

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Consumer & Governmental Affairs Bureau	)	CG Docket No. 02-278
Seeks Comment on Petition for	)	
Declaratory Ruling From a Coalition of Mobile	)	
Engagement Providers	)	
	)	
Rules and Regulations Implementing the	)	
Telephone Consumer Protection Act of 1991	)	

**COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®**

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CTIA – The Wireless Association® (“CTIA”)<sup>1</sup> respectfully submits these comments in response to the November 1, 2013 Public Notice released by the Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding.<sup>2</sup> CTIA supports the Petition for Declaratory Ruling filed by a Coalition of Mobile Engagement Providers (the “Coalition”),<sup>3</sup> in which the Coalition asks the Federal Communications Commission (the “Commission” or “FCC”) to clarify, expeditiously, that “the Telephone Consumer Protection Act (“TCPA”) rules effective October 16, 2013, do not nullify those written express consents already provided by

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<sup>1</sup> CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products. More information about CTIA is available on the Association’s website at <http://www.ctia.org/aboutCTIA/>.

<sup>2</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling from a Coalition of Mobile Engagement Providers*, CG Docket No. 02-278, Public Notice, DA 13-2118 (rel. Nov. 1, 2013) (“*Public Notice*”).

<sup>3</sup> *See A Coalition of Mobile Engagement Providers*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Oct. 17, 2013) (“*Petition*”). *See also* 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”).

consumers before that date.<sup>4</sup> This Petition addresses a narrow issue – whether express written consent obtained from a customer prior to the effective date of the new FCC rules is adequate.

First and foremost, the Commission should grant the Petition for the reasons stated by the Coalition in the Petition. Based on the plain language of the 2012 TCPA Order, the Commission only requires marketers to obtain prior express written consent after October 16, 2013 if they failed beforehand to secure “non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls.”<sup>5</sup> This necessarily implies that if marketers have already secured “written” express consent prior to October 16<sup>th</sup> – including textual input of a mobile phone number online, neither content providers nor consumers should be forced to take additional action. Furthermore, administrative rules should be enforced prospectively, and not retroactively. And, comprehensive industry guidelines, including those published and monitored by CTIA, impose detailed standards that require mobile marketing providers to secure consumer’s express written consent before a mobile text messaging marketing campaign can ever be launched.<sup>6</sup>

**I. Marketers Must Only Renew Consumer Consent if they Failed to Secure Written Express Consent Before Implementation of the 2012 Order.**

The Commission should grant the Coalition’s Petition because doing so confirms the plain language of the 2012 TCPA Order. In relevant part, the Order concludes that “once our

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<sup>4</sup> *Petition* at 1. *See also* 47 U.S.C. § 227 and 47 C.F.R. § 64.1200 *et seq.*

<sup>5</sup> *2012 TCPA Order*, ¶ 68 (emphasis added).

<sup>6</sup> *See* CTIA Compliance Assurance Solution, Mobile Commerce Compliance Handbook (effective Aug 1, 2013), available at [http://wmcglobal.com/assets/ctia\\_handbook.pdf](http://wmcglobal.com/assets/ctia_handbook.pdf). (“Compliance Handbook”). *See also* CSCA Acceptable Use Policy, available at [http://www.ctia.org/business\\_resources/short\\_code/index.cfm/AID/11650](http://www.ctia.org/business_resources/short_code/index.cfm/AID/11650) (“(9) You will ensure that your CSC campaign complies with all applicable requirements for consent, opt-in, and opt-out by a wireless subscriber (including those requirements contained in the documents referenced in sections (1), (2), and (3) above).”).

written consent rules become effective . . . an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls and thus could be liable for making such calls absent prior written consent.<sup>7</sup> This language clearly distinguishes between written consent (including a consumer generated text-message opt-in)<sup>8</sup> and non-written consent. As the Coalition correctly points out, this specific distinction “necessarily implies that an entity will be able to rely on written forms of consent previously obtained from existing customers,” while entities that did not secure such consent before October 16<sup>th</sup> must now obtain it.<sup>9</sup> An opposite interpretation would defeat the Commission’s intent in distinguishing between written and non-written consent and render the language “superfluous, in violation of the ‘cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant.’”<sup>10</sup> This rule of construction applies equally in the regulatory context,<sup>11</sup> and applies here to avoid rendering the Commission’s precise textual explanation meaningless.<sup>12</sup>

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<sup>7</sup> 2012 TCPA Order, ¶ 68 (emphasis added).

<sup>8</sup> A consumer generated text message opt-in, where a user opts-in to receive messages by submitting their phone number electronically, satisfies the Commission’s standard for express written consent under the Commission’s rules and under the Electronic Signatures in Global and National Commerce Act (“E-SIGN Act”). See 2012 TCPA Order, ¶ 12; see also 47 C.F.R. § 64.1200(f)(8)(ii) (defining a “signature” under the “prior express written consent” definition of the new rules to include “an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law”); 15 U.S.C. § 7001(a).

<sup>9</sup> *Petition* at 7.

<sup>10</sup> *In the Matter of Definition of a Cable Television System*, MM Docket No. 89-35, 5 FCC Rcd 7638, ¶ 26 (October 11, 1990).

<sup>11</sup> See *Black & Decker Corp. v. Comm’r*, 986 F.2d 60, 65 (2nd Cir. 1993) (“Regulations, like statutes, are interpreted according to canons of construction”) (internal quotations and citations omitted); see also Norman J. Singer & J.D. Shambie Singer, STATUTES AND STATUTORY CONSTRUCTION § 31:6 (7th ed. 2009) (“A regulation is a written instrument and the general rules of interpretation apply.”).

As noted by the Coalition, there is a fundamental difference between written and non-written express consent - written consent produces a verifiable record. This is why the Commission explicitly stated that after October 16, companies would be unable to rely on non-written forms of consent. In such cases, there would be no verifiable record of consent.<sup>13</sup> It is not surprising, because as a practical matter, a verifiable record provides proof that a consumer previously opted-in to receive a messaging campaign. Thus, given that the Commission specifically intended to “strike a balance between maximizing consumer privacy protections and avoiding [imposition of] burdens on telemarketers,” it makes sense that the Commission required marketers to secure written consent following implementation of the rules to ensure that a verifiable record exists.<sup>14</sup> But forcing marketers to re-secure written consent would not have that desired public policy benefit – and would create an unnecessary burden on consumers and marketers. This is why the Commission did not require this.

## **II. It Would Be Inappropriate to Retroactively Apply the New Regulation.**

As the Commission has recognized, “rules adopted by administrative agencies may be applied prospectively only.”<sup>15</sup> Indeed, it is “uncontroversial” that a “new rule may justifiably be given prospective-only effect in order to protect the settled expectations of those who relied on

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<sup>12</sup> See *e.g. Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668-69 (2007) (refusing to interpret a regulation in a manner that would render language as mere surplusage, and noting: “we have cautioned against reading a text in a way that makes part of it redundant”).

<sup>13</sup> See *Petition* at 7; see also 2012 TCPA Order at ¶ 68.

<sup>14</sup> 2012 TCPA Order at ¶ 5.

<sup>15</sup> *High-Cost Universal Service Support, et al.*, Report and Order and Memorandum Opinion and Order, 25 FCC Rcd 3430, ¶ 11 (2010); 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.”); *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) (no statute authorizes the fcc to adopt regulations with retroactive effect).

the preexisting rule.”<sup>16</sup> Under these circumstances, the express written consent already obtained prior to October 16 was consistent with rules in place at the time consent was given. Retroactive application of the new rules would disrupt the “settled expectations” of consumers – who will be confused if an entity they already have a relationship with takes a new administrative step to re-secure written express consent to accept the types of messages they had already been receiving. Application of this longstanding and uncontroversial principle can result in only one conclusion: the Commission’s 2012 TCPA Order was meant to have been applied prospectively, and not retroactively. Application of this basic principle is consistent with ensuring that consumers are not confused, and that marketing entities are not burdened with an additional, costly, and redundant requirement to re-secure their customers’ express written consent to receive the messages they have already consented, in writing, to receive.

### **III. CTIA’s Self-Regulatory Regime Provides Comprehensive Requirements in the Mobile Marketing Marketplace.**

The Coalition correctly notes that “senders and recipients of messages through the short code channel” are also “subject to comprehensive wireless industry standards”<sup>17</sup> that supplement existing law. Indeed, CTIA governs mobile marketing conduct in the wireless space through the *Mobile Commerce Compliance Handbook*,<sup>18</sup> and the *Compliance Assurance Program*, which is a monitoring program that audits mobile marketing campaigns for compliance with the CTIA

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<sup>16</sup> *Verizon Tel. Cos v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (internal quotations omitted).

<sup>17</sup> *Petition* at 3.

<sup>18</sup> The Handbook includes at least 44 detailed standards governing various aspects of mobile marketing campaigns, including, for example, the opt-in process, the opt-out process, what types of messages are considered spam, privacy issues, customer care, what constitutes illicit content, the maintenance of customer records, the processing of messages from consumers, the content and display of a Call to Action (“CTA”), the content and display of terms and conditions, etc.

standards and provides wireless carriers the ability to take independent, real-time action to enforce those standards. The CTIA Handbook and Compliance Assurance Program both act in concert with the TCPA and the Commission's implementing regulations so that consumers only receive a message they specifically request, and can quickly and easily stop receiving messages whenever they choose. To be clear, these industry compliance requirements are not a substitute for the TCPA and the Commission's implementing regulations, but rather these requirements, reinforced by third-party monitoring, provide the framework for conducting mobile marketing campaigns in compliance with the TCPA's opt-in consent requirements. Accordingly, mobile marketing campaigns that are compliant with the industry requirements also are compliant with the TCPA, and there is no reason to force customers that provided express written consent to receive messaging content prior to October 16th to provide a second form of written consent.

A. CTIA Standards Are Comprehensive.

The cornerstone of CTIA's standards begins with the absolute requirement that a consumer must affirmatively elect to receive messages through a structured opt-in process before a promotional or telemarketing message can be sent.<sup>19</sup> A consumer must proactively opt-in to a marketing campaign by entering a phone number online, clicking through a button on a mobile webpage, sending a short code message containing an advertised keyword, or signing up to receive communication through a point-of-sale location.<sup>20</sup> CTIA requires content providers or aggregators to retain proof that all customers have opted in to receive text messages.<sup>21</sup>

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<sup>19</sup> See CTIA Handbook, page 3, Section A1.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at page 4, Section A4 ("All opt-in and opt-out requests should be retained from the time a user initiates opt-in until a minimum of six months after a user has opted out of a program. Service providers assume responsibility for managing information about deactivated and

The CTIA 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.”<sup>22</sup> Also, the call to action must consistently describe the product or service, and refrain from utilizing generic descriptions such as “downloads,” “alerts,” or “credits” that cannot sufficiently identify what product or service will be delivered.

Finally, CTIA requires content providers to inform consumers of their ability to opt out of a marketing program and enable customers to opt out at any time, and for any reason.<sup>23</sup> This requirement forces shortcode providers to “recognize and respond to all reasonably clear opt-out attempts,” including, at a minimum, the universal keywords STOP, END, CANCEL, UNSUBSCRIBE, and QUIT, and opt the subscriber out of the program.<sup>24</sup> Only one message is permitted in response to a STOP message, and that message must have two elements: the program name, and confirmation that both messages and any charges have ceased.

B. CTIA Standards Are Subject to Independent Review and Monitoring through an Ongoing Auditing Program.

CTIA runs a Compliance Assurance Program (the “Program”) – an independent “in-market” audit program established to provide carriers a single monitoring tool capable of

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recycled numbers and must process this information within three business days of receipt. After porting a phone number between carriers, users must opt in again to desired programs”); *see also* Mobile Marketing Association, *U.S. Consumer Best Practices for Messaging*, Version 7.0, guideline 1.8-2 (Oct. 16, 2012) (describing a similar “Customer Record Maintenance” requirement).

<sup>22</sup> *Id.* at page 5, Section B1.

<sup>23</sup> *Id.* at p. 8, D5.

<sup>24</sup> *Id.*

assessing compliance with CTIA standards.<sup>25</sup> Since its inception, the Program has reviewed approximately 159,000 advertisements and issued over 43,000 audits.

CTIA's Compliance Assurance Program monitors marketing content live, online, to identify content that fails to meet CTIA's standards. The Program reviews and analyzes as many as 12,000 promotions and in-application screens each month; captures promotion-related collateral associated with an offer to examine compliance with the CTIA standards; tests marketers' opt-in and messaging compliance on individual carrier networks; and delivers failed audit reports to non-compliant parties in an effort to secure corrective action.<sup>26</sup> When the Compliance Assurance Program identifies a violation, CTIA issues a violation notice and report directly to the content providers and aggregators<sup>27</sup> through an online portal available to all members of the wireless industry – including carriers.<sup>28</sup> Since CTIA implemented the Program in January, 2011 U.S. compliance rates jumped from 0.02% to 97.9% in December of 2012.<sup>29</sup>

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<sup>25</sup> See WMC Website, available at <http://www.wmcglobal.com> (last visited Nov. 21, 2013).

<sup>26</sup> See Exhibit A, WMC Global, Third-Party Mobile Content Compliance: CTIA – The Wireless Association® (Apr. 17, 2013), at 5. Program violation notices are also grouped according to severity, on a scale between 0 and 2. The most serious infractions which implicate adult content, spam, and violations of CTIA's opt-in policy are deemed "severity zero" and escalated for *immediate* correction. Less severe but still critical violations such as violations of pricing, subscription, and product disclosure terms are deemed "severity 1" and must be cured within 48 hours. Terms and conditions violations and technical violations are deemed "severity 2" and must be corrected within 5 business days. *Id.* at 6.

<sup>27</sup> See *CTIA Handbook*, In-Market Monitoring Guide, page 9, Section F3 (violation notifications are also circulated on a weekly basis, in addition to real-time notifications sent immediately for corrective action).

<sup>28</sup> See <http://ctia.psmsindustrymonitor.com/user/login> (last visited Nov. 21, 2013).

<sup>29</sup> See Exhibit A at 13.

## Industry Results



Our comprehensive standards, and the ongoing monitoring of those standards through the Compliance Assurance Program, is consistent with the strong policy reasons cited by the Commission in adopting the Commission’s 2012 Order.

#### IV. CONCLUSION

CTIA fully supports the Coalition Petition for the legal and policy reasons cited in the Petition. To reinforce the TCPA’s requirements, CTIA and the wireless industry impose comprehensive standards on mobile marketing, and combine that with independent review and ongoing monitoring. Based on the language of the Order and basic principles of administrative law, the Commission did not intend to force consumers who have already provided express written consent prior to October 16, 2013, to then have to provide a second form of written express consent to continue receiving content they specifically requested.

Respectfully submitted,  
By:

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