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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 – Retail Industry Leaders Association (“RILA”), Petition for Declaratory Ruling in CG Docket No. CG 02-278**

Dear Ms. Dortch:

On February 25, 2014, Deborah White, General Counsel, Retail Industry Leaders Association (“RILA”), and Monica Desai of Patton Boggs, LLP, counsel to RILA, met with the following individuals from the Federal Communications Commission (“FCC” or “Commission”) Consumer and Governmental Affairs Bureau, including: Kris Monteith (Acting Bureau Chief), Mark Stone (Deputy Bureau Chief), Aaron Garza (Legal Advisor), Kurt Schroeder (Acting Chief, Consumer Policy Division), John B. Adams (Acting Deputy Chief, Consumer Policy Division), Lynn Follansbee (Attorney), and Kristi Lemoine (Attorney).

During the meeting, RILA and its counsel discussed in detail the issues raised in its Petition for Declaratory Ruling (“Petition”) and subsequent comments.¹ Specifically, RILA asked that the Commission declare 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”), where such communications: (1) are proactively initiated by the consumer, not a telemarketer, (2) consist of isolated, one-time only messages sent immediately in response to a consumer’s specific request, and (3) contain only the specific information requested by the consumer.

¹ Retail Industry Leaders Association, *Petition for Declaratory Ruling*, CG Docket No. 02-278 (filed Dec. 30, 2013) (“RILA Petition” or “Petition”); *Comments of the Retail Industry Leaders Association*, CG Docket No. 02-278 (filed Feb. 21, 2014).

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 *et al.*

RILA and its counsel further emphasized that the Bureau, on delegated authority, or the Commission, could grant the Petition under several theories:

1. Consistency with the Commission’s decision in the Soundbite Declaratory Ruling:

RILA emphasized that because one-time, responsive, on demand texts in no way impinge on a consumer’s privacy, and instead are a direct response providing what the consumer specifically requested, the clarification it is requesting will not undermine the congressional intent of the TCPA. When enacting the TCPA, Congress was most 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.”³ Moreover, RILA explained that in the House report on what ultimately became section 227 of the TCPA, Congress made it crystal clear that it did not intend for the TCPA to apply to “expected or desired” business communications to wireless numbers. Specifically, the House report states, “[t]he restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications,” including those that are “expected or desired . . . between businesses and their customers.”⁴

The Commission relied on this House report when declaring that a one-time text message confirming a consumer’s request to opt out of a text messaging campaign does not violate the TCPA or the Commission’s rules.⁵ In *Soundbite*, the Commission concluded that such opt-out confirmation messages are “normal communications” that are “expected or desired”, and thus outside the TCPA’s intended scope.⁶ The Commission found that under the circumstances at issue, a consumer’s consent to receive such confirmation texts could be “reasonably construed.”⁷

In the on demand text context, it is even more reasonable to construe the consumer’s consent. Indeed, in the on demand context, the consumer has proactively requested a specific text offer and then the retailer immediately sends the one-time response containing the specifically requested information – information *that is both expected and desired*.

³ See *Lozano v. Twentieth Century Fox Film Corp.*, 702 F. Supp. 2d 999, 1008 (N.D. Ill. 2010).

⁴ See House Report 102-317, 1st Sess., 102nd Cong. (1991), at 17.

⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 27 FCC Rcd 15391 (2012) at ¶¶ 1, 8 (the “*Soundbite*” decision).

⁶ *Id.* at ¶ 8.

⁷ *Id.* at ¶¶ 7, 9.

2. There is Overwhelming Support in the Record for Grant of the Petition

The vast majority of the commenters supported RILA's petition, given the desirable nature of on demand texts for consumers and businesses.⁸ Even opposing comments agree that under the strict parameters suggested by RILA, on demand texts do not trigger the prior express written consent rules. For example, Gerald Roylance stated, "If the [on demand] text was sent in response to a consumer's inquiry, then the response text is never a violation."⁹ Further, in his comments, Joe Shields noted, "[t]he Commission has already ruled that a one-time confirmation text sent in response to a consumer's opt out request does not violate the TCPA requirement of prior express consent provided however that there was prior express consent for the text messages the consumer is opting out from. . . . The text message(s) at issue in the petition, on the surface, appear to be no different."¹⁰ And, Robert Biggerstaff also apparently recognizes the limited nature of the messages described in RILA's Petition, commenting that "If a responsive text message constitutes only content expressly consented to by the consumer, then a text from the consumer requesting that information be sent to the consumer by text might satisfy the burden that written consent must be obtained, as long as the appropriate documentation of the consent was maintained."¹¹

Moreover, 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. Nor will such a clarification change any of the obligations of retailers under myriad federal and state privacy protection rules.¹²

⁸ See, e.g., Comments in support submitted by National Association of Broadcasters, National Association of Chain Drug Stores, CTIA – The Wireless Association, and American Financial Services Association, in CG Docket No. 02-278.

⁹ *Gerald Roylance's Comments re Retail Industry Leaders Association's Petition*, CG Docket No. 02-278 (filed Feb. 21, 2014) at 3.

¹⁰ *Comments of Joe Shields on the Petition for Declaratory Ruling of the Retail industry Leaders Association*, CG Docket No. 02-278 (filed Feb. 21, 2014) at 2.

¹¹ *Comments of Robert Biggerstaff in the Petition of RILA*, CG Docket No. 02-278 (filed Feb. 21, 2014) at 2.

¹² See, e.g., Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; Children's Online Privacy Protection Act ("COPPA"), 5 U.S.C. §§ 6501-6505; California Online Privacy Protection Act ("CalOPPA"), Cal. Bus. & Prof. Code § 22575 *et seq.*

3. A Grant is Consistent with Common Sense

In promulgating its new rules, the Commission stated that it wanted to “avoid unnecessarily impeding consumer access to desired information.”¹³ An on demand text provides just such information, including a particular offer, that the consumer has specifically requested and finds desirable. Recent court decisions have emphasized the importance of taking a common sense approach in evaluating TCPA issues.¹⁴ RILA emphasized that common sense would strongly favor granting the Petition under the narrow circumstances outlined by RILA. Because on demand texts are one-time communications, providing the specific disclosure language under the prior express written consent rules does not make sense because there is no continuous, ongoing communication for which the disclosure would apply.

In fact, the Commission 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.”¹⁵ On demand texts fall squarely into the category of calls to wireless numbers that contain “highly desirable” information.

4. Consistency with the Rules in Place

The 2012 TCPA Order did not appear to contemplate the need for the prior express written consent disclosures in the context of a one-time text response to a consumer-initiated request. Instead, the Commission appeared to contemplate application of the prior express written consent in the situation of ongoing calls, or at least more than one call, as reflected in the references in the order to the receipt of future “calls.”¹⁶ The Commission’s very definition of “prior express written consent” also suggests applicability in situations where there are ongoing messages (authorization to receive “advertisements” in the plural, and “telemarketing messages” in the plural).¹⁷ And the rule

¹³ 2012 TCPA Order at ¶ 21.

¹⁴ 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, *Ryabyschuck 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”).

¹⁵ See *id.*, ¶ 29.

¹⁶ 2012 TCPA Order at ¶¶ 32, 33.

¹⁷ 47 C.F.R. § 64.1200(f)(8).

language describing the required elements of the written agreement also refers specifically to the plural, “**calls**”.¹⁸

RILA also emphasized that sending a one-time, on demand text in response to a consumer’s specific request for such a text does not constitute “initiating” a call for TCPA purposes under the Commission’s Prior Express Written Consent Rules.¹⁹ 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.”²⁰ In this context, the consumer “physically place[s]” the “call,” requesting information while the retailer’s role is limited to an immediate, one-time response to the consumer’s specific request. Therefore, one-time on 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.

RILA further emphasized that the Commission’s prior express written consent rules only 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.²¹ As emphasized in RILA’s comments and petition, the Commission defines “advertisement” as any material “advertising the commercial availability or quality of any property, goods, or services;”²² however, it has not defined “advertising.” RILA then explained that the dictionary definition of advertising is “the action of calling something to the attention of the public especially by paid

¹⁸ 47 C.F.R. § 64.1200(f)(8)(i)(A) (“By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing **calls** using an automatic telephone dialing system or an artificial or prerecorded voice”)

¹⁹ Under those 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. 47 C.F.R. § 64.1200(a)(2).

²⁰ 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) (“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).

²¹ 47 C.F.R. § 64.1200(a)(2).

²² 47 C.F.R. 64.1200(f)(1).

announcements,”²³ and 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, a consumer that chooses 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.”²⁴ By contrast, as RILA explained, in the case of on demand texts, the consumer has initiated the request for specifically desired information after evaluating a separate advertisement. Thus, 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.

Finally, RILA and its counsel described how 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. Given the enormous costs of defending even frivolous litigation, and the risk of a losing verdict, even when the risk is small, many companies feel compelled to settle TCPA cases, even when they are devoid of any merit. RILA explained that in light of the exponential growth of TCPA litigation, coupled with the uncertainty that will persist in the absence of an explicit declaration, some retailers may forego the use of on demand offers in order to eliminate the potential risk of expensive class action lawsuits. RILA pointed out that this outcome is inconsistent with clear consumer preference and could not be what the Commission intended.

Respectfully submitted,



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²³ Merriam-Webster Dictionary online, <http://www.merriam-webster.com/dictionary/advertising> (last visited Feb. 25, 2014). *See also* Dictionary.com, defining “advertising” as “the act or practice of calling public attention to one’s product, service, need, etc., especially by paid announcements in newspapers and magazines, over radio or television, on billboards, etc.” <http://dictionary.reference.com/browse/advertising?s=t> (last visited Feb. 25, 2014).

²⁴ 47 C.F.R. 64.1200(f)(12).