

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

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Petition for Declaratory Ruling of the Retail
Industry Leaders Association

CG Docket No. 02-278

**VIBES MEDIA COMMENTS IN SUPPORT OF RILA PETITION FOR
DECLARATORY RULING**

Vibes Media, LLC (“Vibes”) respectfully asks the Commission to grant the petition of the Retail Industry Leaders Association (“RILA”)¹ regarding application of the Commission’s rules implementing the Telephone Consumer Protection Act (“TCPA”) to on demand text offers. The Commission should clarify that these messages—one-time texts sent to a customer in response to a specific request by the customer, and containing only information expected by the customer—are not subject to TCPA’s prior express written consent requirement. The TCPA was enacted to protect consumers from abusive and potentially fraudulent telemarketing activities—not from expected contact by marketers with information the consumers specifically requested. Application of the prior express written consent rule to on demand text offers is contrary to the TCPA’s purposes; it will create consumer confusion as well as increase the possibility of frivolous class action litigation under the TCPA.

¹ Petition for Declaratory Ruling of the Retail Industry Leaders Association, CG Docket No. 02-278 (Dec. 30, 2013) (“RILA Petition”).

I. Background on Vibes' Mobile Marketing Services

Founded in 1998, Vibes is a mobile marketing technology leader that helps some of the world's biggest brands acquire, engage, and deepen relationships with an interested and engaged consumer base. Vibes' mobile solutions include mapping out a mobile strategy, building permission-based mobile databases, driving sales with mobile coupons, activating sponsorships, and integrating with companies to forge immediate, long-lasting and mutually beneficial customer relationships. Vibes also works with its clients to develop program ideas, provide compliance assistance, and generate strategic support, analytics, short code management, and carrier connectivity services.

Vibes' mobile marketing platform, Catapult, allows marketers from some of the most recognizable brands in the world to instantly create on-demand text messaging campaigns. These campaigns are created using keywords and a shortcode, allowing a user to send a text message to the short code and instantly receive a one-time bounceback message containing product or brand information, important news, or a link that the user can click on to be redirected to a variety of mobile web experiences, including mobile web offers.

Vibes works closely with mobile governing bodies such as the Mobile Marketing Association ("MMA") and CTIA-The Wireless Association, ensuring that all of its messaging is compliant and adheres to industry rules, regulations, and best practices. For more than 15 years, Vibes has been a leader in mobile marketing technology and on demand messaging plays a critical role in our customers' overarching mobile marketing strategy.

II. The Commission Should Clarify that On Demand Text Offers Are Not Subject to the TCPA's Prior Express Written Consent Requirement

The prior express written consent requirement is designed to ensure that consumers are not subject to abusive marketing techniques that result in a bombardment of unwanted calls.

This underlying purpose, however, is not served by requiring prior express written consent for on demand text offers. Moreover, requiring prior express written consent for on demand text offers will actually increase consumer frustration and confusion, by requiring them to consent in writing to receiving messages that they expressly request. Finally, unless the Commission clarifies that on demand text offers are not covered by the prior express written consent requirement, retailers and the mobile services companies that work with them on marketing campaigns will be subject to increased risks of frivolous litigation and the wasted costs that such litigation represents.

A. The TCPA Protects Consumers from Unwanted Telemarketing Messages

Congress passed the TCPA to curb the growth of abusive telemarketing practices— notably, excessive and unwanted calls from telemarketers, particularly where the called party then had to pay for the call.² Over the years, the FCC has adopted and amended its TCPA rules to ensure that this overarching goal continues to be met, even as consumers’ telecommunications needs have evolved.³

But Congress never intended to curtail the ability of marketers to reach consumers who desire or expect calls from those companies. Indeed, the TCPA defines “telephone solicitation” as “the initiation of a telephone call or message for the purpose of encouraging a purchase or rental...but such term does not include a call or message (A) to any person *with that person’s*

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

³ See, e.g., *Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, FCC 03-153 ¶ 165 (2003) (finding that SMS messages are “calls” for the purpose of the TCPA).

prior express invitation or permission.”⁴ And in the parallel provisions regarding certain use of facsimile machines, the TCPA singles out “*unsolicited* advertisements” as prohibited.⁵

The Commission’s rules similarly single out the *initiation* of a call made for the purpose of encouraging a purchase as the defining characteristic of telemarketing. And as RILA’s petition makes clear, “initiation” in the context of the TCPA does not encompass activities that “merely have some role, however minor, in the causal chain that results in the making of a telephone call.”⁶ In short, where a marketer makes a call or sends a message to a consumer *only in response to the consumer’s request*, the consumer, not the marketer, has initiated those calls and messages.⁷ And those calls are not covered by the TCPA.

B. On Demand Text Offers Are Fundamentally Different from the Marketing Messages Targeted by the TCPA

“On demand” text offers are very different from the abusive telemarketing practices the TCPA was enacted to prohibit. They are, in fact, precisely the kind of messages Congress explicitly noted should not be limited by the TCPA—calls that are “expected and desired.”⁸ On demand messages are sent only in response to a customer inquiry, they do not recur, and they

⁴ 47 U.S.C. § 227(a)(4) (emphasis added).

⁵ 47 U.S.C. § 227(b)(1)(c) (emphasis added).

⁶ *See The Joint Petition Filed by DISH Network, LLC, the United States of Am., & the States of California, Illinois, N. Carolina, & 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”); RILA Petition at 4.

⁷ *See* RILA Petition at 3-4 (describing the difference between interactions with a consumer initiated by a marketer and interactions with a consumer initiated by the consumer).

⁸ *See* H.R. REP. 102-317, 1st Sess., 102nd Cong. (1991), at 17; *see also Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, Declaratory Ruling, 27 FCC Rcd. 15391, FCC 12-143 ¶ 8 & n.34 (2012).

contain only the information the customer expects.⁹ They are, in every sense, expected and desired.

The fundamental disconnect between application of the TCPA to on demand text messages and abusive telemarketing practices is illustrated by contrasting the application of the prior express written consent rule in the voice context to the text context. When a consumer makes a voice call to a retailer to find out more information about an offer, no one expects that retailer to obtain prior express written consent from the consumer before taking a call—or returning a call—to provide the desired information. But because the rules do not treat voice calls and text messages differently, that is precisely what the retailer must do if the prior express written consent requirement applies to on demand text messages. Thus, if retailers must obtain prior express written consent for on demand text offers, they must also obtain prior express written consent for “on demand” voice calls. No one, though, believes that is the case for voice calls; it similarly should not be the case for text messages.

C. Ensuring that On Demand Text Messages are Not Subject to the Written Consent Requirement Will Reduce Confusion and Frustration for Consumers

By clarifying that on demand text offers are not subject to the prior express written consent requirement, the Commission will not only ensure that its rules are applied only in the circumstances contemplated by Congress, but also will reduce consumer confusion and frustration. In addition, because consumers pay for both sent and received text messages, declaring that on demand text messages do not require prior express written consent will ensure

⁹ RILA Petition at ii, 3. On demand text offers are distinct from other forms of mobile marketing, such as subscription services, where customers opt in to receive a series of ongoing messages or alerts.

that consumers do not need to pay for additional text messages to accommodate that unneeded consent.

When a consumer responds to a call to action or other marketing campaign by requesting information, the consumer expects to receive that information. If retailers are required to send a request for consent first, instead of sending the requested information, consumers are likely to be confused as well as frustrated. Instead of receiving the information they requested, the consumer would first be confronted with a requirement to provide written consent. In some cases, consumers might take that request for consent as illegitimate or an attempt to sign them up for information they do not want to receive. The result is that they may give up on the process—and ultimately never receive the information they wanted.

In addition, if retailers are required to send an additional message seeking prior express written consent to send the requested on demand text offer, consumers will end up paying for twice as many messages as contemplated. Instead of paying for a single outbound text message and a single inbound text message—one requesting information and one containing the requested information—consumers will pay for two outbound and two inbound messages, to accommodate the initial request for information, the request for written consent from the retailer, the written consent itself, and finally the requested information.

Most troubling, while application of the prior express written consent rule might ultimately reduce the number of messages that a consumer receives by discouraging retailers and marketers from using on demand text offers, it would do so at the expense of legitimate business' ability to market products and services to consumers *who actually want to receive those offers*. Burdening on demand text offers with a prior express written consent requirement will all but

eliminate this type of marketing—marketing that consumers respond to and enjoy.¹⁰ The TCPA was not meant to restrain legitimate business practices, but applying the prior express written consent rule to on demand text offers would do just that. The Commission should instead clarify that on demand text offers are not covered by the TCPA and that retailers do not need to obtain prior express written consent before responding to an on demand consumer request for information via text.

D. Clarifying the Rules Will Reduce the Likelihood of Frivolous Litigation

As RILA points out, TCPA class actions have proliferated in recent years.¹¹ And the new rules expanding the circumstances under which retailers must get prior express written consent from consumers has created uncertainty that only increases the risk of unwarranted litigation.¹² Because the costs of defending against even frivolous litigation can quickly become unsustainable, the result may be, as RILA argues, that retailers and marketers will be forced to settle such cases.¹³ Alternatively, retailers and marketers may change their business practices to avoid what are otherwise legitimate marketing techniques, merely to avoid a frivolous lawsuit.

¹⁰ For instance, consumers at a point of sale might see an offer that can save them money on their transaction or that will provide more information about a particular product, such as consumer reviews. On demand text offers enable retailers to provide consumers with these offers and information when it is most timely and relevant. And consumers respond to these offers—Forrester Research estimates that 17 percent of consumers are interested in texting to receive a discount or promotion they can use and that 45 percent of consumers use their phones to research physical goods they are interested in purchasing. Forrester Research, *Mobile Commerce Solution Providers, Q4 2013* (Dec. 27, 2013).

¹¹ RILA Petition at 9.

¹² See, e.g., Shannon S. Petersen & Adrienne Lee, *New FCC Interpretation of “Express Consent” to Increase TCPA Class Action Liability*, Mondaq (Nov. 3, 2013), <http://www.mondaq.com/unitedstates/x/272692/Consumer+Law/New+FCC+Interpretation+Of+Express+Consent+To+Increase+TCPA+Class+Action+Liability>.

¹³ RILA Petition at 10.

The Commission can help prevent these negative effects by clarifying that one-time messages received in response to a customer-initiated request, that contain only the information requested by the consumer, do not fall within the scope of the TCPA and do not require prior express written consent. Such clarification will provide certainty and predictability for businesses and consumers, without undermining the Commission's broader consumer protection goals.

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Vibes respectfully asks the Commission to grant the petition of RILA for a declaratory ruling that the prior express written consent rules do not apply to on demand text offers. Such a ruling is consistent with the Congressional intent in the TCPA as well as with the Commission's overarching TCPA regime. It will ensure that retailers and marketers continue to have the ability to respond to interested consumers, will reduce consumer confusion and frustration, and will provide retailers and marketers with much-needed certainty and predictability in the face of rising TCPA class action litigation.

Respectfully submitted,



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