

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

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

To: The Commission

REPLY COMMENTS OF A
COALITION OF MOBILE ENGAGEMENT PROVIDERS

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Dated: December 17, 2013

EXECUTIVE SUMMARY

The Coalition's Petition for Declaratory Ruling does not ask the Commission to rethink any of its intentions, undo any of its policy objectives, or waive any part of the new Telephone Consumer Protection Act ("TCPA") rules. Instead, the Coalition only requests the Commission to explicitly confirm that the Commission intended its rules to be consistent with the *2012 TCPA Order* by confirming that the new prior express written consent requirement effective October 16 applies only to new customers and to those customers who have already provided non-written consent.

The Commission nowhere stated its intent to nullify previously obtained written consent (which stands in contrast to the Commission's explicit nullification of previously obtained non-written consent). Moreover, the *Order*, including the Regulatory Flexibility Act analysis, is replete with evidence that the Commission simply did not intend for the new prior express written consent requirement to apply to previously obtained verifiable written consent. And this makes sense – there are several inherent differences between written and non-written consent that justify why the Commission would rightly treat these two differently. Furthermore, the clarification is critical to ensure that any manufactured ambiguity in the new prior express written consent rules does not become the basis for expensive, meritless class action litigation.

Finally, an overwhelming majority of commenters, including those submitted by major organizations representing thousands and thousands of diverse companies, support the Commission making the explicit clarification requested by the Coalition. Of the three commenters that oppose the Petition, not one articulates any plausible evidence that demonstrates the Commission intended for the new prior express written consent rules to apply to previously obtained written consent, nor how consumers who have already provided express written consent and have already been receiving mobile marketing messages will in any way benefit from receiving new disclosures that are not relevant in this narrow context.

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A Coalition of Mobile Engagement Providers (“Coalition”),¹ through counsel, submits these reply comments supporting its Petition for Declaratory Ruling in the above referenced proceeding.² The Coalition requests the Federal Communications Commission 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 Instead, as the

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) (“Coalition 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 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”); *see also* 47 C.F.R. § 64.1200 *et seq.*

Commission stated in its *Order*, 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.⁴

As emphasized in filings by the Coalition,⁵ and as demonstrated by the overwhelming support in the docket by major trade associations and coalitions which represent thousands and thousands of companies in all sectors, this clarification is critical 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. The clarification is consistent with the language of the *2012 TCPA Order* and rules, reflects Commission intent, and makes sense from practical and policy perspective. Significantly, making the requested explicit clarification will not require the Commission to undermine any of its policy objectives or waive any part of the new rules. It will simply make clear that the rules are intended to reflect what is already reflected in the *Order*: that the new prior express written consent rules do not apply to previously obtained written consent.

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

The Coalition is not alone in seeking the requested explicit clarification. 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, support the narrow clarification requested by the Coalition. For example, strong support

⁴ See 2012 TCPA Order, ¶¶ 67-68.

⁵ See Coalition 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"); see also 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; see also 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 Dec. 16, 2013.

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 Opposition Does Not Address the Significant Legal And Policy Issues Raised by the Coalition.

Of all the comments received on the Coalition’s Petition, only three commenters opposed the requested clarification.⁶ And none addressed several significant 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

⁶ 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 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”).

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, that justifies and explains why the Commission treated the two differently from a policy perspective.
- 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 marketing industry was 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.”

Instead, opposition asserts without support, and without any explanation regarding the clear contrary language in paragraphs 67 and 68 of the *Order*, that the new language applies to prior customers and to previously obtained written consent.⁷ Despite the clear language of the *Order*, because the rules do not actually use the words “new” and “old,” Mr. Roylance ignores the *Order* and

⁷ In paragraph 67, the 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. *2012 TCPA Order*, ¶¶ 67-68.

asserts the Commission did not intend to distinguish between how the prior express written consent requirements apply to consent for new customers and to existing customers, or to previously obtained written consent and non-written consent.⁸ This is unconvincing. 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.

The three comments filed in opposition also contend that all consumers should be treated the same, whether they are “new” customers or not, and whether they have already provided written express consent or not. Yet, none of the commenters explains how existing customers who have already provided unambiguous written consent would be more protected by receiving the required new disclosures. In addition, none of the three oppositional comments provides any explanation for why two inherently different forms of consent – one is verifiable and one is not – should be treated the same and why it would be improper for the Commission to treat them differently.

III. Explicit Clarification is Necessary to Eliminate the High Risk of Frivolous Class Action Lawsuits Based on this Narrow Issue.

Despite the clear language of the *Order*, the lack of parallel explicit language in the rules will likely be exploited by creative plaintiff attorneys.⁹ 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 treat non-written and written consents obtained prior to October 16 differently, despite

⁸ See Roylance Comments at 4.

⁹ 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.⁹ 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.

the Commission's explicit distinction.¹⁰

Even nuisance lawsuits are expensive.¹¹ Operators in the mobile marketing space must continually navigate an increasingly perilous legal landscape. In recent years, there has been an explosive growth in TCPA litigation 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 in cases where there is no real merit, given litigation risk and costs, companies feel forced to settle or otherwise risk extraordinary exposure. Any perceived uncertainty or ambiguity in the TCPA rules is sure to escalate the already exponential growth of TCPA lawsuits.

Thus, without the requested clarification to provide certainty, companies will be forced to 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. The only way to avoid these adverse consequences is for companies to remove themselves entirely from the mobile marketing space (or for the FCC to take definitive action). Neither Congress nor the Commission could have intended such perverse results. The TCPA was designed to protect consumers from annoying and harassing telemarketing calls, not to subject compliant companies who engage in lawful telemarketing to extraordinary liability risk based on harassing lawsuits that in no way enhance the protection of consumers.

¹⁰ See Roylance Comments at 4.

¹¹ See Comments of the American Financial Services Association, to the *Petition for Declaratory Ruling* filed by a Coalition of Mobile Engagement Providers, in CG Docket No. 02-278, at 3 (dated Dec. 2, 2013) ("AFSA Comments") (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).

IV. The Mobile Marketing Industry Adheres to Rigorous Guidelines That Include Prior Express Consent and Clear and Conspicuous Disclosure.

Consumers who provided express written consent prior to October 16 to receive short code mobile marketing messages did so under detailed industry requirements which govern every aspect of the communications between the consumer and the marketer.¹² 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. 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. As part of the opt-in process, in order to ensure opt-ins are not deceptively obtained and that consumers fully understand what they are signing up for, 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.¹³ The structured opt-in framework applicable to mobile marketing campaigns is designed to ensure 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.

V. The Requested Clarification is Consistent with the 2012 TCPA Order and Final Rule Language, as well as the Policy Underlying Both; Granting the Request Does Not Require the Commission to Reverse Any Policy or Waive Any Rule.

While the explicit clarification requested by the Coalition will provide certainty and mitigate potential litigation risk, it will in no way require the Commission to undo any of its new rules nor in any way undermine its policy goals or intentions when adopting the new written consent rules.

¹² See Coalition Comments at pp. 2-3.

¹³ See 2012 TCPA Order, ¶ 33.

Nothing in the language of the *2012 TCPA Order* or final rule language is an impediment to the Commission explicitly acknowledging that entities may continue to rely on previously obtained written consent provided by consumers prior to October 16, 2013. For these consumers, the consent they have provided is already verifiable and they have been free to opt-out if they did not like the messages they were receiving. As a result, application of the new rules to this narrow category of existing written consents would not provide any additional protection for consumers.

As the Coalition has previously explained, the underlying Notice of Proposed Rulemaking (“NPRM”)¹⁴ provides insight into 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,”¹⁵ it may better protect consumers from “unscrupulous senders” of messages “who erroneously claim to have obtained the subscriber’s oral consent,”¹⁶ and it 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.”¹⁷ In the *Order*, the Commission further explained its policy reasons for nullifying previously obtained non-written consent: in the non-written context, there is no verifiable record of consent produced. Thus from a policy perspective, because existing customers who have already provided written consent that serves as unambiguous proof of consent, such consent already fulfills the same goals articulated by the Commission in adopting the new

¹⁴ *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”).

¹⁵ *See id.*, ¶ 19.

¹⁶ *See id.*, ¶ 20.

¹⁷ *See id.*, ¶ 22.

written consent requirement. As such, there was and is no reason for the Commission to nullify this specific category of consent by the new written consent rules.

Because of the explicit language of the *Order*, the expectation and understanding of Coalition members and many other companies involved in the mobile space was 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, and 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.

Although the *Order* is explicit in stating the Commission's intent regarding written versus non-written, and new customers versus previous customers, while the rules are not, the rule language is consistent. Nothing in the rules nullifies previously obtained written consent. Indeed, in further support, the rule applies when telemarketing is "initiated" without prior express written consent.¹⁸ Although the Commission has not defined "initiate," the common dictionary definition of "initiate" is "to start or begin (something)"¹⁹ or to "cause (a process or action) to begin."²⁰ 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 who have already been receiving messages. For these consumers, the new disclosure language will not provide any new protection. 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

¹⁸ 47 CFR 1200(a)(2).

¹⁹ Merriam-Webster Dictionary (2013).

²⁰ Oxford Dictionaries (2013).

just cause confusion. Clearly the point of the Commission's new rules was to offer consumers better protection, not increase consumer confusion or negatively impact the businesses that have been sending messages to consumers who have already provided verifiable written consent.

VI. The Federal Trade Commission's Treatment of the Established Business Exemption "Grandfathering" Issue Is Instructive for How Previously Obtained Written Consent Should be Treated Under the FCC's TCPA Rules.

Examining the manner in which the Federal Trade Commission ("FTC") treated the "grandfathering" issue when eliminating the established business relationship ("EBR") exemption under the Telemarketing Sales Rule ("TSR") is useful for interpreting the new opt-in requirements for written consent under the TCPA.²¹ Given some of the similarities between the EBR exemption and previously obtained 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, 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 explicit language not permitting the grandfathering of previously obtained non-written consent.

Second, previously obtained written consent in which a consumer expressly and specifically

²¹ See *Telemarketing Sales Rule*, Final Rule Amendments, 73 Fed. Reg. 51164, 51187-88 (2008).

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.²² 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 that the FTC did, the Commission would have explicitly addressed the issue and given companies clear notice and guidance concerning the treatment of written consents already provided by customers before the new rules took effect.

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

Nowhere in the *Order* did the Commission indicate any intent for the new TCPA rules to invalidate previously obtained written consent. Besides the policy reasons for not doing so, nullifying written consent that was previously provided by consumers in conformance with all applicable consent requirements in force at the time would constitute retroactive application of the new rules. The general principle that rules adopted by administrative agencies are applied prospectively only,²³ coupled with the absence of any discussion over how the Commission intended

²² *See id.*

²³ *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.”).

the new rules to contravene this general principle in either the NPRM or the *Order*, provide additional support for the Coalition's requested clarification.

VIII. Explicit Clarification Is Necessary to Reduce Consumer Confusion, Avoid Inadvertent Opt-Outs, and Mitigate Substantial Industry Hardship.

Requiring re-opt-ins in cases where customers have already provided written consent would result in inevitable widespread consumer confusion and substantial industry hardship. As a practical policy matter, without the requested clarification, in light of the potential ambiguity, 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. Also, receiving an additional opt-in request may confuse many consumers who could very well perceive a new opt-in request as spam.²⁴ In these instances, consumers may decide to ignore the re-opt-in request altogether, causing inadvertent opt-outs and a loss of desired messages. These negative consequences of an additional opt-in would not be offset by any substantial consumer benefit.

Furthermore, if the consents that have already been obtained are deemed to be invalidated by the new TCPA rules, the valuable subscriber lists that brands have spent a great deal of resources to develop and that contain customers who have already provided verifiable written consent would be reset to zero, nullifying the significant investment that has already been made. This waste of substantial resources would result in enormous hardship, particularly for small businesses that operate in the mobile space.

Given this inevitable cost and burden, the Commission would have addressed this significant impact in its Regulatory Flexibility Act ("RFA") analysis had it intended to nullify previously

²⁴ See Comments of The Marketing Arm – Wireless, in CG Docket no. 02-278, at 1 (dated December 17, 2013).

obtained written consent.²⁵ The RFA 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.²⁶ 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.²⁷

Although these requirements are procedural in nature,²⁸ the FCC must nevertheless make a "reasonable, good-faith effort to carry out the mandate of the RFA."²⁹ 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.³⁰

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.

²⁵ 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).

²⁶ See 5 U.S.C. § 604(a)(5).

²⁷ *Id.* § 604(a)(6).

²⁸ See *U.S. Cellular Corp. v. F.C.C.*, 254 F.3d 78, 88-89 (D.C. Cir. 2001).

²⁹ *Alenco Comm'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).

³⁰ *Id.* (quoting 5 U.S.C. § 604(a)(5)).

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 stated:

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.³¹

Here, and in the *Order* itself,³² the Commission specifically used 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 was E-SIGN-compliant. Given this, the Commission did not have to conduct any further analysis under the RFA because 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 provides further compelling evidence that the Commission 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).³³ This conclusion is

³¹ See *2012 TCPA Order*, Regulatory Flexibility Analysis, Appendix C, ¶ 12 (emphasis added).

³² 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).

³³ 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 Dec. 16, 2013.

further supported by the fact that neither the NPRM nor the Initial RFA included any mention of nullification of previously obtained written consent. Such notice would have been required if nullification had been the Commission's intent so that parties could have had the opportunity to comment.

Finally, requiring a fresh written opt-in each and every time the Commission changes its rules for all operators in the mobile space would result in practical difficulties and cause an inevitable chilling effect on the use of text message marketing going forward. If there is a precedent for nullification, mobile marketers will no longer consider building costly and resource-intensive databases to be a wise investment since the resulting subscriber lists 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.

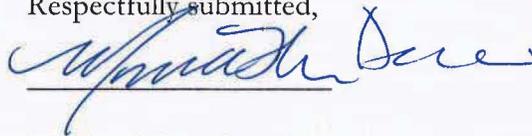
IX. Conclusion.

The Coalition submitted its request out of an abundance of caution to foreclose a possible wave of frivolous class actions lawsuits on this issue. An overwhelming majority of commenters, including those submitted by major trade associations and coalitions representing thousands and thousands of diverse companies, support the Petition. Of the three commenters that oppose the Petition, not one articulates any plausible evidence that demonstrates the Commission intended for the new prior express written consent rules to apply to previously obtained written consent, nor how consumers who have already provided express written consent and have already been receiving mobile marketing messages will in any way benefit from receiving new disclosures that are not relevant in this narrow context.

Given the substantial evidence and support in the record, the Coalition respectfully requests the Commission to declare explicitly what it has already made clear in the *Order*: the revised TCPA rules that became effective on October 16, 2013, do not nullify written consent provided by

consumers prior to that date. Given the tremendous uncertainty and litigation risk caused by the current absence of explicit clarification, it is critical that the Commission make the requested clarification so that mobile marketers can confidently resume operations and consumers can continue to receive the desired communications that they have already provided verifiable written consent to receive.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Monica S. Desai", is written over a horizontal line.

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Dated: December 17, 2013