

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	CG Docket Nos. 18-152, 02-278
Capital One Services, LLC,	)	
Petition for Declaratory Ruling	)	

**PETITION FOR DECLARATORY RULING OF CAPITAL ONE**

Capital One Services, LLC (“Capital One”), a diversified financial services company, seeks the Commission’s help to meet its customers’ intent. When Capital One receives a valid customer opt-out request via text message in response to an informational text that the recipient previously consented to receive, Capital One must discern the scope of that opt-out. Some customers want to opt-out of all texts; others merely want to opt-out of the specific category of text message alert they received most recently. Capital One seeks confirmation that it can address this issue by clarifying the opt-out’s scope.

Pursuant to Section 1.2 of the Commission’s rules,<sup>1</sup> Capital One respectfully requests that the Commission issue a declaratory ruling to confirm that, if the sender of a lawful informational text message transmitted through an automatic telephone dialing system (“ATDS”) receives a valid opt-out request from the recipient in response to that message, and that informational message was part of a program in which the recipient had previously enrolled that transmits several categories of informational messages, then, pursuant to the Commission’s ruling in *SoundBite*,<sup>2</sup> the sender may clarify in an opt-out confirmation message to the recipient the scope

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<sup>1</sup> 47 C.F.R. § 1.2.

<sup>2</sup> See *SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 27 FCC Rcd 15391 ¶¶ 1, 7, 12 (2012) (“*SoundBite*”).

of the recipient's opt-out request without violating the Telephone Consumer Protection Act ("TCPA")<sup>3</sup> or related Commission rules.<sup>4</sup> This clarification message would not contain marketing or promotional content or seek to persuade the recipient to reconsider his or her opt-out decision.

This proposition is the only reasonable interpretation of *SoundBite*, the TCPA, and the Commission's rules. It is necessary to effectuate consumer intent by allowing Capital One's customers to have informed control over the scope of their opt-out. Nevertheless, given the highly technical nature of TCPA compliance, Capital One seeks this declaratory ruling in an abundance of caution to ensure that it can implement this customer-friendly measure without having to defend itself in costly and unnecessary litigation.<sup>5</sup> The increase in the filing of TCPA claims, together with the nature of its penalties, have made the submission of this Petition for Declaratory Ruling advisable.

Capital One previously asked the Commission for this same clarification in an *ex parte* submission<sup>6</sup> that followed the issuance of a public notice<sup>7</sup> seeking to reexamine various aspects

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<sup>3</sup> 47 U.S.C. § 227.

<sup>4</sup> *See generally* 47 C.F.R. § 64.1200.

<sup>5</sup> To be clear, Capital One is confident that it would prevail if this proposed practice were challenged.

<sup>6</sup> Letter from Yaron Dori, Counsel to Capital One, to Marlene Dortch, Secretary, FCC, CG Docket Nos. 18-152, 02-278 (Nov. 5, 2018). That *ex parte* notice also asked the Commission to clarify what constitutes a revocation of prior express consent to receive text messages. Capital One continues to support its position, but this Petition for Declaratory Ruling does not reiterate that request.

<sup>7</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision*, CG Docket Nos. 18-152, 02-278, Public Notice, 33 FCC Rcd 4864 (2018).

of the TCPA in the wake of the D.C. Circuit's decision in *ACA International v. FCC*.<sup>8</sup> Because the Commission has yet to act more broadly on TCPA reform, Capital One is resubmitting this narrow request through this Petition for Declaratory ruling to provide the Commission with the option of ruling on it separately.

Grant of this Petition for Declaratory Ruling is in the public interest. The text message program to which this request pertains is voluntary and recipients expressly consent to receive its informational messages. The automated text messages that are transmitted are informational in nature and the recipient can revoke his or her consent at any time, including by replying "STOP" to any message. The sole issue upon which Capital One seeks confirmation is whether, under *SoundBite*, the Company may send an opt-out confirmation message to clarify the customer's intent regarding the breadth of his or her opt-out.

For example, if Capital One were to send a text about a declined card transaction to which the customer replies "stop," it could be unclear whether the customer wants to opt out of receiving *all* messages from Capital One, including payment due notices and suspected fraud alerts, or only card decline notices. The customer should have the right to clarify his or her intent within the SMS channel and continue to receive desired informational text messages. At the same time, the customer should be protected so that if he or she does not respond to the clarification requests, all program text messages will cease. Capital One urges the Commission to confirm that the company can seek this clarification while providing such protection by transmitting an opt-out confirmation message within the scope of *SoundBite's* terms to clarify the extent of that opt-out request as set forth in this Petition.

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<sup>8</sup> 885 F.3d 687 (D.C. Cir. 2018).

## I. INTRODUCTION AND BACKGROUND

Capital One is committed to consumer privacy. As one of the leading providers of financial services in the U.S., Capital One understands the importance of safeguarding consumers and providing them with the information, transparency, and choice they need to help them make the best decisions for their financial future. Capital One has always sought to meet customers in the locations and channels most convenient for them. Historically, that was through conversations with customer service agents at a local branch or by telephone. But as technology has made other options possible, many customers have made clear that they want to access information, ask questions, and take action through electronic means. Text messages have become their channel of choice.<sup>9</sup>

One of the tools that Capital One has developed for these purposes is “Eno,” an intelligent assistant that allows customers to manage their accounts, ask questions, and receive information through text messages. Eno enables consumers to seek and receive several different categories of information via text message through the convenience of a single prior express consent mechanism. Customers who use Eno receive informational text messages that include fraud alerts, payment reminders, low balance or available credit notices, and overseas transaction alerts. They also can send text messages to Eno to seek information from Capital One proactively, like details about the customer’s accounts (such as available balance), or more sundry matters such as the hours of operation at a local branch. In essence, Eno enables consumers to request and receive the same sort of information that previously could be obtained only by calling a customer service center or visiting a local branch. It also enables customers to

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<sup>9</sup> Capital One customers have elected to receive more than 30 million servicing text message alerts monthly. Customers value these alerts. For example, customers respond to fraud alerts more than 75% of the time, which is substantially higher engagement than similar alerts provided by email.

obtain this information more quickly and on their terms—from any location and at any time.

To enroll in Eno, a customer must affirmatively provide his or her mobile telephone number and consent to receive information from Eno via text message.<sup>10</sup> Because many types of services and information are available through Eno, and because Capital One from time to time adds new ones, Capital One clearly and conspicuously discloses to customers that when they enroll in Eno they will receive several different categories of informational text messages, including examples of those categories (*e.g.*, fraud alerts, transaction history, balance information).<sup>11</sup>

Because Eno transmits more than one category of informational text messages, if a consumer revokes his or her consent in response to a particular text message (such as by replying “STOP”), it may not be clear whether the consumer seeks to opt-out of *all* text messages from Eno or only the category of text message to which the consumer replied “STOP.”

Eno operates differently than text message programs that cater to a single purpose. A bank might have a program through which a customer can consent to receive “low balance” notifications via text message. When the customer receives such a notification and replies “STOP,” the bank presumably understands that response to apply to all future low balance notification messages so the customer’s enrollment in the program effectively would terminate. Eno, however, offers customers the convenience of receiving multiple types of informational text messages through a single prior express consent mechanism. This makes it easier for customers

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<sup>10</sup> See Capital One, *How do I get started with Eno?*, <https://www.capitalone.com/applications/eno/> (“To text with Eno and ask questions about your card, bank, or auto loan account: 1. Sign in to your account. 2. Confirm your mobile phone number. 3. Select ‘Enroll Now.’”).

<sup>11</sup> See *id.* (stating that Eno automatically sends text message alerts regarding fraud alerts, account balances, available credit, minimum payment amounts, due dates, and transaction history).

to manage their financial accounts and enables Eno to respond dynamically to changing circumstances. But this also means that when Eno and other intelligent assistants transmit more than one category of text messages as part of a single service to customers, a “STOP” response can be construed as applying only to the category of message to which it specifically responds, or it can be construed to apply to the entire program and thus to all categories of messages in that program.<sup>12</sup>

Capital One respectfully requests that the Commission confirm that *SoundBite* permits Capital One to transmit an opt-out confirmation notice in response to a “STOP” command in these circumstances, and that seeking clarity from the customer regarding the scope of that opt-out request in that notice would be permissible, provided the notice does not include marketing or promotional content and does not encourage the customer to reconsider his or her opt-out request. In the context of Eno, if a customer replied “STOP” to a low balance alert, a clear example of a lawful, clarifying opt-out confirmation notice would be “STOP only low balance or all Eno texts? To STOP only low balance but not other Eno texts, REPLY 1. If you do not reply, all Eno texts will STOP.” A representative example of how this would appear on a customer’s mobile phone is provided in Attachment A.

## **II. TRANSMITTING A CLARIFYING OPT-OUT CONFIRMATION NOTICE IN THE CONTEXT OF MULTI-CATEGORY TEXT MESSAGE PROGRAMS IS PERMISSIBLE UNDER *SOUNDBITE***

In the absence of an emergency, the TCPA and the Commission’s implementing

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<sup>12</sup> Currently, Capital One offers customers a feature that permits them to pause or suspend a text message colloquy with Eno, while still allowing for the transmission of certain categories of critical messages such as fraud alerts. *See id.* However, this rudimentary feature does not enable users to precisely curate the kinds of text messages they prefer to receive when they seek to stop certain categories of messages. Capital One is seeking the confirmation requested in this Petition for Declaratory Ruling so that it can provide its customers with the tools they need to better control the types of informational text messages Eno offers.

regulations prohibit the transmission of an informational text message using an ATDS to a mobile telephone number without the recipient's prior express consent.<sup>13</sup> The Commission has interpreted the TCPA as permitting consumers to revoke consent if they no longer wish to receive text messages from a sender.<sup>14</sup>

In *SoundBite*, the Commission clarified that a sender may confirm a recipient's consent revocation request without violating the TCPA or the Commission's rules by transmitting within a short period a one-time opt-out confirmation message. The Commission found that consumers expect to receive a confirmation message as part of the opt-out process, and that such messages are widely used by businesses, governmental entities, and non-profit organizations.<sup>15</sup> The evidentiary record in *SoundBite* supported this finding: consumers had not complained about receiving confirmation text messages—rather, the Commission had received complaints from consumers as a result of *not* receiving such messages.<sup>16</sup> The Commission concluded that a consumer's prior express consent to receive text messages from an entity includes receiving a one-time opt-out confirmation message from that entity.<sup>17</sup> In doing so, the Commission clarified that its holding was limited to confirmation text messages that do not contain marketing, solicitations, or attempt to convince the recipient to reconsider his or her opt-out decision.<sup>18</sup>

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<sup>13</sup> See 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1)(iii); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115 ¶ 165 (2003).

<sup>14</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7993–94 ¶ 56 (2015).

<sup>15</sup> *SoundBite*, 27 FCC Rcd at 15395 ¶ 9.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 15395 ¶ 8.

<sup>18</sup> *Id.* at 15397 ¶ 12.

In the context of a text message program that transmits more than one category of messages, it makes intuitive sense that a text message sender may clarify the scope of a recipient's consent revocation in an opt-out confirmation message without violating the TCPA, provided that the clarifying opt-out confirmation message does not contain marketing or promotional content or seek to encourage the recipient to reconsider the opt-out request. The Commission's reasoning in *SoundBite* regarding confirmation text messages applies equally to a text message clarifying the scope of an opt-out request in such a message—*i.e.*, a consumer's prior express consent to receive several different categories of informational text messages from a sender reasonably can be construed to include consent to receive a one-time text message clarifying whether the consent revocation applies to all text messages from that sender or only to the message category in response to which the "STOP" reply was sent. Consumers would benefit from such a clarification because it would allow them to make an informed choice as to which messages they do and do not want to receive and provide them a better account management experience.

When a text message program involves multiple categories of messages, it is reasonable to assume that consumers expect to receive, as part of the opt-out process, a text message clarifying the scope of their consent revocation. Indeed, as the Commission noted in *SoundBite*, clarification text messages "are critical to the purposes of the underlying, ongoing text messages that the consumers originally elected to receive."<sup>19</sup> Otherwise, consumers inadvertently may stop receiving important text messages regarding their accounts.<sup>20</sup> Similarly, absent a

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<sup>19</sup> *Id.* at 15396 ¶ 9.

<sup>20</sup> *See id.* ("For example, confirmation that a consumer no longer wishes to receive fraud prevention alerts on bank accounts ensures that the opt-out request did not come from a third party seeking to stop such texts to conceal fraudulent activities.").



clarification text message, “a consumer may be uncertain whether his or her request was successfully processed and unnecessarily spend time and resources trying to find out.”<sup>21</sup>

Confirming the scope of consent revocation through a clarifying text message promotes the TCPA’s goals of privacy and safety, ensuring that consumers do not inadvertently opt-out of receiving important information relating to their accounts. For example, absent the ability to clarify, if a recipient enrolled in Eno replies “STOP” to a low balance notification thereby opting out of Eno entirely, that recipient would not receive other types of notifications, including fraud alerts, that the consumer may expect to continue to receive. This would undermine consumer choice and create unnecessary vulnerabilities for the consumer. Indeed, in *SoundBite*, the Commission alluded to this very concern when it noted that confirmation text messages “promote [] the TCPA’s goals of protecting consumer privacy and promoting public safety” because “text messages can include important information relating to the consumer’s bank accounts [and] credit cards”<sup>22</sup>—the very kind of transmissions that this Petition seeks to preserve.

Capital One recognizes that the specifics will matter here. In the context of Eno, an example of the sort of clarifying opt-out confirmation notice that would be consistent with this Petition in response to a “STOP” command from the recipient upon receipt of a low balance alert would be “STOP only low balance or all Eno texts? To STOP only low balance but not other Eno texts, REPLY 1. If you do not reply, all Eno texts will STOP.”<sup>23</sup> As this example makes clear, if the consumer does not reply to the clarifying opt-out confirmation message, the

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<sup>21</sup> *Id.* at 15396 ¶ 10.

<sup>22</sup> *Id.*

<sup>23</sup> *See* Exhibit A.

consumer will be opted out of all Eno texts. This clarification is not materially different from the ordinary opt-out confirmation message at issue in *SoundBite*. It does not attempt to convince the recipient to reconsider his or her opt-out decision, but at the same time it provides the customer with an opportunity to clarify the scope of his or her consent revocation. Accordingly, the Commission should confirm that this kind of clarifying text message is permissible under *SoundBite* and does not violate the TCPA.

### III. CONCLUSION

For the foregoing reasons, Capital One respectfully requests that the Commission issue the declaratory ruling sought herein.

Respectfully submitted,

CAPITAL ONE SERVICES, LLC



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# EXHIBIT A

