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Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Ex Parte Notice – A Coalition of Mobile Engagement Providers, Petition for Declaratory Ruling in CG Docket No. CG 02-278**

Dear Ms. Dortch:

On December 12, 2013, Monica Desai of Patton Boggs, LLP, counsel to a coalition of mobile engagement providers ("Coalition"),[1] and Coalition members participated in a meeting with Federal Communications Commission ("FCC" or "Commission") staff from the Consumer and Government Affairs Bureau, including: Kris Monteith (Acting Bureau Chief), Mark Stone (Deputy Bureau Chief), Kurt Schroeder (Acting Chief, Consumer Policy Division), John B. Adams (Acting Deputy Chief, Consumer Policy Division), Aaron Garza (Legal Advisor), and Kristi Lemoine (Attorney); and staff from the Office of General Counsel, including: Diane Griffin Holland (Deputy Associate General Counsel) and Claude Aiken (Office of the General Counsel).

The Coalition members attending in person were Alan Sultan (Senior Vice President, Business Development, Hipcricket), David Schwind (Director, Global Mobile Relations, Genesys), and Jennifer Bagg (Partner, Wiltshire & Grannis, LLP, Counsel to Vibes). The following Coalition members participated by phone: Anna Aban (Business Development Manager, 4INFO, Inc.), Kirsten McMullen (Chief Privacy Officer, 4INFO, Inc.), Ira Schlussel (Senior Vice President, General Counsel, ePrize), Justin Gutterman (Mobile Industry Manager, Mobile Commons), Cara Frey (General Counsel, Mobile Marketing Association), Alan Sege (Chief Strategy Officer and General Counsel, payvia), Debra Bernard (Partner, Perkins Coie, Counsel to payvia), Matt Lesher (Chief Operating Officer, Tetherball), Cheryl Sanders (Vice President, Business Operations,

[1] The Coalition consists of the following companies: 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).

Vibes),and Matt Silk (Chief Marketing Officer, Waterfall Mobile Inc.). Maria Wolvin of Patton Boggs, LLP, counsel to the Coalition, also participated by phone.

During the meeting, the Coalition reiterated the points it raised in its Petition for Declaratory Ruling,[2] requesting the Commission to clarify that the revised Telephone Consumer Protection Act ("TCPA") rules that went into effect on October 16 apply only to new customers and to existing customers who had only provided non-written forms of express consent prior to that date, as explicitly specified in the Commission's implementing *Order*.[3] The Coalition emphasized that it is seeking the requested clarification to ensure that any perceived ambiguity in the new prior express written consent rules does not become the basis for expensive, meritless class action litigation. Specifically, the Coalition highlighted the following:

I. There is Overwhelming Support for the Coalition's Request.

The Coalition emphasized that an overwhelming majority of commenters, including those from broad industry groups composed of major trade associations and coalitions representing literally thousands and thousands of companies in all sectors, vigorously supported the narrow clarification requested by the Coalition. For example, strong support for the Petition was offered by the **National Association of Broadcasters** (NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks), **CTIA – The Wireless Association®** (CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers), the **Retail Industry Leaders Association** (RILA is the trade association of the world's largest retail companies, including retailers, product manufacturers, and service suppliers), the **American Financial Services Association** (AFSA is the national trade association for the consumer credit industry including those from consumer and commercial finance companies, auto finance/leasing companies, mortgage lenders, mortgage servicers, credit card issuers, industrial banks and industry suppliers), the **National Retail Federation** (NRF is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries), and the **Brand Activation Association, Inc.** (BAA is a trade organization and resource for research, education, and collaboration for marketing professionals, representing thousands of brands worldwide).

II. The Three Comments in Opposition Did Not Address the Significant Legal and Policy Issues Raised in the Petition.

Only three commenters opposed the Petition,[4] none of which addressed several significant

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[2] Petition for Declaratory Ruling, A Coalition of Mobile Engagement Providers, CG Docket No. 02-278, filed on October 17, 2013 ("Petition"). *See also* Comments of A Coalition of Mobile Engagement Providers, to the Petition for Declaratory Ruling filed by a Coalition of Mobile Engagement Providers, in CG Docket No. 02-278 (dated Dec. 2, 2013)("Coalition Comments").

[3] *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").

[4] *See* Comments of Gerald Roylance, to the *Petition for Declaratory Ruling* filed by a Coalition of Mobile Engagement Providers, in CG Docket No. 02-278 (dated Nov.1, 2013)("Roylance Comments"); *see*

legal and policy issues raised in the Petition, including for example:

- The absence of any language in the *2012 TCPA Order* that would indicate the Commission intended to nullify previously obtained written consent.

- The specific language in paragraphs 67 and 68 of the *Order* which clearly and explicitly set forth the different treatment of non-written consent and written consent, as well as the applicability to new customers.

- The inherent difference between previously obtained written consent (through which a verifiable written record of consent is produced) and non-written consent, which justifies and explains why the Commission treated the two differently.

- The tremendous impact of nullification on businesses, including many small businesses, that have spent substantial resources in building valuable subscriber databases.

- The chilling effect on mobile marketing if the mobile industry were required to re-build expensive and labor intensive subscriber databases every time the Commission changed its interpretation of consent.

- The principle against retroactive application of rules that would be violated if previously obtained written consents were nullified by the new rules.

- The likelihood that a consumer who has already previously provided written consent to receive certain telemarketing messages would much more likely be confused or annoyed, rather than further protected, by receiving a message out of the blue which states that the consumer agrees to receive "telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice," and is not required to agree to continue to receive those messages "as a condition of purchasing any property, goods, or services."

As the Coalition's Petition and comments exhaustively demonstrate, nothing in the *Order* or rules indicate that the Commission intended for the new written consent rules to apply to previously obtained written consent. Furthermore, all available evidence logically supports the conclusion that the Commission never addressed previously obtained written consent in the rules because (as the *Order* clearly indicates) it never intended for the new rules to nullify such unambiguous written consents that already fulfill the same fundamental consumer protection goals as the new rules.

Because of the explicit language of the *Order*, Coalition members and many other companies

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also Comments of Robert Biggerstaff, to the *Petition for Declaratory Ruling* filed by a Coalition of Mobile Engagement Providers, in CG Docket No. 02-278 (dated Dec. 5, 2013)("Biggerstaff Comments"); *see also* Comments of Jay Connor, to the *Petition for Declaratory Ruling* filed by a Coalition of Mobile Engagement Providers, in CG Docket No. 02-278 (dated Dec. 2, 2013)("Connor Comments").

involved in the mobile space understood that the new prior express written consent rules would apply to new customers beginning on October 16, 2013, as well to existing customers who only provided non-written consent. It was also understood that the new rules did not apply to previously obtained written consent. Obviously, Commission rules are not to be read in isolation; accompanying Orders provide vital information for understanding how the Commission intends for new rules to operate. Here, while the *Order* uses very clear language to state that the new rules apply to previously obtained non-written consent, and to new customers, the rules themselves do not make that explicit distinction.

Although the *Order* is clearer than the rule, the rule language is consistent. The rule uses the word "initiate." While the Commission has not defined "initiate," the common dictionary definition of "initiate" is "to start or begin (something)"[5] or to "cause (a process or action) to begin."[6] The logical implication, and the reading that makes most sense from a practical and policy perspective, is that marketers must comply with the new prior express written consent requirement when a consumer joins a campaign, not apply the new rules midstream to consumers who have already been participating in a program and have been receiving messages. For these consumers, the new disclosure language will not provide any new or better information because they already understand the ramifications of their opt-in. If anything, receiving new disclosure language that is not at all relevant to the types of messages a consumer is used to receiving will likely just cause confusion. Clearly the point of the Commission's new rules was to offer consumers better protection, not increase consumer confusion that will likely result in unintentional opt-outs.

III. Unchecked and Exponentially Increasing Litigation Makes Clarification Necessary.

As the effective date of the rules grew closer, and as more and more companies have been sued over increasingly expansive TCPA legal theories, covered entities began to worry that what seemed to be the clear and logical interpretation of the new rules could actually be exploited by creative plaintiff attorneys.[7] This is why the Coalition seeks clarification now. This risk is exemplified by the comments of Mr. Roylance, who makes no effort to explain the language in paragraphs 67 and 68 of the *Order,* and simply asserts that the Commission did not intend to make a distinction, despite the Commission's explicit distinction.[8] Even nuisance lawsuits are expensive.[9]

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[5] Merriam-Webster Dictionary (2013).

[6] Oxford Dictionaries (2013).

[7] In 2008, there were 14 federal TCPA class action cases, while in 2012 that number jumped to over 1,100 federal TCPA cases. 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. [7] *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/; *see also* AFSA Comments at 2-3.

[8] *See* Roylance Comments at 4.

Because of this potential risk, the Coalition decided it would be prudent to request an explicit clarification of the rules.

IV. The Requested Clarification is Consistent with Commission Policy, the Regulatory Flexibility Act, and with the FTC Rulemaking.

While this explicit clarification will provide certainty and mitigate potential litigation risk, it will in no way require the Commission to undo any of its new rules or make any special concessions that would in any way undermine its policy goals or intentions when adopting the new written consent rules.

The Coalition reiterated that customers who have provided written consent prior to October 16 did so under the rigorous industry guidelines that outline exactly what mobile marketers must disclose to consumers prior to them being able to opt-in to a mobile program. These include a description of the types of messages to be received, the frequency of those messages, the cost, how to get help, and how to stop receiving messages. Before a mobile marketer can send such messages, it must obtain carrier approval for its proposed opt-in language, a lengthy process that typically takes about three months. Under this process, express written consent must be obtained before a mobile marketer can send any telemarketing messages to a consumer. 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 at any time. Industry guidelines require calls to action to be clear and accurate, a mandate which fulfills the same purpose as the Commission's "clear and conspicuous disclosure" requirement for prior express written consent.[10] While the industry requirements are arguably even more detailed than the Commission's rules in this regard, the pre-October 16th disclosure language did not include language stating that the consumer authorizes the delivery of "telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice," and language reflecting that the consumer is not required to sign the agreement "as a condition of purchasing any property, goods, or services."[11]

The Coalition also explained that if the Commission had intended to require small entities to re-opt-in existing customers who have already provided written consent, the *2012 TCPA Order* would have provided an analysis under the Regulatory Flexibility Act ("RFA").[12] That statute

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[9] *See* AFSA Comments at 3 (stating that, "[e]ven when companies prevail in lawsuits, the cost to pursue the lawsuit (often through an appellate court) is over $100,000. *See also David M. Emanuel v. The Los Angeles Lakers Inc.*, case number 13-55678, U.S. Court of Appeals, Ninth Circuit, Appellee's Answering Brief, at 55 (Nov. 14, 2013)("LA Lakers Brief"); *see also David M. Emanuel v. The Los Angeles Lakers Inc.*, case number 13-55678, U.S. Court of Appeals, Ninth Circuit, Amicus Brief of Twitter, Inc. and Path, Inc., at 1 (Nov. 21, 2013).

[10] *See 2012 TCPA Order*, ¶ 33.

[11] 47 CFR 64.1200(f)(i)(A),(B).

[12] *See* 5 U.S.C. §§ 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (*SBREFA*), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The Coalition notes that it does not raise any issues related to the Paperwork Reduction Act.

requires the Commission to consider the impact of a final rule on small entities and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities.[13] If a final rule would impose a significant burden on small entities, then the Commission would be required to provide:

> a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.[14]

Although these requirements are procedural in nature,[15] the FCC must nevertheless make a "reasonable, good-faith effort to carry out the mandate of the RFA."[16] At a minimum, the Commission must "describe the steps it took 'to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes,'" including an analysis of the factors enumerated above.[17]

While the Commission fully addressed in detail concerns over the new written express consent requirements as applied to informational calls made by small business in its RFA analysis in the *2012 TCPA Order*, the Commission did not conduct a similar analysis of the economic impact of the new written consent rules on small businesses that make non-informational telemarketing calls. Instead, the Commission simply concluded that its decision to allow written consent obtained in compliance with the E-SIGN Act would reduce the impact of requiring written consent to businesses of all sizes. In fact, and of great significance to further support the reading that the Commission did not intend to nullify previously obtained written consent, the Commission states:

> With regard to any uncertainty concerning what satisfies the prior express consent requirement, the Commission concludes that consent **obtained** in compliance with the E-SIGN Act will satisfy the requirements of our revised rule, including permission obtained via an email, website form, text message, telephone keypress, or voice recording.[18]

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[13] *See* 5 U.S.C. § 604(a)(5).

[14] *Id* § 604(a)(6).

[15] *See U.S. Cellular Corp. v. F.C.C.*, 254 F.3d 78, 88-89 (D.C. Cir. 2001).

[16] *Alenco Commc'n , Inc. v. F.C.C.*, 201 F.3d 608, 625 (5th Cir. 2000) (concluding that the FCC complied with the RFA because its decision was "accompanied by substantial discussion and deliberation" of the factors required by the statute) (internal quotations and citations omitted).

[17] *Id.* (quoting 5 U.S.C. § 604(a)(5)).

[18] *See 2012 TCPA Order*, Regulatory Flexibility Analysis, Appendix C, ¶ 12 (emphasis added).

Here, and in the *Order* itself,[19] the Commission specifically uses the past tense "obtained" in explaining the reduced impact the new written consent rules are meant to have on covered entities. The literal and logical meaning of this language is that the Commission intended that entities would be able to rely on previously obtained written consent to "satisfy the requirements" of the new prior express written consent rule, as long as such consent is E-SIGN-compliant. Given this, the Commission did not have to conduct any further analysis because it made it clear that it simply did not intend for the written consent rules to apply retroactively in instances where written consent was already provided in compliance with the E-SIGN Act. Therefore, the RFA analysis actually provides further compelling evidence that the Commission just simply did not intend for previously obtained written consent to be nullified by the new rules (at least in instances where the previously obtained written consent complies with the E-SIGN Act, such as in the case of text opt-ins).

The Coalition also explained that the Federal Trade Commission ("FTC") treatment related to the "grandfathering" issue when eliminating the established business relationship ("EBR") exemption under the Telemarketing Sales Rule ("TSR") was instructive in further confirming the Commission's intention not to nullify existing written consent obtained prior to October 16.[20] Given the similarities between the EBR exemption and non-written consent, it makes sense that the FCC and FTC would provide similar treatment for those; conversely, given the fundamental differences between the EBR exemption and previously obtained written consent, it makes sense that those would rightfully and logically be treated differently.

First, under the EBR, a consumer's consent would only have been implied based on an existing relationship between a company and the consumer; like non-written consent, no verifiable record of consent would ever have been produced. Unlike previously obtained written consent which produces a verifiable record, the 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. Thus, the FTC elimination of the EBR without grandfathering is consistent with the Commission's elimination of non-written consent without grandfathering.

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

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[19] *See 2012 TCPA Order*, ¶ 34 (stating "… we now similarly conclude that consent **obtained** in compliance with the E-SIGN Act will satisfy the requirements of our revised rule, including permission obtained via an email, website form, text message, telephone keypress, or voice recording. Allowing documentation of consent under the E- SIGN Act will minimize the costs and burdens of acquiring prior express written consent for autodialed or prerecorded telemarketing calls while protecting the privacy interests of consumers)(emphasis added).

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

rules became fully effective and by describing the transition of existing consents to new consents.[21] By contrast, and as further evidence that the Commission did not intend the new rules to apply to existing customers who have previously provided written consent, the Commission explicitly stated that the new prior express written consent requirements apply to "new" customers and updated written consent is only required of consumers who previously provided "non-written" express consent. Otherwise, in the same manner as the FTC, the Commission would have explicitly addressed the issue and given companies clear notice and guidance concerning the treatment of written consents provided by customers before the new rules took effect.

V. Practical Impact.

While it is hard to categorize with precision, Coalition members are experiencing that there is a variety of ways in which their clients are implementing the new rules with respect to customers who already provided written express consent prior to October 16. Many marketers, based on the clear language of the *Order*, have chosen to maintain the status quo and not request those pre-October 16 existing customers to re-opt in with the new disclosure language. Many other brands are pausing their programming while awaiting a Commission ruling. Generally, larger companies fearing class action lawsuits have taken a more conservative approach and either requested a fresh opt-in with the new disclosure language, or stopped mobile marketing altogether due to the risk of frivolous lawsuits. In instances where companies have sent the new disclosure language and requested fresh opt-ins to existing customers, the drop-off rate has been devastating - estimated to be 40%-80%. However, most of the drop-off is the result of receiving no response back from consumers after providing the new disclosures, not from consumers who have actively opt-out in response to the new rule language. As a result, the cause of the significant drop-off is unclear: some consumers may have intended to opt-out of campaigns, but others may not have responded out of confusion or some other misunderstanding (such as suspicion that the message may be some sort of scam). Because the new rule language is not relevant in the context of an existing relationship when verifiable consent has already been provided, the natural inclination for many consumers has likely been to ignore a message received out of the blue that does not make sense to them. Some companies, out of frustration, have decided to avoid the uncertainty altogether and have made the decision to completely pull out of mobile marketing altogether. This has had a significant detrimental impact on those companies that invested resources to build up those lists, as well as on the consumers who will no longer receive desired messages from these companies.

Respectfully submitted,

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[21] *See id.*