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

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. CG 02-278
	)	
	)	
Petition for Declaratory Ruling of the Retail Industry Leaders Association (RILA)	)	
	)	

To: The Commission

COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

The Retail Industry Leaders Association ("RILA"), a trade association representing over 200 retailers, product manufacturers, and service suppliers, submits these comments in support of its Petition for Declaratory Ruling in the above referenced proceeding.[1] Specifically, and as further detailed in its Petition, RILA respectfully urges the Commission to declare explicitly that the Telephone Consumer Protection Act ("TCPA") rules effective October 16, 2013,[2] do not apply to isolated, immediate, one-time responses to consumer-initiated requests for text offers ("on demand text offers" or "on demand texts").

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[1] Retail Industry Leaders Association, *Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed Dec. 30, 2013) ("RILA Petition" or "Petition"); *see also*, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Filed by Retail Industry Leaders Association*, Public Notice, CG Docket No. 02-278, DA 14-75 (rel. Jan. 22, 2014)("Public Notice").

[2] See *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"); *see also* 47 C.F.R. § 64.1200(a)(2) and (a)(3) ("prior express written consent rules").

I. BACKGROUND ON THE RETAIL INDUSTRY LEADERS ASSOCIATION

RILA is a trade association whose more than 200 retailer, product manufacturer, and service provider members include the world's largest and most innovative retail companies. Together, RILA members account for more than $1.5 trillion in annual sales; millions of American jobs; and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad. RILA is a known as a trusted source to speak on behalf of leading retailers and is committed to ensuring that lawmakers and regulators understand emerging trends in the retail industry, including how government actions may impact retailers. RILA's voice on such issues is especially pertinent, as throughout the retail industry it has become increasingly common for smartphone-equipped consumers to expect and demand concierge-like, personalized experiences. Today, one of the most important ways retailers meet these increasing consumer expectations for value, personalization, and convenience is through the use of on demand text offers.

II. THE COMMISSION SHOULD CLARIFY THAT ITS RULE REQUIRING PRIOR EXPRESS WRITTEN CONSENT TO RECEIVE TEXT MESSAGES DOES NOT APPLY TO ON DEMAND TEXTS.

As RILA detailed in its Petition, on demand text offers are <u>only</u> sent as a one-time, immediate response to a consumer-initiated request. For instance, a consumer sees a call to action display (e.g., "text 'special stock-up discount' to 56-789 for 25% off your next purchase"). Next, if interested, the consumer texts "special stock-up discount" to 56-789. Finally, as expected, the consumer receives a near instant text response containing the desired offer. No additional offers are sent in response to the particular, one-time consumer-initiated text request – the consumer only receives what was specifically requested and expected.

RILA believes the Commission had no intention for the prior express written consent rules to apply to such consumer-initiated on demand texts. RILA urges the Commission to declare this explicitly. First, under the revised TCPA rules, it is unlawful to "initiate, or cause to be initiated" any telemarketing call or advertisement to a wireless number using any automatic telephone dialing system or an artificial or prerecorded voice without the prior express written consent of the called party.[3] Although neither the TCPA statute nor rules define the term "initiate," earlier this year, the Commission clarified that "a person or entity 'initiates' a telephone call when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities, such as third-party retailers, that might merely have some role, however minor, in the causal chain that results in the making of a telephone call."[4]

In the on demand text offer context, common sense dictates that the consumer is the initiating party – the consumer "physically place[s]" the "call," requesting information while the retailer's role is limited to responding to the consumer's specific request.[5] Thus, one-time on

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[3] 47 C.F.R. § 64.1200(a)(2).

[4] *See The Joint Petition Filed by DISH Network, LLC, the United States of America, and the States of California, Illinois. North Carolina, and Ohio for Declaratory Ruling Concerning the TCPA Rules, et al.*, Declaratory Ruling, 28 FCC Rcd 6574, FCC 13-54, ¶ 26 (2013) ("DISH Network Declaratory Ruling")("The dictionary meaning of the term is "to set going, by taking the first step."); *see also*, *DISH Network, LLC v. FCC*, No. 13-1182, slip op. at 2 (D.C. Cir. Jan. 22, 2014) (reviewing separate portion of DISH Network Declaratory Ruling involving guidance to courts regarding applicability of common law of agency in the telemarketing context).

[5] As RILA explained in its Petition, while the FCC has declared text messages to be "calls" pursuant to the TCPA, there are several reasons to question that conclusion.

demand texts sent by retailers in response to consumer-initiated requests do not qualify as "initiating" a call and are therefore not subject to the prior express written consent rules.

Next, the prior express written consent rules prohibit the initiation of a call that "includes or introduces an advertisement or constitutes telemarketing" other than a call made with the prior express written consent of the called party.[6] The Commission defines "advertisement" as any material "advertising the commercial availability or quality of any property, goods, or services;"[7] however, the Commission has not defined "advertising." The dictionary definition of advertising is "the action of calling something to the attention of the public especially by paid announcements."[8] In the case of on demand texts, the material "calling something to the attention of the public" is found in a separate source, such as, for example, a newspaper, magazine, billboard or store display. After viewing that advertisement and its associated promotional offer, the consumer wanting to take advantage of the offer initiates the request through a text. Then, an on demand text is sent in response to the consumer containing the promotion or offer expressly requested.

Similarly, the Commission defines "telemarketing" as "the initiation of a telephone call or message for the purpose of encouraging a purchase or rental, or investment in, property, goods, or services."[9] By contrast, in this context, the consumer has initiated the request for specifically

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[6] 47 C.F.R. § 64.1200(a)(2).

[7] 47 C.F.R. 64.1200(f)(1).

[8] *See* RILA Petition at p. 5, fn. 12.

[9] 47 C.F.R. 64.1200(f)(12).

desired information after evaluating a separate advertisement. As a result, because the purpose of an on demand text is to respond "on demand" to the consumer's specific request, the response is not "telemarketing" and the new prior express written consent rules do not apply.

III. MAKING THE REQUESTED CLARIFICATION DOES NOT IMPLICATE ANY OF THE CONCERNS THAT THE COMMISSION HAD IN ADOPTING ITS UPDATED RULES AND WILL ENSURE THAT CONSUMERS CONTINUE TO RECEIVE EXPECTED, HIGHLY DESIRABLE COMMUNICATIONS.

Concerned with "telemarketers contact[ing] the same number repeatedly, telemarketers mak[ing] calls during the dinner hour or late at night, calling parties [that] do not identify themselves, and unsolicited calls placed to cellular numbers [that] often impose costs on the called party," Congress passed the TCPA in 1991 to protect consumer privacy and deter such abusive telemarketing practices.[10] Because one-time on demand texts are in direct response to a consumer's request, they in no way impinge on that consumer's privacy. Thus, this clarification will not undermine Congress' intent in enacting the TCPA.

Moreover, in the House report on what ultimately became section 227 of the TCPA, Congress made it clear that it did not intend for the TCPA to apply to "expected or desired" business communications to wireless numbers.[11] The responsive on demand text containing only

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[10] *See Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1008 (N.D. Ill. 2010).

[11] *See* House Report 102-317, 1st Sess., 102nd Cong. (1991), at 17 (emphasis supplied).

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the expressly requested offer is both expected and desired by the consumer, and is therefore consistent with the goals and objectives of the TCPA.

When enacting rules to implement the TCPA, the Commission has consistently sought to thwart invasive telemarketing practices. Specifically, in the 2012 TCPA Order, the Commission reiterated that the prior express written consent rules were meant to "offer consumers greater protection from intrusive telemarketing calls" and "unwanted calls."[12] As RILA explained in its Petition, the Commission's reasoning in support of prior express written consent and its ability to "better protect" consumers simply does not apply in the on demand text scenario.[13]

In fact, the Commission has explicitly recognized that not all calls to wireless numbers are problematic, and that instead some calls "offer access to information that consumers find highly desirable."[14] On demand texts by definition contain "highly desirable" information, by providing consumers with the information that they expressly have requested.

In light of the inherently limited, non-invasive nature of on demand texts that in no way impinge on consumer expectations of privacy or undermine the Commission's goals in adopting a written consent requirement, the Commission should explicitly declare that its updated prior written express consent requirements do not apply to on demand text offers.

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[12] *See* 2012 TCPA Order, ¶¶ 1, 2, 4.

[13] RILA Petition at p. 7.

[14] *See* 2012 TCPA Order, ¶ 29.

IV. MAKING THE REQUESTED CLARIFICATION MAKES SENSE FROM A CONSUMER POLICY PERSPECTIVE AND IS NECESSARY TO ELIMINATE UNCERTAINTY OVER THE APPLICATION OF THE UPDATED TCPA RULES TO ON DEMAND TEXTS.

Consistent with recent court decisions, the Commission should take a common sense approach in evaluating the applicability of the TCPA to on demand texts.[15] Not only does the requested declaration comport with the language and intent of the TCPA and the Commission's implementing rules, but it also makes sense from a consumer policy perspective. First and foremost, RILA's requested clarification will not change any existing protections that the Commission has implemented related to the unwanted, invasive telemarketing messages that the TCPA was designed to thwart. Simultaneously, the requested clarification will preserve the preference of consumers to receive convenient on demand offers, which are inherently desired communications expressly requested by consumers.

Second, prior express written consent rules do not make sense in the on demand text scenario because there is no continuous, ongoing communication for which a disclosure would apply. As a result, consumers are likely be confused by receiving required disclosure language, incorrectly inferring that the message means they will have to opt-in to an entire campaign in order to receive one isolated offer. The Commission could not have intended to confuse consumers or to inconvenience consumers by requiring them to take several steps to receive a specific, desired,

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[15] *See, e.g.*, *Gragg v. Orange Cab Co.*, 2014 U.S. Dist. LEXIS 16648 at *3-4 (W.D. Wa. Feb. 7, 2014)(adopting the 9th Circuit's "common sense" approach to reviewing TCPA claims, and citing *Chesbro v. Best Buy Stores, L.P.,* 11-35784, 705 F.3d 913 (9th Cir. Dec. 27, 2012)). *See also, Ryabyshchuck v. Citibank (S.Dakota) N.A.*, 2012 U.S. Dist. LEXIS 156176 at *8-9 (S.D. Cal. 2012)("context is indisputably relevant to determining whether a particular call is actionable under the TCPA").

one-time text offer. Accordingly, to eliminate these perverse consumer policy consequences, the Commission should make the explicit clarification that the new prior express written consent rules do not apply to on demand text offers.

Finally, the number of TCPA class action lawsuits continues to rise, often based on legal theories designed to expand liability in ways that Congress never intended. One study estimates that TCPA lawsuits rose by an annualized rate of 70 percent in 2013 alone.[16] As RILA has explained, given the enormous costs of defending even frivolous litigation, and the risk (even if small) of a losing verdict, many companies feel compelled to settle TCPA cases, even when they are devoid of any merit.[17] As a result, some retailers are beginning to forego the use of on demand offers altogether to eliminate the potential risk of expensive class action lawsuits. This outcome is inconsistent with clear consumer preference and could not be what the Commission intends.

Thus, to avoid depriving consumers of the types of communications they desire, as well as to eliminate uncertainty and shield retailers from having to defend against costly, meritless litigation, it is critical for the Commission to explicitly make the narrow requested clarification that the prior express written consent rules do not apply to one-time, on demand text offers sent in response to a consumer initiated request.

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[16] Darren Waggoner, *TCPA Lawsuits Projected to Grow 70 Percent in 2013*, Collections&CreditRisk, Dec. 26, 2013, available at http://www.collectionscreditrisk.com/news/tcpa-lawsuits-projected-to-grow-3016431-1.html (free registration required)(last accessed Feb. 20, 2014); Patrick Lunsford, *TCPA Lawsuits Really are Growing Compared to FDCPA Claims*, insideARM.com (Accounts Receivable Management), available at http://www.insidearm.com/daily/debt-buying-topics/debt-buying/tcpa-lawsuits-really-are-growing-compared-to-fdcpa-claims/ (last accessed Feb. 20, 2014).

[17] RILA Petition at pgs. 9-10.

IV. CONCLUSION.

In enacting the TCPA, Congress sought to combat annoying, invasive and unwanted automated telemarketing calls that threaten consumer privacy. On demand texts do not implicate any of these important concerns, or any of the concerns raised by the Commission in adopting the prior express written consent rules. RILA believes the Commission had no intention for the prior express written consent rules to apply to such consumer-initiated on demand texts. These are consumer-friendly communications that are expressly requested, expected, and highly desired by consumers. Specifically, on demand texts are: (1) proactively initiated by a consumer, (2) isolated, one-time only messages sent immediately in response to a consumer's request, and (3) provide the consumer with the specific information requested by a consumer.

Given these characteristics, RILA requests that the Commission declare expeditiously that its prior express written consent rules do not apply to this narrow category of text messages. This important clarification is consistent with Congress's intent not to impede "desired or expected" communications between consumers and businesses, and makes sense from a consumer policy perspective. Critically, the requested ruling will allow retailers and other companies that send one-time, responsive on demand text messages to continue this consumer-friendly practice without uncertainty or fear of expensive, frivolous litigation.

As RILA stated in its petition, common sense dictates that if a consumer asks a retailer to send a text with a specific offer or coupon, the retailer should be able to respond to that specific request without being subject to TCPA liability.

Respectfully submitted,

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