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

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| In the Matter of | ) | |
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| Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 | ) | CG Docket No. CG 02-278 |
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| Petition for Declaratory Ruling of A Coalition of Mobile Engagement Providers | ) | |
| | ) | |

To: The Commission

# COMMENTS OF A COALITION OF MOBILE ENGAGEMENT PROVIDERS


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## EXECUTIVE SUMMARY

The *2012 TCPA Order* and final rules make clear that the Commission's prior express written consent requirement applies to new customers, and to all existing customers who have only provided non-written forms of express consent prior to October 16, 2013. It is imperative for the Commission to state explicitly what it clearly intended and implied - that the new prior express written consent requirement does not invalidate the verifiable written consents already provided by consumers prior to that date.

This clarification is supported by the language of the *2012 TCPA Order* and the language of the Commission's revised TCPA rules, and is consistent with the general administrative law principle that rules are not applied retroactively. Clarification is also consistent with the Commission's underlying policy goal of ensuring consumers provide "unambiguous consent" to receive telemarketing communications. This is especially true for mobile marketing, which is governed by industry standards requiring telemarketers to provide detailed disclosures that accurately inform the consumer about the messages they request to receive, to send only the messages that consumers specifically request, and to allow consumers to quickly and easily stop receiving messages.

Moreover, the Commission could not have intended consumers to be confused by opt-in requests requiring them to take additional steps to continue receiving the same communications they have already requested in writing to receive. And the Commission could not have intended to cause substantial hardship to industry, such as having to destroy valuable subscriber databases, without countervailing consumer benefits.

Finally, given the extraordinary growth of frivolous class action litigation in the mobile marketing industry, the requested explicit clarification is essential to eliminate uncertainty and reduce the potential for unnecessary and wasteful TCPA litigation based on any perceived ambiguity in the Commission's revised rules.

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A Coalition of Mobile Engagement Providers ("Coalition"),[1] through counsel, submits these comments supporting its Petition for Declaratory Ruling in the above referenced proceeding.[2] The Coalition requests the Federal Communications Commission ("Commission" or "FCC") to declare explicitly that the Telephone Consumer Protection Act ("TCPA") rules effective on October 16, 2013, do not nullify any express written consents provided by consumers prior to October 16.[3]

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[1] The Coalition consists of the following communications infrastructure, technology, and professional services companies that work with brands, retailers, banks, online services, and companies of all types to engage with and interact with their customers using mobile messaging and other channels available for communication with consumers via mobile phones: 4INFO, Inc. (www.4info.com); ePrize (www.eprize.com); Genesys (http://www.genesyslab.com/); Hipcricket (www.hipcricket.com); Mobile Commons (www.mobilecommons.com); Mobile Marketing Association (MMA) (www.mmaglobal.com); payvia (www.usepayvia.com); Tatango (www.tatango.com); Tetherball (www.tetherball360.com); Vibes (www.vibes.com); and Waterfall Mobile Inc. (www.waterfallmobile.com).

[2] *A Coalition of Mobile Engagement Providers*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Oct. 17, 2013) ("Petition"); *see also Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling From A Coalition of Mobile Engagement Providers,* Public Notice, CG Docket No. 02-278, DA 13-2118 (rel. Nov. 1, 2013)("Public Notice").

[3] *See* 47 C.F.R. § 64.1200 *et seq.*

Instead, beginning on October 16, the revised rules apply only to new customers and to existing customers who had only provided non-written forms of express consent prior to that date.

As explained in the Petition, this clarification is supported by the language of the *2012 TCPA Order*,[4] is consistent with the language of the revised TCPA rules, and is reflective of general administrative law principles. Moreover, this clarification is important to reduce consumer confusion and industry burdens. Explicit clarification by the Commission is particularly critical in order to mitigate the filing of frivolous TCPA class action lawsuits.

## I. The Mobile Marketing Industry Adheres to Rigorous Guidelines That Ensure Consumers are Protected through a Consumer-Initiated, Verifiable Opt-In Process and an Easy, Unrestricted Opt-Out Process.

Consumers who provided express written consent prior to October 16 to receive short code mobile marketing messages did so under a set of detailed industry requirements that govern every aspect of the communications between the consumer and the marketer. All senders of messages through the short code channel are subject to comprehensive wireless industry standards. These include rigorous requirements before a mobile text messaging telemarketing campaign can even be launched, including a requirement that express written consent must be obtained before a mobile marketer can send any telemarketing messages to a consumer. Furthermore, through continuing monitoring of short code mobile marketing campaigns throughout their lifecycle by carriers, the CTIA, and sms aggregators, programs that become out of compliance after their launch are subject to penalties, up to and including suspension or termination of short codes by carriers.

Under these standards, mobile marketers must provide disclosures to enable consumers to make informed choices about participation in a program, and then give consumers full authority over their continued participation in a program by empowering them to opt out of a program at any

[4] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 12-21 (rel. Feb. 15, 2012)("2012 TCPA Order" or "Order").

time. Importantly, a consumer must affirmatively request messages and provide consent through a structured opt-in process before being sent any promotional or telemarketing content through text messages.

As part of this process, in order to ensure opt-ins are not deceptively obtained from consumers, industry guidelines require calls to action to be clear and accurate, displaying "a detailed and accurate description of the product or service as part of the main offer *in addition* to disclosures in the terms and conditions."[5] This industry requirement, which fulfills the same purpose as the Commission's "clear and conspicuous disclosure" requirement for prior express written consent, ensures that consumers understand what they are signing up for and the consequences of an opt-in.[6] A call to action must also include additional disclosures, such as the quantity of messages the consumer will receive, a description of the service, and how to get help. In addition, as part of the opt-in process, a consumer is clearly informed of how to stop participating in and receiving messages from any program for any reason, including by texting STOP or similar keywords to the short code at any time.[7] This structured framework ensures that consumers know what they are signing up for, only receive messages that they specifically request, and can quickly and easily stop receiving messages whenever they choose.

## II. The Requested Clarification is Consistent with the 2012 TCPA Order Language and the Final TCPA Revised Rule Language, as well as the Policy Underlying Both.

The language of the *2012 TCPA Order* supports the conclusion that entities may continue to rely on previously obtained written consent provided by consumers prior to October 16, 2013. If not, key language in paragraphs 67 and 68 of the *Order* would be superfluous. In paragraph 67, the

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[5] CTIA, CTIA Compliance Assurance Solution Mobile Commerce Compliance Handbook (effective Aug 1, 2013), at page 5, Section B1, *available at* http://wmcglobal.com/assets/ctia_handbook.pdf.

[6] *See 2012 TCPA Order*, ¶ 33.

[7] *See* Petition at 5.

Commission explained that a 12-month transition period was appropriate to prepare consent forms and related materials for new customers. This reference to "new" customers would be superfluous if the Commission had intended telemarketers to go back and get additional consent for existing customers. In paragraph 68, the Commission made clear that updated written consent would be needed from consumers who previously had provided non-written express consent. By explicitly stating "an entity will no longer be able to rely on non-written forms of express consent once our rules become effective," the Commission necessarily implies that entities will be able to rely on written forms of express consent obtained from customers prior to October 16, 2013. Otherwise, this language would also be superfluous.

Similarly, while the Commission made abundantly clear that previously obtained non-written consent would no longer be valid once the new rules became effective, it did not address previously obtained written consent. The obvious implication is that the Commission did not address the impact of the new TCPA rules on previously obtained written consent because it simply did not intend to invalidate the unambiguous, verifiable written consents already provided by consumers. In fact, nothing in the *Order* reflects any Commission intent to nullify written consent previously obtained.

Furthermore, the underlying Notice of Proposed Rulemaking ("NPRM")[8] is instructive in explaining why the Commission distinguished the treatment of previously obtained written and non-written consent. In the NPRM, the Commission noted that a written agreement helps to "ensure that consumers are adequately apprised of the specific nature of the consent that is being requested"[9] and may better protect consumers from "unscrupulous senders" of messages "who

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[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Notice of Proposed Rulemaking, 25 FCC Rcd 1501 (2010) ("2010 TCPA NPRM").

[9] *See id.*, ¶ 19.

erroneously claim to have obtained the subscriber's oral consent."[10] The Commission further opined that written consent 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."[11] Given this background, the Commission's distinction between written and non-written consent makes sense, and it is not surprising that the Commission would expect existing customers who previously provided only non-written forms of express consent to now provide written consent so that "unambiguous proof of consent" can be obtained.[12]

The final rule language does not change this conclusion. Like all rules, the requirements do not begin until the effective date. Here, the effective date of the new rules is October 16, 2013. As a result, beginning on October 16, 2013, under the revised rules, the new prior express written consent requirement containing specific disclosures applies.

While the final rule language provides the requirements for obtaining consent for new customers, it is silent regarding how the revised rules requiring prior express written consent apply to existing customers who have already provided consent. In fact, nothing in the rule language indicates that consent previously obtained is no longer valid and must be discarded in favor of a new opt-in containing the new disclosure language. Only the *Order* clarifies this – and under the *Order*, it is clear that previously obtained non-written forms of express consent will no longer be valid beginning on October 16, 2013, while no impact of the new rules on previously obtained written consent is described.

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[10] *See id.*, ¶ 20.

[11] *See id.*, ¶ 22.

[12] *See id.*

In the *Order*, the Commission explained its policy reasons for nullifying previously obtained non-written consent: in the non-written context, there is no verifiable record of consent produced. Obviously, previously provided written consent does not raise this same concern because a verifiable record of express consent is produced. Indeed, previously obtained written consent from existing customers already fulfills the same goals the Commission articulated in adopting the new prior express written consent requirement.[13] Thus from a policy perspective, the Order and Rules are consistent with the notion that the Commission did not nullify previously obtained written express consent.

## III. The Manner in Which the Federal Trade Commission Handled the "Grandfathering" Issue When Eliminating the Established Business Relationship Exemption Under the Telemarketing Sales Rule Is Instructive for How Previously Obtained Written Consent Should be Treated Under the New TCPA Rules.

In the *Order*, the Commission sought to ensure its rules implementing the TCPA were fostering consistency with the Federal Trade Commission ("FTC").[14] Accordingly, the way in which the FTC treated the "grandfathering" issue when eliminating the established business relationship ("EBR") exemption under the Telemarketing Sales Rule ("TSR") should inform the Commission's thinking with respect to interpreting the new opt-in requirements for written consent under the TCPA.[15] In eliminating the EBR exemption, the FTC explicitly made clear that any EBRs in place prior to the effective date of the revised TSR rules would not be grandfathered.[16] The differences

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[13] Specifically, it does not make sense to nullify consumer-initiated text message opt-ins, which produce a verifiable record and which the Commission recognizes are compliant with the E-SIGN Act. *See 2012 TCPA Order,* ¶ 34. *See also* Electronic Signatures in Global and National Commerce Act ("E-SIGN Act"), 15 U.S.C. § 7001 *et seq.* (preamble); *see* 15 U.S.C. § 7001(a).

[14] *See, e.g., 2012 TCPA Order*, ¶¶ 1, 18-23, 35, 42.

[15] *See Telemarketing Sales Rule*, Final Rule Amendments, 73 Fed. Reg. 51164, 51187-88 (2008).

[16] *See id.*

between the EBR exemption and previously obtained written consent are instructive in explaining the reasons each is rightfully and logically treated differently.

First, under the EBR, consent would only have been implied based on an existing relationship between a company and a consumer. As a result, consent based on an EBR is analogous to previously obtained non-written express consent in that neither would have produced or relied upon a verifiable written record of consent. This lack of a written record of consent in these contexts is antithetical to the purpose of the revised regulations, which aim to ensure consumers expressly provide consent in an unambiguous written format. As a result, given the lack of any verifiable record in both instances, it makes sense that the way in which the FTC handled eliminating the EBR (*i.e.*, not permitting the grandfathering of consents based on the EBR) would be similar to the Commission's language not permitting previously obtained non-written consent to satisfy the new prior express written consent rules as of the effective date of the new rules. Conversely, because previously obtained written consent does produce an express verifiable record that is consistent with the core of the revised TCPA rules, it makes sense that this form of existing consent was treated differently by the Commission.

Second, previously obtained written consent in which a consumer expressly and specifically opts-in to receive desired communications is inherently different than consent based on an EBR, because consumers may not expect to receive marketing messages when they do not expressly opt-in. Given this critical distinction, it is only logical to treat them differently.

Finally, in eliminating the EBR, the FTC prepared companies for retroactive application by explicitly notifying companies that consent based on an EBR would no longer be valid once the new rules became fully effective and by describing the transition of existing consents to new consents.[17] By contrast, the Commission explicitly stated that the new prior express written consent

[17] *See Telemarketing Sales Rule*, Final Rule Amendments, 73 Fed. Reg. 51164, 51187-88 (2008).

requirements apply to "new" customers and updated written consent is only required of consumers who previously provided "non-written" express consent. This distinction further confirms that the Commission did not intend for the new rules to apply to previously obtained written consent. Otherwise, the Commission would have explicitly addressed the issue and given companies notice and guidance concerning the treatment of written consent previously provided by customers before the new rules took effect, in the same way the FTC did when explicitly eliminating the EBR exemption for both existing and new customers.

## IV. Applying the New Rules Retroactively to Previously Obtained Written Consent Would Be Inconsistent With General Principles of Administrative Law.

The *Order* is devoid of any explicit Commission intent to nullify previously obtained written consent. This is not surprising because applying the new TCPA rules to previously obtained written consent would be inconsistent with the general principle that rules adopted by administrative agencies are applied prospectively only.[18] Also, if the Commission had intended to apply the new rules retroactively, it would have included this proposal in the underlying NPRM in order to provide stakeholders with the requisite notice or opportunity to comment. Given the lack of any indication the new rules would retroactively apply to previously obtained written consent, coupled with the total absence of any indication that the Commission intended to nullify previously obtained written consent, the Commission should state explicitly that the new rules apply only to new customers beginning on October 16, 2013, and to existing customers who had only provided non-written forms of express consent prior to October 16.

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[18] *See, e.g.*, *High-Cost Universal Service Support*, *et al.*, Report and Order and Memorandum Opinion and Order, 25 FCC Rcd 3430, ¶ 11 (2010) ("Generally, rules adopted by administrative agencies may be applied prospectively only."); *see also Jahn v. 1-800-Flowers.com, Inc.*, 284 F.3d 807, 810 (7th Cir. Wis. 2002)("Federal regulations do not, indeed cannot, apply retroactively unless Congress has authorized that step explicitly."); *see also Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988)("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

## V. The Nullification of Prior Written Consent Would Require Millions of Re-Opt-Ins Causing Significant Consumer Confusion and Substantial Industry Hardship that the Commission Would Have Addressed.

The central purpose of the revised TCPA rules is to obtain verifiable written consent for the policy reasons described in the underlying NPRM, including to ensure consumers adequately understand what they are consenting to, to protect consumers from erroneous claims of consent, and to reduce consumer confusion.[19] However, in instances where the customer has already provided written consent prior to October 16, and has been receiving messages since then, these important goals have already been fulfilled. Thus, the Commission's goals would not be advanced by invalidating those prior written consents.

Requiring re-opt-ins in cases where customers have already provided written consent would result in inevitable widespread consumer confusion and substantial industry impact. As a practical policy matter, such a broad requirement would mean millions of existing customers, who have already provided written express consent to receive desired mobile marketing messages, would have to opt-in again to continue to receive the same communications that they have already been receiving. This does not make sense, particularly because these same consumers have been and remain free at any time to revoke their consent to receive marketing messages for any reason.[20]

Receiving an additional opt-in request may also confuse many consumers. Thus, in this narrow context, instead of adding any protections for consumers, a message out of the blue notifying a consumer that messages may be sent "using an automatic telephone dialing system" or that agreement is not required "as a condition of purchasing any property, goods, or services" when they have already been receiving such messages, and then requiring an affirmative response to

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[19] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Notice of Proposed Rulemaking, 25 FCC Rcd 1501 (2010) ("2010 TCPA NPRM").

[20] *See* Petition at 5.

confirm that the consumer understands the message, would very likely result in confusion and inconvenience without being counterbalanced by any substantial benefit to the consumer.

For example, in some instances, mobile marketers provide informational alerts to consumers via text message, such as sports scores and weather forecasts. Consumers only receive these messages if they have opted in to receive these alerts, and only after receiving full and clear disclosure about the service they are requesting. Many subscribers have been registered for these services for years. For these existing users, requiring an additional written opt-in now would be both confusing and intrusive. These users are well aware of their opt-in and what it entails, particularly since most receive daily text messages. For these users, the service must be considered valuable or they would have chosen to opt out already. In these cases, a new opt-in request would serve as an annoyance and an interruption to the services they have already opted into without providing any new or better information. Furthermore, given the existing relationship between the consumer and the sender of the messages, an additional opt-in request could likely be viewed as spam. In these instances, consumers may decide to ignore the re-opt-in request altogether, causing inadvertent opt-outs and a loss of desired messages.

In addition, substantial resources would be wasted if all existing written consents were invalidated, without providing new consumer benefits. There is a lengthy process and considerable investment made by mobile marketing companies to develop subscriber lists, including developing print material, broadcast commercials, emails and various incentive programs to promote subscribership. Adding a "call to action" is an involved process that goes beyond simply adding words to marketing materials.[21] Instead, the brands must work with the SMS provider and legal counsel to make sure all of the applicable terms and conditions as required by the industry guidelines

[21] A "call to action" ("CTA") is something a consumer sees that provides instructions for how to begin receiving specific marketing messages. A consumer could see a CTA to sign up for text alerts in any number of ways, e.g. on a website or in a print advertisement.

are properly included. In addition, CTIA audits calls to action and if they do not meet the precise requirements, they must be changed.

If the consents that have already been obtained are deemed to be invalidated by the new TCPA rules, these valuable subscriber lists that brands have spent a great deal of resources to develop and that contain subscribers that have already provided verifiable written consent would be reset to zero, nullifying the significant investment that has already been made.

Furthermore, the impact of nullifying the written consents that have already been obtained would be especially challenging for small businesses that operate in the mobile space. Because imposing the new rules on these entities would be extremely burdensome and costly, the Commission would have analyzed this impact under the Regulatory Flexibility Act ("RFA").[22] Instead, as further evidence that the Commission did not intend to apply the new rules to previously obtained written consent, the *2012 TCPA Order's* Final Regulatory Flexibility Analysis contained no such analysis and nowhere describes the enormous economic and time intensive burden that would result if all previously obtained written consents were nullified.

Finally, requiring a fresh written opt-in each and every time the Commission decides to change its rules would result in practical difficulties and have a chilling effect on the use of subscriber lists. It would not be reasonable to expect the mobile marketing industry to re-set their subscriber database to zero each and every time the Commission decided again that new or different disclosures might be required under the TCPA – particularly if there is no clear countervailing public

[22] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (*SBREFA*), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The RFA requires agencies to consider the impact of their regulatory proposals on small entities and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities.

policy benefit.[23] Otherwise, the substantial investments made by mobile marketers in building databases based on current regulations would continuously be at risk of losing all value. Such an unfair and wasteful result, particularly without a justifiable countervailing benefit, could not be the Commission's intent.

## VI. Expeditious Clarification is Necessary to Eliminate the High Risk of Frivolous Class Action Lawsuits Based on the Lack of Explicit Language in the Order Related to Previously Obtained Written Consent.

In recent years, there has been an explosive growth in TCPA litigation. In 2008, there were 14 federal TCPA class action cases, while in 2012 that number jumped to over 1,100 federal TCPA cases.[24] In just the first nine months of 2013, there were already over 1,300 TCPA lawsuits filed, reflecting a 70% increase in TCPA filings from the same period last year. [25] This extraordinary growth is due in large part to the fact that under the TCPA: (1) companies face strict liability, (2) there is a penalty of $500-$1500 per message, (3) there are uncapped damages, and (4) there is no common sense check on litigation theories. As a result, even if there is a reasonable defense, given litigation risk and costs, companies feel forced to settle or otherwise risk extraordinary exposure.[26]

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[23] The Coalition does not disagree with the Commission's decision to require prior express written consent when previously only non-written consent was obtained. This was a reasonable and narrow delineation, supported by strong public policy reasons.

[24] *See* 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/.

[25] *See* Patrick Lunsford, *TCPA Lawsuits Really Are Growing Compared to FDCPA Claims*, insideARM.com (Oct 22, 2013), *available at* http://www.insidearm.com/daily/debt-buying-topics/debt-buying/tcpa-lawsuits-really-are-growing-compared-to-fdcpa-claims/.

[26] In a recent amicus brief filed with the Ninth Circuit supporting the dismissal of a TCPA class action lawsuit against the Los Angeles Lakers, Twitter, Inc. and Path, Inc. described the TCPA as "being misused by plaintiffs' lawyers to seek windfall damages and coercive settlements from a wide array of legitimate businesses," "an extortionist club in cases it was never meant to cover," and "a vehicle for vexatious lawsuits." Similarly, in their brief, the Lakers described the large number of similar putative class actions "based upon contrived violations of the TCPA" that "seek hundreds of millions of dollars in aggregated statutory and treble damages, often compelling defendants to settle

A major part of the problem is that there is no downside for class action lawyers to continuously file TCPA lawsuits, given the potential for lucrative attorney pay-outs. As a result, consumers who are the intended beneficiaries of the TCPA rarely benefit from TCPA class action litigation while payouts for TCPA attorneys continue to rise.

Without the requested clarification, companies will be forced to either accept the risk of defending against frivolous TCPA litigation, agree to large settlement agreements regardless of liability, and adopt unnecessary, expensive, consumer-unfriendly approaches that the Commission never intended, or remove themselves from the mobile marketing space entirely.[27] Neither Congress nor the Commission could have intended the TCPA to produce such adverse consequences that in no way enhance the protection of consumers.

## VII. Conclusion.

It is imperative for the Commission to avoid any potential ambiguity by declaring explicitly that the revised TCPA rules that became effective on October 16, 2013, do not nullify written consent provided by consumers prior to that date. Instead, the revised rules apply to new customers beginning on October 16, 2013, and to existing customers who had only provided non-written forms of express consent prior to October 16. Previously obtained written consent from existing customers provides "unambiguous proof" of consent and therefore already fulfills the same goals the Commission articulated in adopting the new prior express written consent requirement.

This clarification is supported by the language of the *2012 TCPA Order*, is consistent with the language of the revised TCPA rules, and is reflective of general administrative law principles.

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even meritless cases rather than risk potentially crippling jury verdicts." *David M. Emanuel v. The Los Angeles Lakers Inc.*, case number 13-55678, U.S. Court of Appeals, Ninth Circuit.

[27] *See* Letter from Monica S. Desai, Counsel, A Coalition of Mobile Engagement Providers, to Marlene H. Dortch, Secretary, Federal Communications Commission, Notice of Ex Parte in CG Docket No. 02-278, dated Oct. 31, 2013.

Moreover, this clarification is important to reduce consumer confusion and industry burdens. Finally, explicit clarification by the Commission is critical in order to mitigate the filing of frivolous TCPA class action lawsuits that will undoubtedly seek to exploit any potential ambiguity in the new rules in the hopes of a lucrative settlement.

Respectfully submitted,

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