

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Petition for Declaratory Ruling of the Retail)	
Industry Leaders Association (RILA))	
)	
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COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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To: The Commission

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CTIA – The Wireless Association® (“CTIA”)¹ hereby submits these comments in response to the FCC’s request for public comments and in support of the Retail Industry Leaders Association’s (“RILA”) Petition for Declaratory Ruling in the above captioned proceeding.² In these comments, CTIA respectfully urges the Commission to declare that its Telephone Consumer Protection Act (“TCPA”) rules effective October 16, 2013 (“prior express written consent rules”),³ do not apply to isolated, immediate, one-time responses to consumer-initiated requests for text offers (“on demand text offers” or “on demand texts”). Such communications

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization includes Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² 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”).

³ 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”).

are both desired and expected by consumers. Moreover, a declaration by the FCC would be consistent with the privacy and consumer protection goals of the FCC and is important to provide explicit guidance, particularly in today's climate of increasingly frivolous and expansive lawsuits under the TCPA.

I. THE COMMISSION SHOULD CLARIFY THAT THE PRIOR EXPRESS WRITTEN CONSENT RULES DO NOT APPLY TO ON DEMAND TEXTS.

On demand text offers are messages that organizations, like retailers or other sellers of goods and services, send as a one-time immediate response to a consumer-initiated request. For instance, a typical scenario and the rapidly occurring sequence of events would be: (1) an in-store consumer views a display with an offer for a free e-Gift card with the purchase of one or more promotional items; (2) such consumer purchases the item(s); (3) the consumer then highlights the item(s) on the store receipt and takes a picture of it with his or her smartphone; (4) next, to request the offer, the consumer texts the picture and the offer keyword that was shown on the display to a short code; and finally, (5) the consumer receives the on demand text in response to his or her request with a reward code that can be redeemed for the desired e-Gift card.

Under the Commission's prior express written consent 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.⁴ However, CTIA agrees with RILA that the Commission's intent could not have been for these rules to apply when a consumer has specifically requested a particular message be sent, as is the case with on demand texts (as shown in the typical sequence of events above).

⁴ 47 C.F.R. § 64.1200(a)(2).

Further, as detailed by RILA in its Petition, while the term “initiate” is not defined, the Commission has made clear 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.”⁵ Common sense dictates that in the case of on demand text offers, the initiating party is the consumer who has requested a specific text offer.⁶

Finally, and equally vital to the inapplicability of the Commission’s prior express written consent rules in this context, CTIA agrees with RILA that neither the Commission’s definition of “advertisement” (and its use of “advertising”) nor its definition of “telemarketing,” as used in the context of the prior express written consent rule, reasonably fit in the on demand text offer context.⁷

II. THE EXPLICIT CLARIFICATION REQUESTED BY RILA DOES NOT THWART THE IMPORTANT POLICY GOALS UNDERLYING THE TCPA, BUT INSTEAD WILL SUPPORT CONSUMER DEMANDS TO RECEIVE DESIRED COMMUNICATIONS.

CTIA supports the important privacy and consumer protection goals underlying the TCPA. To that end, providing explicit clarification that the prior express written consent rules do not apply to consumer-requested on demand texts will not undermine those goals. As RILA highlighted in its Petition, Congress intended that the TCPA should not apply to “expected or

⁵ See RILA Petition at pgs. 3-4; *see also*, *DISH Network, LLC v. FCC*, No. 13-1182, slip op. at 2 (D.C. Cir. Jan. 22, 2014) (reviewing distinct section of the DISH Network Declaratory Ruling regarding guidance to courts on common law of agency applicability in the telemarketing service provider context).

⁶ As RILA explained in its Petition, CTIA recognizes that the Commission has declared text messages to be “calls” under the TCPA, but suggests that such a conclusion is questionable.

⁷ See RILA Petition at pgs. 4-6.

desired” communications.⁸ And the Commission has recognized that some calls “offer access to information that consumers find highly desirable.”⁹ One-time, on demand texts are a good example of the type of communications desired by a consumer, as they are sent in direct response to a consumer’s specific request.

As the number and expansive nature of TCPA lawsuits continues to increase, and in light of the costs associated with defending even frivolous actions, it is critical for the FCC to make the requested clarification.¹⁰ Doing so will ensure that consumers continue to receive these desirable communications.

III. CONCLUSION

To ensure that consumers continue to receive the communications that they desire, and specifically request, and that providers of on demand texts, like retailers, have the certainty they need, CTIA joins RILA in urging the Commission to explicitly declare that on demand texts are not within the scope of its prior express written consent rules.

⁸ RILA Petition at pg. 6 and fn. 15 (explaining that a House report regarding TCPA deliberations “made it crystal clear” that the law should not be applied to “expected or desired” communications between business and their customers); *see also*, 137 Cong. Rec. S9874 (daily ed. July 11, 1991) (statement of Sen. Hollings, noting that the TCPA was “purely targeted at those calls that are the source of the tremendous amount of consumer complaints...telemarketing calls placed to the home.”).

⁹ *See* RILA Petition at pg. 8 (citing *2012 TCPA Order* ¶ 29).

¹⁰ *See* RILA Petition at pgs. 9-10 (discussing TCPA lawsuit trends and uncertainty that is leading retailers to avoid the use of on demand texts).

Respectfully submitted,
By:

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