

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

In the Matter of)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)
)
Petition for Declaratory Ruling of the Retail)
Industry Leaders Association)

To: The Commission

**PETITION FOR DECLARATORY RULING OF THE
RETAIL INDUSTRY LEADERS ASSOCIATION**

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EXECUTIVE SUMMARY

The Retail Industry Leaders Association (“RILA”) requests the Federal Communications Commission to declare that the Telephone Consumer Protection Act (“TCPA”) rules effective October 16, 2013, do not apply to isolated, immediate, one-time responses to consumer-initiated requests for text offers (“on demand text offers” or “on demand texts”). The Commission could not have intended for the new written consent rules to apply to such consumer-initiated on demand texts, and it appears that the TCPA does not apply to this category of calls at all, because these particular communications are: (1) proactively initiated by the consumer, not a telemarketer, (2) isolated, one-time only messages sent immediately in response to a consumer’s specific request, and (3) contain only the specific information requested by the consumer. Nevertheless, given the ever-growing tide of frivolous and costly TCPA class action lawsuits, it is critical for the Commission to explicitly state what is obvious - that a retailer should be able to provide the information specifically requested by a consumer without being subject to TCPA litigation.

Accordingly, RILA respectfully urges the Commission to make the narrow declaration that when an on demand text has the specific characteristics described above, obtaining prior express written consent under the TCPA is not required. This important clarification comports with the language of the TCPA statute and rules, is consistent with Congressional intent not to impede “desired or expected” communications between consumers and businesses, does not implicate any of the concerns the Commission sought to address in adopting the new prior express written consent requirements, and makes sense from a consumer policy perspective. This narrow ruling will also allow retailers and other companies that send on demand text messages in response to specific consumer requests for isolated offers to continue this widespread, consumer-friendly practice without fear of expensive, frivolous litigation.

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The Retail Industry Leaders Association (“RILA”) respectfully urges the Federal Communications Commission (“FCC” or “Commission”) to issue a Declaratory Ruling, pursuant to Section 1.2 of the Commission’s rules,¹ on a narrow issue related to the prior express written consent requirements adopted in the *2012 TCPA Order* (“Order”).² Specifically, and out of an abundance of caution, RILA requests the Commission to declare explicitly that the Telephone Consumer Protection Act (“TCPA”) rules effective October 16, 2013,³ do not apply to isolated, immediate, one-time responses to consumer-initiated requests for text offers (“on demand text offers” or “on demand texts”). Not only does RILA believe the Commission had no intention for the new written consent rules to apply to such consumer-initiated on demand texts, but because these communications are: (1) proactively initiated by the consumer, not a telemarketer, (2) isolated, one-time only messages sent immediately in response to a consumer’s specific request, and (3)

¹ 47 C.F.R. § 1.2.

² See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, FCC 12-21, ¶ 20 (rel. Feb. 15, 2012)(“2012 TCPA Order”).

³ See *id.*; see also 47 C.F.R. § 64.1200 *et al.*

contain only the specific information requested by the consumer, it is not clear that the TCPA applies to this category of responsive texts at all.⁴ Nevertheless, given the ever-growing tide of frivolous and costly TCPA class action lawsuits, it is critical for the Commission to explicitly state what is obvious - that a retailer should be able to provide the information specifically requested by a consumer without being subject to TCPA litigation.

RILA respectfully urges the Commission to make the narrow declaration that when an on demand text has the specific characteristics described above, obtaining prior express written consent under the TCPA is not required.⁵ This important clarification comports with the language of the TCPA statute and rules, is consistent with Congressional intent not to impede “desired or expected” communications between consumers and businesses, does not implicate any of the concerns the Commission sought to address in adopting the new prior express written consent requirements, and makes sense from a consumer policy perspective. This narrow ruling will also allow retailers and other companies that send on demand text messages in response to specific consumer requests for isolated offers to continue this widespread, consumer-friendly practice without fear of expensive, frivolous litigation.

I. BACKGROUND ON RILA AND ON DEMAND TEXT OFFERS.

RILA is the trade association of the world’s largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than \$1.5 trillion in annual sales, millions of American jobs and more

⁴ At most, by solely containing the specific information requested by consumers, on demand texts are most properly categorized as informational texts, which the Commission has already decided fall outside the new prior express written consent requirements.

⁵ In the *SoundBite Declaratory Ruling*, the Commission followed a similar path by declaring that one time text confirmations of a consumer’s opt-out do not violate TCPA or the Commission’s rules as long as the confirmation text has the “specific characteristics” outlined in the *Ruling*. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 27 FCC Rcd 15391, ¶¶ 1, 7 (2012)(“Soundbite Declaratory Ruling”).

than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

As a trusted source to speak on behalf of leading retailers, RILA is committed to ensuring that lawmakers and regulators understand trends in the retail industry and how government decisions may intentionally or unintentionally impact retailers. Presently, throughout the retail industry, it has become increasingly common for consumers to demand and expect concierge-like, personalized retail experiences that facilitate making purchases on demand. One of the most important ways retailers meet these increased consumer expectations for value, personalization, and convenience is through the use of on demand text offers.

On demand text offers are only sent as a one-time, immediate response to a consumer-initiated text request: first, consumers see a call to action display (e.g., text “offer” to 12-345 for 20% off your next purchase); second, if interested, consumers text the word “offer” to 12-345; third, consumers receive a near instant text response containing the desired offer. There is no marketing material contained in the reply text unrelated to the information specifically requested by the consumer. No additional offers are sent in response to the consumer-initiated text request – the consumer only receives specifically what the consumer requested via the on demand text.

II. SENDING A ONE-TIME, ON DEMAND TEXT OFFER IN RESPONSE TO A CONSUMER’S SPECIFIC REQUEST DOES NOT CONSTITUTE “INITIATING” A CALL FOR TCPA PURPOSES.

Under the revised TCPA rules, it is unlawful to “initiate, or cause to be initiated” any telemarketing call or advertisement to a wireless number using any automatic telephone dialing system or an artificial or prerecorded voice without the prior express written consent of the called party.⁶ Although neither the TCPA statute nor rules define the term “initiate,” earlier this year, the Commission clarified that “a person or entity ‘initiates’ a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such

⁶ 47 C.F.R. § 64.1200(a)(2).

as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call.”⁷

In the on demand text offer context, the consumer is clearly the party that “physically place[s]” the “call”,⁸ while the retailer’s role is limited to responding to the consumer’s specific request.⁹ As already described above, a retailer will only send an on demand text in response to a consumer-initiated text request for a specific offer. As a result, on demand texts sent by retailers are the natural, expected, and desired consequence of a consumer-initiated text requesting a specific, one-time offer. Thus, the isolated, one-time on demand text offers sent by retailers in response to consumer-initiated requests do not qualify as “initiating” a call and are therefore not subject to the TCPA’s prior express written consent provisions.

III. SENDING A ONE-TIME, ON DEMAND TEXT OFFER IN RESPONSE TO A CONSUMER’S SPECIFIC REQUEST DOES NOT CONSTITUTE AN “ADVERTISEMENT” OR “TELEMARKETING” FOR TCPA PURPOSES.

The revised TCPA rules prohibit the initiation of a call that “includes or introduces an advertisement or constitutes telemarketing” other than a call made with the prior express written

⁷ See The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio for Declaratory Ruling Concerning the TCPA Rules, *et al.*, Declaratory Ruling, 28 FCC Rcd 6574, FCC 13-54, ¶ 26 (2013) (“DISH Network Declaratory Ruling”).

⁸ The FCC has declared text messages to be “calls” pursuant to the TCPA. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd 14014 ¶ 133 (2003) (“2003 TCPA Order”). While not the subject of this Petition, there are several reasons to question the FCC’s conclusion that text messages are “calls.” The TCPA was enacted before the advent of text messages. The plain meaning of a “call” is an oral communication, not a written communication. Text messages do not present the same underlying concerns that prompted Congress to enact the TCPA, such as tying up phone lines. See Senate Report No. 102-178, 1991, p.2; see also Monica Desai, *et al.*, *A TCPA for the 21st Century: Why TCPA Lawsuits Are on the Rise and What the FCC Should Do About It*, International Journal of Mobile Marketing, Summer 2013.

⁹ The Commission has concluded that text messages, including short message service (SMS) calls, are calls for TCPA purposes. See 2003 TCPA Order, 18 FCC Rcd at 14115, para. 165.

consent of the called party.¹⁰ The Commission defines “advertisement” as any material “advertising the commercial availability or quality of any property, goods, or services.”¹¹ The Commission did not define “advertising.” The dictionary definition of advertising is “the action of calling something to the attention of the public especially by paid announcements.”¹² In the case of on demand texts, the material “calling something to the attention of the public” is found in a separate source, such as, for example, a newspaper, magazine, billboard or store display. After viewing that advertisement and reviewing the associated promotional offer, the consumer initiates the choice to request that offer through an on demand text. The response is the promotion or offer requested by the consumer.

Similarly, the Commission defines “telemarketing” as “the initiation of a telephone call or message for the purpose of encouraging a purchase or rental, or investment in, property, goods, or services.”¹³ By contrast, a response to an on demand text is to provide the specific information that is clearly desired by consumers as evidenced by his or her immediately preceding initial text request. As a result, because the purpose of an on demand text is to *respond* “on demand” to a *consumer-initiated* specific request for particular information, this narrow category of text messages falls outside the definition of telemarketing and therefore the new prior express written consent rules do not apply.

Instead, on demand texts that meet the precise criteria as set out in this Petition, i.e., one-

¹⁰ 47 C.F.R. § 64.1200(a)(2).

¹¹ 47 C.F.R. 64.1200(f)(1).

¹² Merriam-Webster Dictionary online, <http://www.merriam-webster.com/dictionary/advertising> (last visited Dec. 22, 2013). See also Dictionary.com, defining “advertising” as “the act or practice of calling public attention to one’s product, service, need, etc., especially by paid announcements in newspapers and magazines, over radio or television, on billboards, etc.” <http://dictionary.reference.com/browse/advertising?s=t> (last visited Dec. 22, 2013)

¹³ 47 C.F.R. 64.1200(f)(12).

time only messages sent immediately in response to a consumer-initiated request that contain only the specific requested offer, are more akin to informational texts, which the Commission has already explicitly stated are not required to comply with the new TCPA prior express written consent rules.

IV. MAKING THE REQUESTED CLARIFICATION IS CONSISTENT WITH THE PURPOSE AND INTENT OF THE TCPA.

Congress passed the TCPA in 1991 to protect consumers from abusive telemarketing practices and to protect consumer privacy. Specifically, Congress was concerned with “telemarketers contact[ing] the same number repeatedly, telemarketers mak[ing] calls during the dinner hour or late at night, calling parties [that] do not identify themselves, and unsolicited calls placed to cellular numbers [that] often impose costs on the called party.”¹⁴ Because one-time, responsive, on demand texts in no way impinge on a consumer’s privacy, and instead are a direct response providing what the consumer specifically requested, this clarification will in no way undermine the congressional intent of the TCPA.

Moreover, in the House report on what ultimately became section 227 of the TCPA, Congress made it crystal clear that it did not intend for the TCPA to apply to “expected or desired” business communications to wireless numbers.¹⁵ Specifically, the House report states, “[t]he restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications,” including those that are “expected or desired . . . between businesses and their customers.”¹⁶ In the on demand text context, consumers proactively initiate the request for a text offer and then the retailer immediately sends the one-time response with the specific requested

¹⁴ See *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1008 (N.D. Ill. 2010).

¹⁵ See House Report 102-317, 1st Sess., 102nd Cong. (1991), at 17 (emphasis supplied); see also *SoundBite Declaratory Ruling* at ¶ 8 and n.34.

¹⁶ See House Report 102-317, 1st Sess., 102nd Cong. (1991), at 17 (emphasis added).

information. Thus, the response text containing only the specific offer is both expected and desired by the consumer, and is therefore consistent with the goals and objectives of the TCPA. In fact, given this language and the overall context that led to the TCPA, “there is no basis for inferring that Congress, in enacting legislation to regulate nuisance telemarketing, intended to make actionable such consensual, socially useful messaging” under the TCPA.¹⁷

V. MAKING THE REQUESTED CLARIFICATION DOES NOT IMPLICATE ANY OF THE CONCERNS THAT THE COMMISSION HAD IN ADOPTING THE NEW PRIOR EXPRESS WRITTEN CONSENT REQUIREMENT AND ENSURES CONSUMERS CONTINUE TO RECEIVE EXPECTED, “HIGHLY DESIRABLE” COMMUNICATIONS.

When enacting rules to implement the TCPA, the Commission has consistently sought to thwart invasive telemarketing practices. Specifically, in the *2012 TCPA Order*, the Commission reiterated that the new TCPA rules were meant to “offer consumers greater protection from “intrusive telemarketing calls” and “unwanted calls.”¹⁸

To this end, in the underlying Notice of Proposed Rulemaking (“NPRM”), the Commission noted that written consent may better protect consumers from “unscrupulous senders” of messages “who erroneously claim to have obtained the subscriber’s oral consent,”¹⁹ and may reduce “confusion” and “protect consumers and industry from erroneous claims that consent was or was not given” because “unlike oral consent, the existence of a paper or electronic record may provide unambiguous proof of consent.”²⁰ None of these objectives apply to on demand texts.

¹⁷ See *David M. Emanuel v. The Los Angeles Lakers Inc.*, case number 13-55678, U.S. Court of Appeals, Ninth Circuit, Appellee’s Answering Brief, at 55 (Nov. 14, 2013)(“LA Lakers Brief”); see also *3550 Stevens Creek Associates v Barclays Bank of Cal.*, 915 F.2d 1355, 1363 (9th Cir. 1990) (declining to infer Congressional intent “to create . . . a far-reaching private cause of action” that “would have substantial and far-reaching legal, financial, and practical consequences”).

¹⁸ See 2012 TCPA Order, ¶¶ 1, 4.

¹⁹ See *id.*, ¶ 20.

²⁰ See *id.*, ¶ 22.

In fact, the Commission explicitly recognized that not all calls to wireless numbers are problematic, and that instead some calls “offer access to information that consumers find highly desirable.”²¹ On demand texts fall squarely into the category of calls to wireless numbers that contain “highly desirable” information. Like other informational messages, on demand texts provide consumers with the information that they specifically request, and do not contain any undesired marketing material. They are one-time responses to a consumer’s specific request for an offer or other information that they want; as such, they are inherently desired by consumers. Furthermore, consumers have come to rely upon on demand text offers to meet their growing expectation for personalized, convenient offers available on the spot.

In light of the inherently limited, non-invasive nature of on demand texts that in no way impinge on consumer expectations of privacy or undermine the Commission’s goals in adopting a written consent requirement, the Commission should explicitly declare that the new disclosure language required by the *2012 TCPA Order* does not apply to on demand text offers.

VI. MAKING THE REQUESTED CLARIFICATION MAKES SENSE FROM A CONSUMER POLICY PERSPECTIVE.

Not only does the requested declaration comport with the language and intent of the TCPA statute and rules, but it also makes sense from a consumer policy perspective. First and foremost, texts that are not on demand texts and contain marketing or other promotional materials beyond what a consumer has specifically requested to receive will continue to be regulated as telemarketing messages fully subject to the TCPA’s rules. RILA’s requested clarification will not change any existing protections that the Commission has implemented related to the unwanted, invasive telemarketing messages that the TCPA was designed to thwart. At the same time, the requested clarification will preserve the preference of consumers to receive convenient on demand offers, which are inherently desired communications specifically requested by consumers. Second, because

²¹ *See id.*, ¶ 29.

on demand texts are one-time communications, providing the specific disclosure language under the prior express written consent rules does not make sense because there is no continuous, ongoing communication for which the disclosure would apply. As a result, consumers will likely be confused by receiving the disclosure language, incorrectly inferring that the message means they will have to opt-in to an entire campaign in order to receive one isolated offer. Thus, instead of reducing confusion, application of the new prior express written consent rules in the on demand text context will almost certainly increase consumer confusion.

The Commission could not have intended to, at best, inconvenience consumers by requiring them to take several steps to receive a specific, desired, one-time text offer, and at worst, confuse consumers by muddying the waters of the consent they “clearly and unmistakably” provided by proactively submitting the identified short code.²² As a result, in order to eliminate these perverse consumer policy consequences, the Commission should make the explicit clarification that the new prior express written consent rules do not apply to on demand text offers.

VII. EXPLICIT CLARIFICATION IS NECESSARY TO ELIMINATE ANY UNCERTAINTY OVER HOW THE NEW TCPA RULES IMPACT ON DEMAND TEXTS AND TO FORECLOSE THE RISK OF FRIVOLOUS CLASS ACTION LAWSUITS.

The number of TCPA class action lawsuits continues to rise, often based on legal theories designed to expand liability in ways that Congress never intended. One study estimates that TCPA lawsuits rose by 63 percent in 2012 alone and that the numbers are on track to be even higher this year.²³ Given the enormous costs of defending even frivolous litigation, and the risk of a losing

²² See *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. Cal. 2009).

²³ WebRecon, *FDCPA and Other Consumer Lawsuit Statistics, Dec 16-31 & Year-End Review, 2012*, retrieved from <https://www.webrecon.com/b/fdcpa-case-statistics/for-immediate-release-fdcpa-and-other-consumer-lawsuit-statistics-dec-16-31-year-end-review-2012/>.

verdict, even when the risk is small, many companies feel compelled to settle TCPA cases, even when they are devoid of any merit.²⁴

In light of the exponential growth of TCPA litigation, coupled with the uncertainty that will persist in the absence of an explicit declaration, retailers are beginning to forego the use of on demand offers altogether in order to eliminate the potential risk of expensive class action lawsuits. This outcome is inconsistent with clear consumer preference and could not be what the Commission intends.

Thus, to avoid depriving consumers of the types of communications they desire, as well as to eliminate uncertainty and shield retailers from having to defend against costly, meritless litigation, it is critical for the Commission to explicitly make the narrow requested clarification that the new TCPA prior express written consent rules do not apply to one-time, on demand text offers sent in response to a consumer initiated text request.

VIII. CONCLUSION

Congress enacted the TCPA to combat annoying, invasive and unwanted automated telemarketing calls that threaten consumer privacy. On demand text offers do not implicate any of these concerns, and instead are consumer-friendly communications that are specifically requested, expected, and desired by consumers. Specifically, on demand texts are: (1) proactively initiated by a

²⁴ See, e.g., LA Lakers Brief, at 1 (stating that “[w]hile the precise allegations vary from suit to suit, the underlying strategy remains the same: stretching the plain meaning and purpose of the TCPA to target legitimate, innocuous communications – not the spam, not the intrusive telemarketing, and not the invasion of privacy the Act was designed to curtail. Based upon contrived violations of the TCPA, the suits seek hundreds of millions of dollars in aggregated statutory and treble damages, often compelling defendants to settle even meritless cases rather than risk potentially crippling jury verdicts. Congress did not intend to cultivate litigation of this nature, and it is devoid of social utility.”); see also *David M. Emanuel v. The Los Angeles Lakers Inc.*, case number 13-55678, U.S. Court of Appeals, Ninth Circuit, Amicus Brief of Twitter, Inc. and Path, Inc., at 1 (Nov. 21, 2013)(stating that the TCPA “is increasingly being misused by plaintiffs’ lawyers to seek windfall damages and coercive settlements from a wide array of legitimate businesses.”).

consumer, (2) isolated, one-time only messages sent immediately in response to a consumer's request, and (3) contain only the specific information requested by a consumer.

In light of this, and out of an abundance of caution, RILA requests that the Commission declare expeditiously that the TCPA rules effective October 16, 2013, do not apply to the narrow category of on demand text offers when such messages have the specific characteristics described above. This important clarification comports with the language of the TCPA statute and rules, is consistent with Congress's intent not to impede "desired or expected" communications between consumers and businesses, does not implicate any of the concerns the Commission sought to address in adopting the new prior express written consent requirement, and makes sense from a consumer policy perspective. The requested ruling will also allow retailers and other companies that send one-time, responsive on demand text messages to continue this widespread, consumer-friendly practice without fear of expensive, frivolous litigation. Obviously, if a consumer asks a retailer to send a text with a specific offer or coupon, the retailer should be able to respond to that specific request without being subject to TCPA liability.

Respectfully submitted,



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