

The Brand Activation Association, Inc. (“BAA”) respectfully submits these Comments in response to the request by the Federal Communications Commission (“FCC” or “Commission”) concerning its review of the Petition for Forbearance filed by the Direct Marketing Association and the Petition for Declaratory Ruling from a Coalition of Mobile Engagement Providers (together, “the Petitions”). The BAA supports the Petitions’ analysis and conclusions in their entirety. Most importantly, as articulated in the Petitions, the BAA strongly believes, and implores the Commission to explicitly declare that marketers do not need to obtain new, duplicative written consent from consumers who, prior to October 16, 2013, had already provided written consent to receive mobile marketing communications – provided such consent was consistent with the Telephone Consumer Protection Act (“TCPA”) rules (“Rules”) in place at the time consent was given. As explained in the Petitions and in our Comments below, application of the new Rules¹ to current subscribers would (i) be potentially confusing and frustrating to consumers, (ii) result in a significant waste of resources already expended to build a compliant contact list, and (iii) potentially lead to negative consumer sentiment towards the brands who seemingly “dropped” the consumers from their lists without notice or consent from the consumer. All such results are incongruous with the letter, spirit, and intent of the new Rules.

I. Background

The BAA, established in 1911 (formerly known as the Promotion Marketing Association”), is the leading not-for-profit trade organization and resource for research, education, and collaboration for marketing professionals. Representing the over \$1 trillion integrated marketing industry, the organization is composed of Fortune 500 companies, top digital, advertising and marketing agencies, law firms, retailers, service providers and academia, representing thousands of brands worldwide. Championing the highest standards of excellence and recognition in the promotion and integrated marketing industry globally, the BAA’s objective is to foster a better understanding of promotion and integrated marketing and its role in the overall marketing process.

¹ 47 C.F.R. §§ 64.1200 et seq.

II. Industry Rules Ensure That Subscribers Who Have Previously Provided Written Consent Are Protected By A Subscriber-Initiated Opt-In Process

As noted in the Petitions, all senders and recipients of messages using a short code are, and have for many years been, subject to comprehensive wireless industry standards that serve as de facto rules. In the absence of a specific definition and guidance regarding the meaning of “express consent” in the TCPA and the Commission’s rules prior to its February 2012 rulemaking,² several stakeholders in the mobile marketing area published and enforced industry best practices³ (the “Guidelines”). These stakeholders include the CTIA – The Wireless Association, the Mobile Marketing Association, AT&T, Verizon and other major wireless carriers.

The Guidelines require marketers to provide consumers with specific disclosures and instructions on how to subscribe to receive marketing as well as non-marketing messages on their mobile devices. The disclosures in these “calls to action,” which may take the form of print material, broadcast commercials, online forms, kiosks, and other media, are required to be understandable and clear and conspicuous. Subscribers initiate the “conversation” by responding to these calls to action by either providing their mobile phone number and taking an affirmative action in the case of a non-mobile response channel, or by texting a keyword to a short code on a mobile device. The Guidelines also require marketers to send subscribers a confirmation text message that includes instructions on how to unsubscribe from future messages.

The combination of the Guidelines’ disclosure requirements coupled with the requirement that a consumer must affirmatively opt in to receive the messages has provided industry with an easy and effective method for communicating important and valuable information to consumers via their mobile devices. Although failing to adhere to the Guidelines would not in and of itself result in legal liability, companies that have not provided consumers with basic disclosures about a mobile campaign or have failed to obtain a consumer’s consent to receive such messages have been the subject of FCC enforcement actions and costly consumer class actions, as described in the Petitions. Companies therefore had a strong incentive to comply

² *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830 (2012).

³ *See, e.g.*, MOBILE MARKETING ASSOCIATION, MOBILE ADVERTISING GUIDELINES, February 2011, available at <http://www.mmaglobal.com/policies/global-mobile-advertising-guidelines>.

with the Rules then in effect (as well as the Guidelines), and those that did should not now be penalized by having to obtain a consumer's opt-in again.

III. Requiring Mobile Marketers To Re-Obtain Millions Of Written Consents Would Be Unduly Burdensome And Disruptive

As discussed in the Petitions, if the Commission's true intention under the new Rules were to invalidate all prior written consents (and all existing lists), with all of the resulting confusion and immense burden on industry and brands whose lists have been invalidated, it would have addressed these issues in its rulemaking. As a practical matter, such an interpretation would affect a generous portion of the industry, from small business owners to multinational corporations. Requiring companies to request that existing subscribers provide additional consent will result in confusion because these subscribers have already provided consent in writing and have already been receiving messages – as well as clear and conspicuous notice regarding how to opt out of receiving future marketing messages. Even more troubling would be the implied message conveyed by a duplicative “opt-in” request to existing subscribers – that their previous consent was lacking or somehow deficient.

Furthermore, industry members have expended significant time, effort, and resources to create, curate, and maintain their subscriber lists. If previously obtained written consent is deemed invalidated by the new Rules, companies would see these efforts and investments wasted for no valid reason or rationale. Years of consumer goodwill and information obtained in a manner entirely compliant with the Guidelines and laws in effect at the time and that comport with the privacy concerns the Rules are intended to address, would be nullified – not because of any risk to subscriber privacy or education, but simply because companies did not follow the new, technical requirements of the revised Rules.

Finally, marketers would be restricted from contacting subscribers who did not re-subscribe prior to October 16 with the additional disclosures required by the new Rules. Allowing the new Rules to operate retroactively would leave these “hand raisers” – subscribers who specifically requested to be contacted about new offers, deals, and alerts – with an unfulfilled promise to receive marketing messages from the brands they patronize. Worse, the cessation of these messages will create, and many companies have already reported, a different

type of consumer confusion, as subscribers have no way of knowing why these companies have cast them aside – leading to poor brand impression and possibly even consumer ill will. Moreover, marketers would not be able to re-contact subscribers through the same method of communication through which subscribers had become accustomed – the text message – and subscribers may be left without any guidance as to how to re-subscribe.

Some BAA members believe they will be forced to abandon text message campaigns entirely if they lose their subscriber lists because it simply will not be worth the significant new investment. This could not possibly have been the intention of the Commission in developing the new Rules.

IV. Requiring Marketers To Re-Obtain Written Consent Would Expose Marketers To Regulatory Sanctions And Frivolous Lawsuits

The Petitions posit that the Commission must provide explicit clarification regarding the issue of previously obtained written consent or marketers will be exposed to potential regulatory sanctions or frivolous lawsuits by an increasingly active plaintiffs bar, and the BAA agrees. There is no reason to expose marketers to regulatory sanctions for perfectly valid written consent because they did not inform subscribers of information of which they are already perfectly aware. Similarly, the industry would be required to waste important resources defending warrantless lawsuits based on an unnecessary lack of clarity that was never the intent of the Commission.

V. Conclusion

For the foregoing reasons, the BAA respectfully requests that the Commission grant either or both of the Petitions; clarify that the new Rules do not require entities that have already obtained prior express consent in writing under the pre-October 16 Rules to once again obtain written consent; and forbear from enforcing the new Rules against marketers that communicate with consumers in reliance of previously obtained consent.