

June 11, 2015

**Ex Parte**

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

Re: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278

Dear Ms. Dortch:

On behalf of Vibes Media, LLC (“Vibes”), on June 11, 2015, I spoke by telephone with Maria Kirby, Legal Advisor to Chairman Wheeler, regarding the above proceeding. This conversation was consistent with the positions described in the Vibes letter of June 10, 2015, which is attached hereto.

Pursuant to the FCC’s rules, I have filed a copy of this notice electronically in the above-noted proceeding. Please contact me if you have any questions.

Sincerely,



Jennifer P. Bagg  
*Counsel to Vibes Media, LLC*

cc: Maria Kirby

June 10, 2015

**Ex Parte**

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

Re: *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278

Dear Ms. Dortch:

On behalf of Vibes Media, LLC (“Vibes”), on June 8, 2015, I spoke by telephone with Chanelle Hardy, Chief of Staff to Commissioner Clyburn, and Travis Litman and Jennifer Thompson, advisors to Commissioner Rosenworcel, regarding the above-referenced matter. On June 9, 2015, I spoke by telephone to Amy Bender, advisor to Commissioner O’Rielly. On June 10, 2015, I spoke by telephone to Nicholas Degani, advisor to Commissioner Pai.

In each of these conversations, I explained that Vibes is a mobile marketing technology leader that helps some of the world’s biggest brands acquire, engage, and deepen relationships with an interested and engaged consumer base.<sup>1</sup> Vibes’ mobile solutions include mapping out a mobile strategy, building permission-based mobile databases, driving sales with mobile coupons, activating sponsorships, and integrating with companies to forge immediate, long-lasting, and mutually beneficial customer relationships. Vibes also works with its clients to develop program ideas, provide compliance assistance, and generate strategic support, analytics, short code management, and carrier connectivity services.

Vibes’ mobile marketing platform, Catapult, allows marketers from some of the most recognizable brands in the world to create on-demand text messaging campaigns. Vibes works closely with mobile governing bodies such as the Mobile Marketing Association (“MMA”) and CTIA—The Wireless Association (“CTIA”), ensuring that all of its messaging is compliant with the Telephone Consumer Protection Act (“TCPA”) and adheres to industry rules, regulations, and best practices. For more than 15 years, Vibes has been a leader in mobile marketing technology and on demand messaging plays a critical role in our customers’ overarching mobile marketing strategy.

I reiterated Vibes’ support of the petition for declaratory ruling filed by the Mobile Engagement Providers that sought clarification that the TCPA rules effective October 16, 2013, did not nullify those written express consents that had already been provided by consumers that

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<sup>1</sup> VIBES, Customers, <http://www.vibes.com/customers/>.

were consistent with the TCPA rules in effect prior to the effective date of the new rules.<sup>2</sup> I also reiterated Vibes' support of the Retail Industry Leaders Association's petition for declaratory ruling requesting that the Commission clarify its treatment of one-time, on-demand text messages under the TCPA rules.<sup>3</sup>

I stated that Vibes currently follows the existing TCPA rules and industry guidelines, and described the importance of using the forthcoming order to provide a clear road map of the activities that are illegal under the TCPA. This will reduce existing uncertainty surrounding the current TCPA rules and also help to quell the proliferation of frivolous litigation. It will also ensure consumers are afforded those protections provided by the TCPA. I stated that Vibes would prefer clarity—even if it does not present the ideal outcome from a business or consumer experience perspective—over ambiguity.

I discussed the following concerns regarding proposals reflected in the Chairman's Fact Sheet:<sup>4</sup>

**Reassigned Telephone Numbers.** I explained that a “one call” limit makes little sense and is unworkable in the text context since the nature of a text communication does not involve any direct human interaction. Thus, in order to determine if a number has been taken out of service or reassigned, Vibes relies on a customer notification—such as an opt-out request or a bounce back message—or the lists of deactivated numbers published by carriers. But a customer who has opted into a mobile marketing campaign is very unlikely to provide notification to the campaign that their number is about to be disconnected and that the number will be potentially reassigned. Thus, accurate and timely lists of deactivated telephone numbers published by large carriers are the only plausible way for a mobile marketer to determine if a number has been taken out of service or reassigned. However, not all carriers publish such lists, and the lists are not always accurate and up to date.<sup>5</sup> Without timely and accurate lists of deactivated telephone numbers, and in the absence of any customer notification, there is no technological way for a mobile marketer to know that a number has been reassigned.

I described the new loophole that the “one call” limit will create for creative plaintiffs—and their even more creative attorneys—to bring frivolous claims.<sup>6</sup> Potential plaintiffs would be

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<sup>2</sup> Petition for Declaratory Ruling of a Coalition of Mobile Engagement Providers, CG Docket No. 02-278 (filed Oct. 17, 2013). Vibes was one of the mobile engagement providers that filed this petition.

<sup>3</sup> Petition for Declaratory Ruling of the Retail Industry Leaders Association, CG Docket No. 02-278 (filed Dec. 30, 2013). *See also* Comments of Vibes Media, LLC, CG Docket No. 02-278 (filed Feb. 21, 2014); Letter from Jennifer Bagg, Counsel, Vibes Media, LLC, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed Apr. 25, 2014).

<sup>4</sup> FCC, *Wheeler Proposal to Protect and Empower Consumers Against Unwanted Robocalls, Texts to Wireless Phones*, Fact Sheet (May 27, 2015) (“Fact Sheet”).

<sup>5</sup> *See* Comments of CTIA, CG Docket No. 02-278 (filed Mar. 10, 2014).

<sup>6</sup> Vibes and Vibes' clients have seen firsthand the creative lengths of plaintiffs' attorneys. For instance, the Manning Law Office in Newport Beach, CA, routinely sends demand letters to companies for alleged TCPA violations. The purported “plaintiffs” appear to be attorneys,

perversely incentivized not to provide any notification after receiving a text message meant for the entity previously assigned the phone number. Instead, the potential plaintiffs would be able to increase their statutory award simply by waiting for more messages to arrive.

In the absence of a technological solution that enables mobile marketers to recognize when a number has been reassigned and the loophole created by the “one call” limit, I suggested the Commission adopt a safe harbor that would exempt mobile marketers from a TCPA violation for texting a reassigned number more than one time when it has relied on all available deactivation lists and has not received any other form of subscriber notification that the number has been reassigned.<sup>7</sup>

**Revocation of Consent.** I explained that the proposal to allow consumers to revoke their consent in “any reasonable way” presents technological barriers in the mobile marketing context. The systems used for mobile marketing must be pre-programmed to recognize certain words as an opt-out request. In reflection of this technological requirement, the industry standards contain a specific list of keywords that mobile marketers must recognize as a subscriber opt-out request.<sup>8</sup> Specifically, mobile marketing systems must recognize the keywords STOP, CANCEL, UNSUBSCRIBE, QUIT, END, and STOPALL as a request by subscribers to opt-out of a mobile campaign.<sup>9</sup> This is a widely recognized and published set of opt-out keywords that are used across the industry in calls to actions and terms and conditions. I urged the Commission to defer to this list of keywords.

I described the problems that could arise if the Commission were to expand the opt-out keywords beyond those contained in the CTIA guidelines. In particular, the word “NO” is used in interactive texting programs such as voting campaign and opinion polls. Requiring mobile campaigns also to allow NO as an opt-out keyword would be difficult to implement and would likely lead to consumer confusion. However, if the Commission believes that additional keywords should also constitute an opt-out request, I urged that it should adopt a specific and exclusive list of keywords so that mobile marketers can build the list into their programs.

I also urged the Commission to clarify how an opt-out request should be treated when the subscriber has signed up to receive multiple mobile campaigns that use the same short code. Many

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paralegals and other staff of the law office who initiate the text messages by affirmatively signing up to receive offers. They wait for multiple texts to arrive and then the Manning Law Office sends a letter with unsupported and inaccurate allegations of TCPA violations. These letters make large settlement demands and threaten class action treatment.

<sup>7</sup> The Commission could also recognize this factual scenario as an affirmative defense to a claim that the marketer sent more than one message to a reassigned number.

<sup>8</sup> CTIA—THE WIRELESS ASSOCIATION, *CTIA Short Code Monitoring Program: Short Code Monitoring Handbook* (effective Nov. 01, 2014), available at <http://wmcglobal.com/media/CTIA-Short-Code-Monitoring-Handbook-v1.4.1.pdf> (“CTIA Handbook”). The Mobile Marketing Association also develops codes of conduct, consumer best practices and mobile advertising guidelines for the mobile marketing industry. See MOBILE MARKETING ASSOCIATION, *Policies and Guidelines*, <http://mmaglobal.com/policies>.

<sup>9</sup> CTIA Handbook at 3.

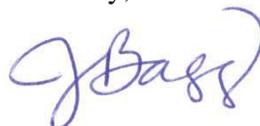
entities providing mobile alerts use the same short code for multiple campaigns due to the limited availability of short codes. For instance, parents may separately sign up for school district alerts for a child in middle school and a child in high school, and both alerts will be delivered via the same short code. When the middle school child moves onto high school the parent will likely want to opt-out of the middle school alerts. But, if the subscriber texts STOP to the short code, the school district will not know if the subscriber wants to opt-out of the middle school alerts, the high school alerts, or both. In this scenario, the school district should be permitted to respond with a simply clarifying text (*i.e.*, press 1 to opt-out of middle school alerts, 2 to opt-out of high school alerts, 3 to stop all). This simple one-time text will help reduce industry confusion while ensuring that subscribers continue to receive the notifications they desire.<sup>10</sup>

**Timing.** Finally, at least one proposal (and probably more) in the Fact Sheet would require mobile marketers to make significant technological changes. For instance, if the Commission expands the list of acceptable keywords that can constitute an opt-out request, then mobile marketers will have to rewrite all existing mobile marketing campaigns to recognize the additional keywords. Accordingly, I urged the Commission to allow sufficient time for companies to come into full compliance with the new rules.

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Pursuant to the FCC's rules, I have filed a copy of this notice electronically in the above-noted proceeding. Please contact me if you have any questions.

Sincerely,



Jennifer P. Bagg  
Counsel to Vibes Media, LLC

cc: meeting participants

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<sup>10</sup> This practice is akin to sending a final, one-time text message to confirm receipt of a consumer's opt-out request. The Commission has concluded that the consumer benefits from such messages outweighed the incremental cost to consumers. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991: SoundBite Communications, Inc. Petition for Expedited Declaratory Ruling*, Declaratory Ruling, FCC 12-143, 27 FCC Rcd. 15,391, ¶ 10 (2012).