Before the
Federal Communications Commission
Washington, D.C.

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

REPLY COMMENTS OF THE AMERICAN BANKERS ASSOCIATION

The American Bankers Association (ABA) writes in support of the petition filed by the Retail Industry Leaders Association (RILA) requesting the Federal Communications Commission (Commission) to clarify that the Telephone Consumer Protection Act (TCPA) rules, effective October 16, 2013[1], do not apply to immediate, one-time responses to consumer-initiated requests for text offers (on-demand texts or on-demand text offers).[2] ABA supports in full all of the legal and regulatory policy arguments made by RILA in its petition.

I. Background on the banking industry's use of on-demand text offers

ABA represents banks of all sizes and charters and is the voice for the nation's $14 trillion banking industry and its two million employees. The majority of ABA's members are banks with

[1] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* CG Docket No. 02-278, FCC 12-21 (Feb. 15, 2012) (2012 TCPA Order).
[2] *Petition of Retail Industry Leaders Association for Declaratory Ruling*, CG Docket No. 02-278 (filed Dec. 30, 2013)(Petition); *see also* Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Filed by Retail Industry Leaders Association, Public Notice, GC Docket. No. 02-278, DA 14-75 (Jan. 22, 2014).

less than $185 million in assets. As noted in RILA's petition, advances in mobile technology have raised consumer expectations for personalized, "concierge-like" service.[3] Our members have sought to respond to these expectations by offering online and mobile banking and providing customers with a broad array of communication channels. The overriding goal of the banking industry is to provide customers with personalized and convenient access to information about their accounts and offers for financial products and services when it is most timely and relevant.

Thus, many of our members currently place, or would like to place, a message on an Automated Teller Machine (ATM) screen describing a financial product or service and encouraging customers to text "special information or offer to 12-345 " for additional information or a specific offer. If the customer initiates the text, the bank responds immediately via text with information or an offer responsive solely to the request. No additional offers or other promotional information is sent in response to the text. The customer receives only what was expressly requested—and was expected in response to the specific request.

II. The Commission should clarify that on-demand text offers are not subject to the TCPA's prior express written consent requirement.

We agree with RILA that the on-demand text messages that a bank sends to the customer in the scenario described above should not be subject to the Commission's October 2013 prior express written consent rules because these communications are: (1) proactively initiated by the customer; (2) isolated, one-time only messages sent immediately in response to a specific

[3] Petition, *supra at* 3.

request; and (3) contain only the information requested by the customer. These on-demand texts are very different from the abusive telemarketing practices that Congress sought to prohibit when it enacted the TCPA. Indeed, they are precisely the kind of messages Congress explicitly noted should not be limited by the TCPA—calls that are "expected and desired" business communications to wireless numbers.[4]

The irrationality of concluding otherwise is explained in the comment submitted by Vibes Media, LLC:

> 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.[5]

III. Subjecting on-demand texts to the written consent requirement will confuse and inconvenience consumers.

As RILA and numerous other commenters point out, requiring prior express written consent for on-demand text offers will confuse and inconvenience consumers. Having just texted the bank with a specific, direct request, a customer would anticipate the immediate delivery of the requested offer or information, not a string of messages necessary to establish consent.

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[4] *See* H.R. REP. 102-317, 1st Sess., 102nd Cong. (1991), at 17.
[5] Comments of Vibes Media, LLC, CG Docket No. 02-278 (filed Feb. 21, 2014) at 5.

However, banks have no practical way to provide consent, as currently defined by the Commission, and still provide the instantaneous, responsive on-demand texts their customers desire.

IV. The requested clarification will reduce the likelihood of frivolous TCPA litigation.

TCPA class action litigation has exploded in recent years and the growth of TCPA lawsuits shows no indication of slowing down.[6] As RILA and other commenters note, because of the cost of defending against even a TCPA lawsuit, many retailers are choosing to avoid what are otherwise legitimate marketing techniques, merely to avoid a frivolous lawsuit. ABA members are no exception; many banks have discontinued the practice of providing information about a product or service on an ATM screen and inviting the consumer to respond with an on-demand text. Consumers are the ultimate losers as a result of these decisions as they are denied an opportunity for timely and relevant information.

V. There is overwhelming support in the record for the requested clarification.

The vast majority of the commenters have supported RILA's petition, which is to be expected given the desirable nature of on demand texts for consumers. Even opposing comments acknowledge that under the strict parameters suggested by RILA, on-demand texts should not trigger the prior express written consent rules. For example, Gerald Roylance states, "If the [on demand] text was sent in response to a consumer's inquiry, then the response text is never a violation."[7] Similarly, Joe Shields writes, "[t]he Commission has already ruled that a

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[6] *See* U.S. Chamber of Commerce Institute for Legal Reform, *The Juggernaut of TCPA Litigation* (October, 2013), available at http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF.

[7] Comments of Gerald Roylance, CG Docket No. 02-278 (filed Feb. 21, 2014) at 3.

one-time confirmation text sent in response to a consumer's opt out request does not violate the TCPA… The text message(s) at issue in the petition, on the surface, appear to be no different."[8] Finally, Robert Biggerstaff recognizes the limited nature of the messages described in RILA's petition, commenting, "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."[9]

VI. Conclusion

Given the increasing number and cost of frivolous TCPA class action lawsuits, ABA respectfully requests the Commission to grant RILA's petition and clarify that on-demand texts are not subject to TCPA's prior express written consent requirement. The TCPA was enacted to protect consumers from annoying, invasive and unwanted telemarketing activities—*not* from consumer-friendly communications that are specifically requested and expected by consumers.

Respectfully submitted,

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[8] Comments of Joe Shields, CG Docket No. 02-278 (filed Feb. 21, 2014) at 2.
[9] Comments of Robert Biggerstaff, CG Docket No. 02-278 (filed Feb. 21, 2014) at 2.