

December 2, 2014

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Notice of Ex Parte – CG Docket No. 02-278
Retail Industry Leaders Association**

Dear Ms. Dortch:

On December 1, 2014, Monica Desai of Squire Patton Boggs (US) LLP, counsel to Retail Industry Leaders Association (RILA), met via phone with Mark Stone, Deputy Bureau Chief of the Consumer and Governmental Affairs Bureau of the Federal Communications Commission (FCC or Commission) to discuss the Petition for Declaratory Ruling filed by RILA December 30, 2013.¹

During the meeting, Ms. Desai emphasized that common sense should prevail – if a consumer sends a text to an entity requesting particular information, the entity sending a one-time response with the precise information requested by that consumer should not be subject to TCPA liability. Sending a one-time, “on-demand” text specifically in response to a consumer’s request does not constitute “initiating a call” under the TCPA. Nor should the responsive text be characterized as an “advertisement” or “telemarketing” in the context of the TCPA. A clarification on this point is helpful for consumers as well – as it would allow businesses to continue to provide “highly desirable” communications upon consumer request.

Clarification from the Commission on this point is consistent with the intent and purpose of the TCPA. The purpose of the TCPA is to protect consumers from abusive telemarketing practices and to protect consumer privacy. Sending to a consumer precisely what they asked for is not “abusive” and does not impede on their privacy. Moreover, the TCPA was never

¹ Petition for Declaratory Ruling of the Retail Industry Leaders Association, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Declaratory Ruling of the Retail Industry Leaders Association*, CG Docket No. 02-278 (Dec. 30, 2013)(Petition). *See also* Comments of the Retail Industry Leaders Association, CG Docket No. 02-278 (Feb. 21, 2014); Reply Comments of the Retail Industry Leaders Association, CG Docket No. 02-278 (Mar. 10, 2014).

intended to apply to “expected or desired” business communications to wireless numbers.² A response providing the precise offer or other type of information is the epitome of “expected or desired” business communications.

Sending a one-time, on-demand text offer in response to a consumer’s specific request does not constitute “initiating” a call under the TCPA. It is unlawful under the TCPA to “initiate, or cause to be initiated” any telemarketing call or advertisement to a wireless number without first obtaining the prior express written consent of the “called party.”³ A person initiates a call “when it takes the steps to physically place a telephone call.”⁴ In the context at issue here, the consumer initiates a call, to which the entity merely responds with the precise information requested by the consumer.

One-time, on-demand texts are not “advertisements” or “telemarketing” calls under the TCPA. Commission rules prohibit calls to wireless numbers that “include[] or introduce[] an advertisement or constitute[] telemarketing” absent “prior express written consent.”⁵ In the “on demand” text context, the advertisement is found elsewhere – for example in a newspaper ad, on a billboard, or heard on the radio – and the consumer initiates the text in response to that advertisement. Thus, the response to the consumer’s request for information is not an advertisement. Nor does the one-time, on-demand text qualify as telemarketing. Under the Commission’s rules, telemarketing is the initiation of a telephone call or message for the purpose of encouraging a purchase or rental, or investment in, property, goods, or services.⁶ Here, the purpose of the on-demand text is to respond to a consumer-initiated inquiry requesting specific information.

Making the clarification would not implicate any of the concerns the Commission had when it adopted the prior express written consent requirements. As RILA has explained previously, on-demand texts “offer access to information that consumers find highly desirable,” providing consumers with information that they specifically request.⁷ Under that backdrop, one-time, on-demand texts are noninvasive, do not intrude on consumer privacy, and thus do not implicate the concerns the Commission addressed in adopting the prior express written consent requirements. There is no ongoing communication that would require prior express written

² See House Report 102-317 at 17, 1st Sess., 102nd Cong. (1991)(explaining that “restrictions 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.”).

³ 47 C.F.R. § 64.1200(a)(2).

⁴ 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 ¶ 26 (2013).

⁵ 47 C.F.R. § 64.1200(a)(2) and (a)(3).

⁶ 47 C.F.R. § 64.1200(f)(12).

⁷ Petition at 8. See also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278 (2012)(2012 TCPA Order)(noting that “not all calls to wireless numbers are problematic”).

consent. As a result, any communications including the disclosure language required under the prior express written consent rules would likely only confuse and annoy customers who requested a specific piece of information. Applying the prior express written consent requirements under these circumstances seems illogical at best, and would fly in the face of common sense.

To avoid depriving consumers of communications they expect and desire, and to prevent frivolous TCPA litigation based on the application of the prior express written consent rule to a situation to which it clearly does not apply, RILA urges the Commission to clarify that TCPA liability is not triggered by one-time, on-demand texts providing information in response to consumer-initiated requests.

Respectfully submitted,



Monica S. Desai
Squire Patton Boggs, LLP
2550 M Street, NW
Washington, DC 20037
202-457-7535
Counsel to Retail Industry Leaders Association

cc: Mark Stone