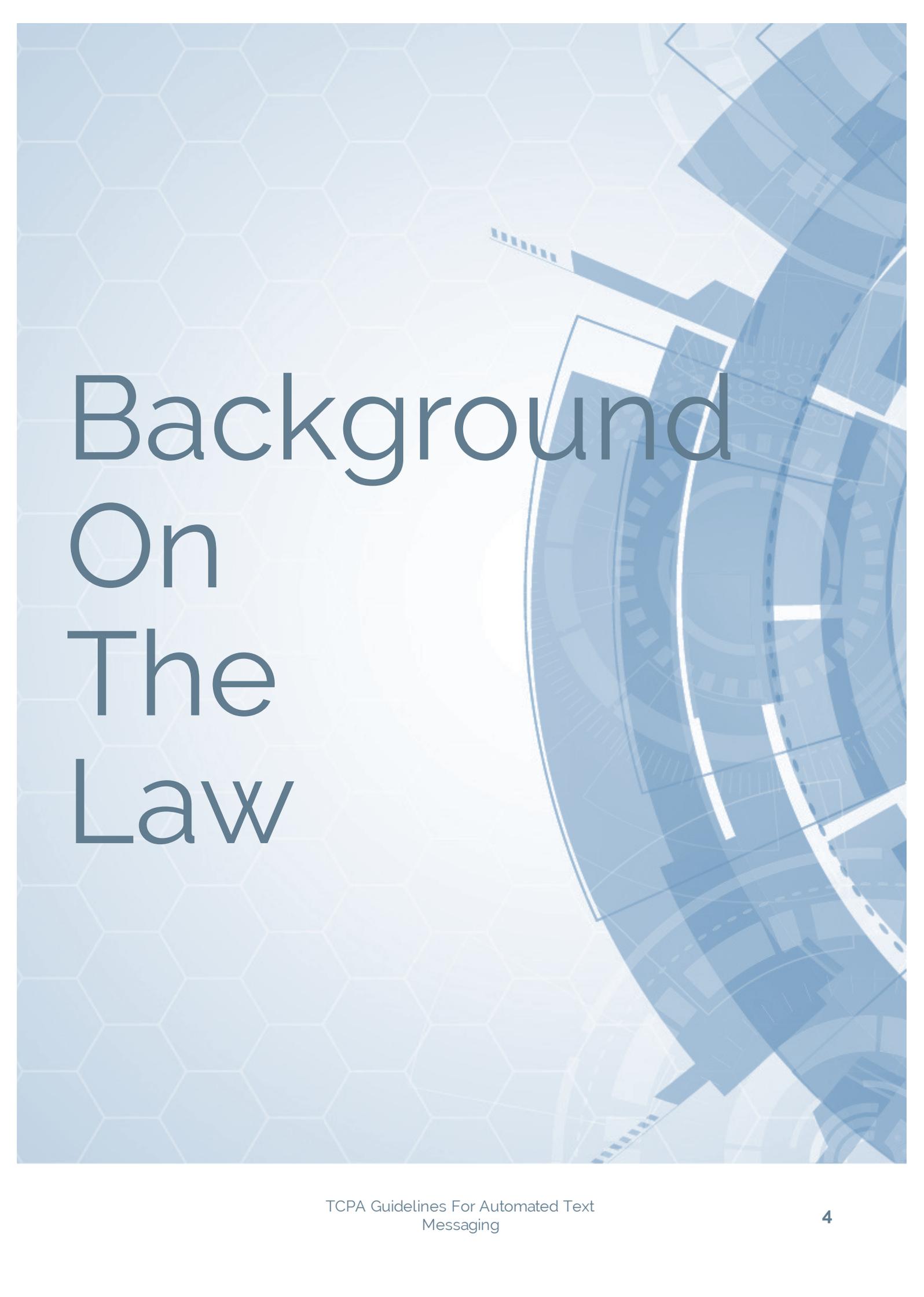
Introduction

People often ask us how the recent FCC TCPA Omnibus Declaratory Ruling affects automated text messaging for surveys, marketing and other types of communications. While the ruling on July 10, 2015 did change some of the rules outlined in the TCPA, it also clarified existing regulations to make those using automated text message better informed.

What follows is our best understanding of how to make text message surveys comply with the new positions the FCC outlines in the 2015 Omnibus Ruling. But we are engineers, not lawyers, so this is not legal advice!

To read the FCC TCPA Omnibus Declaratory Ruling in full, visit:

<https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order>



Background On The Law



Background On The Law

United States text messaging laws are complicated and change frequently. They largely originate from the Telephone Consumer Protection Act of 1991, which was passed a year *before* the SMS was invented.

Every few years the FCC has issued clarifications and updates to the regulations; the 2015 Omnibus Ruling changes some rules that the FCC issued in 2012. As evidence of how in-flux the rules are, only 2 of the FCC's 5 commissioners approved this most recent Omnibus Ruling; 2 others partially approved it, and 1 dissented.

The main purpose of the TCPA is to prevent companies from sending unwanted telemarketing spam. Because of that, we can summarize the law's restrictions on text messages in two points:

1. You must get consent from a person before you can send automatic text messages to that person.
2. The person must be able to, at any time, revoke their consent and stop receiving future text messages.

Text Message Consent Guidelines

You need consent from respondents, even for non-commercial text messages.



Text Message Consent Guidelines

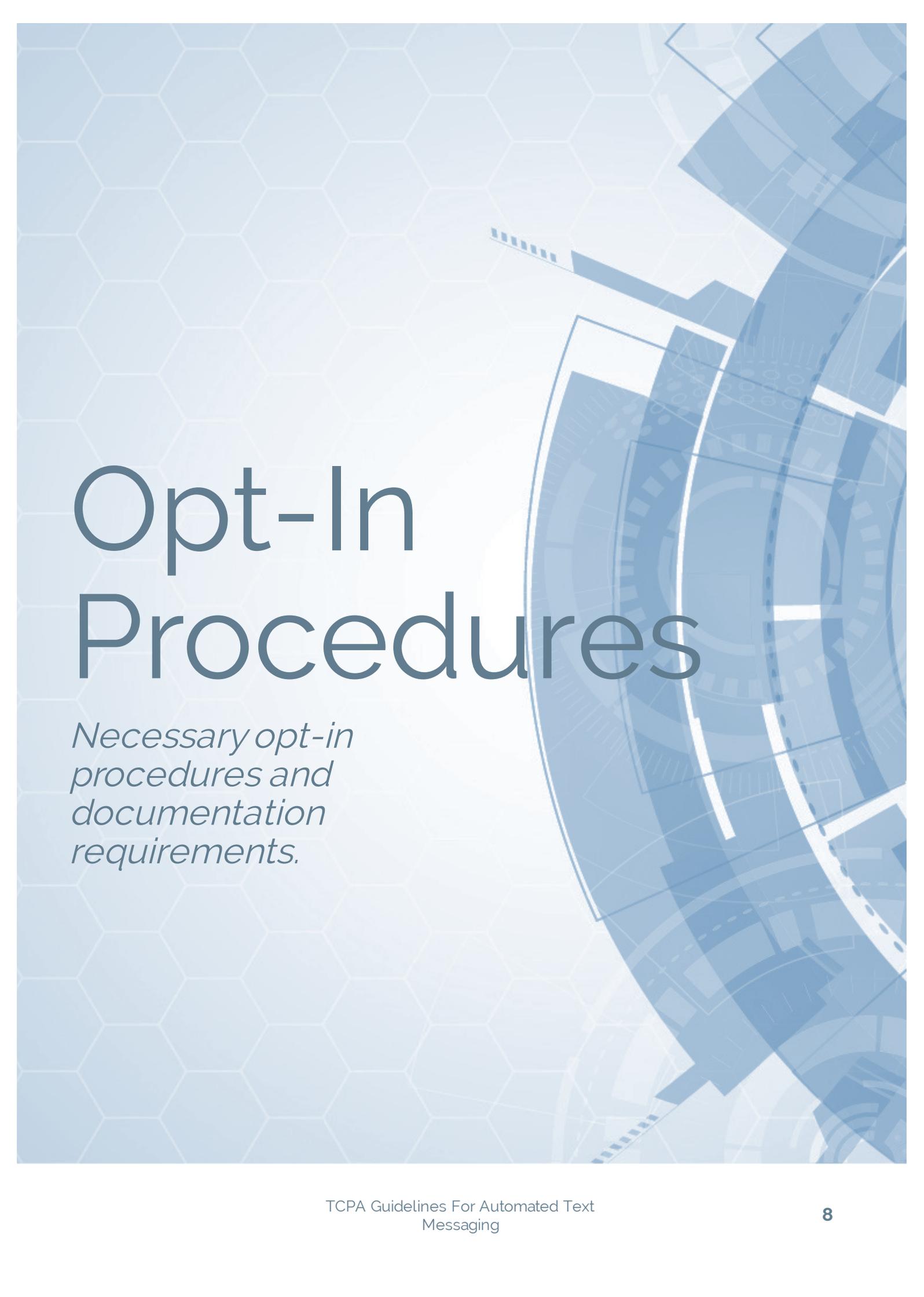
In 2012, the FCC ruled that there were different standards of consent for commercial and non-commercial messages. As of July 10, 2015, that's no longer the case and the FCC now treats all messages the same.

First, the Omnibus Ruling clarifies that automatic SMS messages fall under the same restrictions as robocalls:

"...raises the issue of whether SMS text messages are subject to the same consumer protections under the TCPA as voice calls. We reiterate that they are... the Commission in 2003 determined that the TCPA applies to SMS texts."(paragraph 107)

Then the Ruling says that all non-emergency messages require consent, regardless of whether they're for commercial purposes:

"the Commission's policy, consistent with the plain language of the TCPA, is to treat informational and telemarketing calls to wireless phones the same. We do so again today, and find no reason here to differentiate the two." (paragraph 69)



Opt-In Procedures

*Necessary opt-in
procedures and
documentation
requirements.*



Opt-In Procedures

One point in the Omnibus Ruling actually makes it *easier* to collect opt-ins for SMS surveys. Previously it was unclear whether written consent was needed to send non-commercial texts; but the FCC now explicitly explains that verbal consent can count as an opt-in:

"For non-telemarketing and non-advertising calls, express consent can be demonstrated by the called party giving prior express oral or written consent or, in the absence of instructions to the contrary, by giving his or her wireless number to the person initiating the autodialed or prerecorded call." (paragraph 52)

However, if you're running a survey, the burden is on you to document that you've received the necessary consent from each participant in the survey:

"if any question arises as to whether prior express consent was provided by a call recipient, the burden is on the caller to prove that it obtained the necessary prior express consent." (paragraph 47)

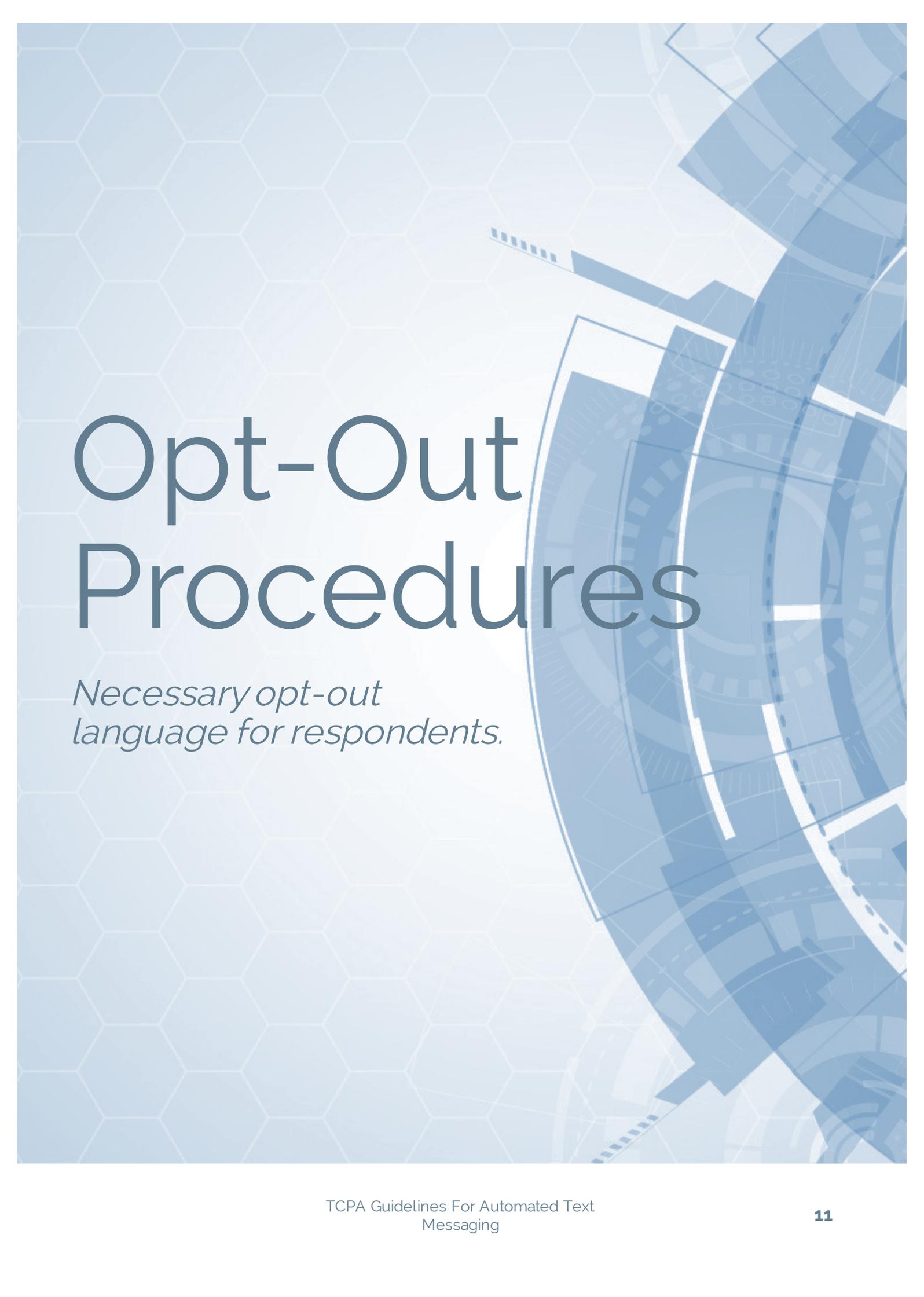


Opt-In Procedures Cont'd

The FCC is vague about how to document consent, but suggests that “proper business records” are adequate:

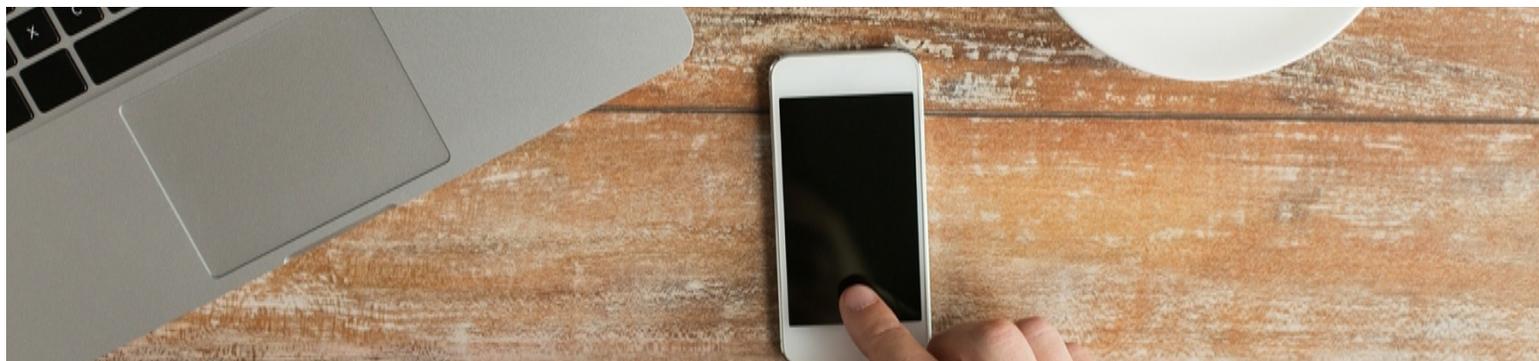
“The well-established evidentiary value of business records means that callers have reasonable ways to carry their burden of proving consent. We expect that responsible callers, cognizant of their duty to ensure that they have prior express consent under the TCPA and their burden to prove that they have such consent, will maintain proper business records tracking consent.”(paragraph 70)

If you're using Instant Census and having respondents text in to join, Instant Census will record the respondent's text message consent for you. But if you're uploading a list of phone numbers into Instant Census, you need to document how you received consent from each one. You can get consent on paper, via email, via text message, over the phone, or on a web form- you just need to document how and when you received it.²



Opt-Out Procedures

*Necessary opt-out
language for respondents.*

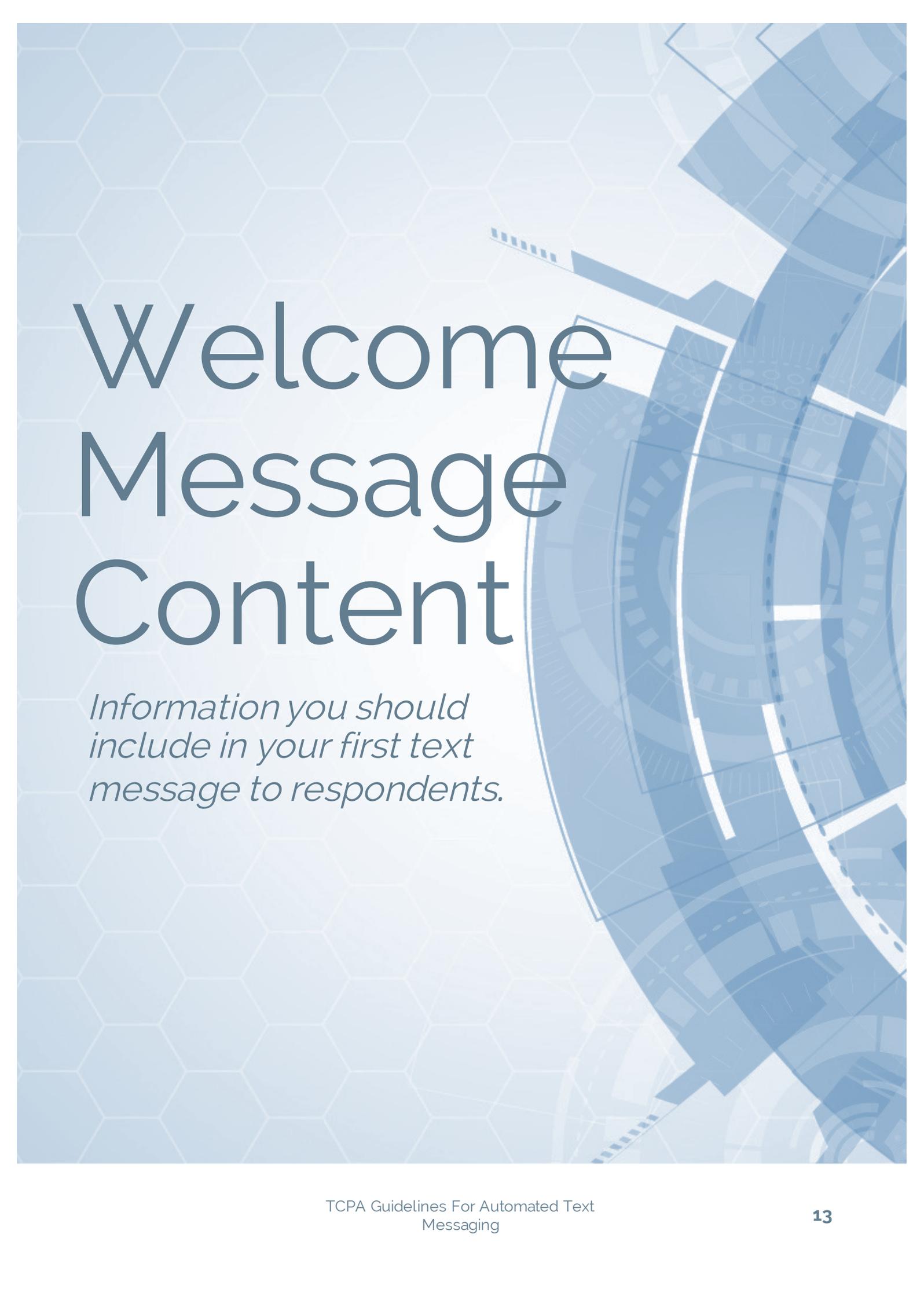


Opt-Out Procedures

The FCC requires that if a respondent sends a message with just the word *STOP*, you must stop texting them *immediately* ³ (although you're allowed to send a single confirmation message to tell the person that they've been removed).⁴

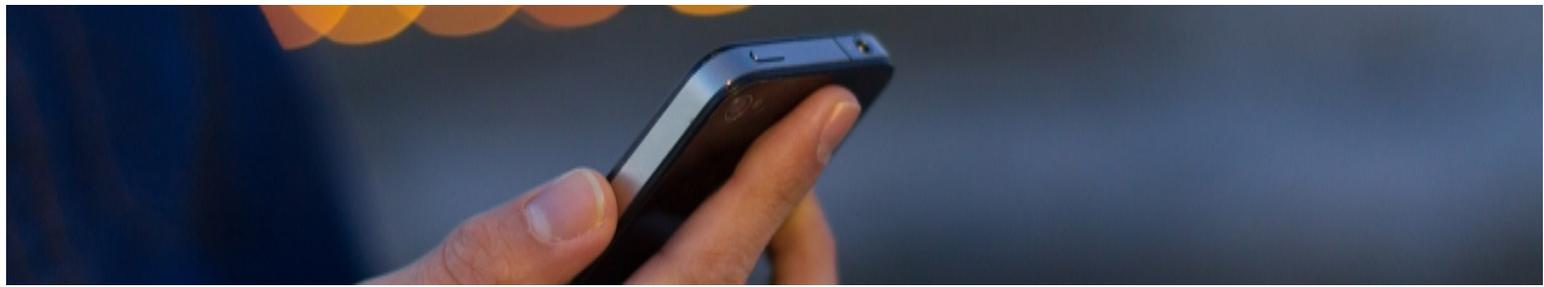
Instant Census handles this automatically when someone texts *STOP*, and it's case-insensitive, so *STOP*, *Stop*, and *stop* all do the same thing. Instant Census sends one opt-out confirmation message and then immediately ceases texting that person's number. People who have opted out can opt back in to Instant Census by texting *START*.

The Omnibus Ruling also announced that people must be able to opt out "through any reasonable means." (paragraph 55) This part is especially vague, but it appears that if a person calls, emails, writes a letter, or asks in-person to be opted-out of automatic text messages, you must stop sending them text messages.⁵



Welcome Message Content

*Information you should
include in your first text
message to respondents.*



Welcome Message Content

In your first message to the respondent, you have to:

1. *Identify who is sending the messages ("e.g. This is the ___ Survey Center")*
2. *Tell the respondent how to opt out ("Text STOP at any time to opt out.")*

Instant Census automatically sends a message with this information (customized to identify the organization sending the survey) to new respondents when they're enrolled. If we're sending respondents a survey every week, we only send them this informational intro message once, at the start of the first survey; we don't re-send it every week.

Need more detail?

*Curious how consent regulations
apply in a specific case?*

*Want to know more about
how Instant Census complies with
these laws?*

Get in touch!

info@instantcensus.com

Footnotes

1. Also see paragraph 123: "We reject arguments that the TCPA's protections are limited to telemarketing calls to wireless numbers and should not require consent for non-telemarketing robocalls... made with a predictive dialer. The TCPA's restrictions on autodialed, artificial-voice, and prerecorded-voice calls to wireless numbers apply equally to telemarketing and informational calls. With the exception of calls made for emergency purposes or with the prior express consent of the called party, the TCPA broadly prohibits calls made using "any automatic telephone dialing system" to "any telephone number assigned to a . . . cellular telephone service" without limiting that restriction to telemarketing calls."
2. According to a [2013 FCC Compliance Guide](#): "*Prior Express Written Consent ... consent obtained in compliance with the E-SIGN Act will satisfy the requirements of its revised rule, including permission obtained via an email, website form, text message, telephone keypress, or voice recording.*"
3. See paragraph 64: "Consumers have a right to revoke consent, using any reasonable method including orally or in writing. Consumers generally may revoke, for example, by way of a consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location, among other possibilities. We find that in these situations, callers typically will not find it overly burdensome to implement mechanisms to record and effectuate a consumer's request to revoke his or her consent. We conclude that callers may not abridge a consumer's right to revoke consent using any reasonable method. The Commission has concluded as much for certain telemarketing calls, as our rules require that telemarketing calls using a prerecorded or artificial voice "provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request" and leave a "toll free number that enables the called person to call back at a later time" if the call is answered by voicemail. And when the Commission granted an exemption from the TCPA in the Cargo Airline Order, it required that callers give consumers a direct opt-out mechanism such as a key-activated opt-out mechanism for live calls, a toll-free number for voicemails, and a reply of "STOP" for text messages. The common thread linking these cases is that consumers must be able to respond to an unwanted call— using either a reasonable oral method or a reasonable method in writing—to prevent future calls."
4. See paragraph 57: "In the SoundBite Declaratory Ruling, the Commission concluded that a one-time text confirming a consumer's request to opt out of future calls did not violate the TCPA"
5. See paragraph 64