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April 25, 2014

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

Re: *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*

Dear Ms. Dortch:

Vibes Media, LLC (“Vibes”) supports the Retail Industry Leaders Association (“RILA”) petition for declaratory ruling requesting that the Commission clarify its treatment of on-demand text messages under the TCPA rules.¹ As Vibes explained in its comments, one-time, on-demand text messages are very different from the abusive telemarketing practices the TCPA was enacted to prohibit and are, in fact, precisely the kind of messages Congress explicitly noted should not be limited by the TCPA—those that are “expected and desired.”² Clarifying that the Commission’s prior express written consent rules do not apply to such messages will be consistent with that Congressional intent as well as with the Commission’s overarching TCPA regime by ensuring that retailers and marketers continue to have the ability to respond to interested consumers. It will also 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.

As Vibes, RILA, the National Association of Broadcasters, and others have explained, one-time, on-demand text messages are sent only in response to a customer inquiry; are sent immediately in response to said inquiry; and no other messages are sent to the customer.³

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

² 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*, FCC 12-143, 27 FCC Rcd. 15391, ¶ 8 & n.34 (2012) (“*SoundBite Declaratory Ruling*”).

³ See Comments of Vibes Media, LLC (Feb. 21, 2014); Reply Comments of the National Association of Broadcasters at 2-3 (Mar. 10, 2014); Reply Comments of the American Bankers Association at 2-3 (Mar. 10, 2014); Comments of the National Association of Broadcasters at 3-4 (Feb. 21, 2014); Comments of the Retail Industry Leaders Association at

Retailers who send on-demand text messages are not “captur[ing] the callerId of all the incoming calls, and then blast[ing] away with autodialed calls.”⁴ They are doing nothing more than immediately replying with a one-time response to a customer-initiated request for more information. This reply is functionally equivalent to responding verbally to a request from a caller who telephoned a business seeking information or using the “call return” feature on a telephone to respond to a customer’s voice call inquiry.

In this respect, a one-time, on-demand text message is much more like the one-time opt-out confirmation that the Commission has acknowledged is permitted under the TCPA rules than it is like traditional telephone telemarketing, as other commenters acknowledge.⁵ Opt-out confirmation messages are sent directly in response to a consumer’s request that no further text messages be sent; the Commission noted that consumers expect these confirmation messages and, in fact, complain when they do not receive them.”⁶ One-time, on-demand text messages are likewise sent directly in response to a consumer inquiry and consumers expect to receive the requested information. But they do not expect to receive a confusing request for consent, which some consumers may believe is an illegitimate attempt to sign them up for continuing messages.⁷ Rather than ensuring that consumers are not faced with a bombardment of unwanted calls as intended by the TCPA, 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.

Moreover, the claim in the record by an individual commenter that Vibes is “mix[ing] the proverbial apples and oranges, attempting to analogize text messages to ‘live’ telephone calls”⁸ ignores the Commission’s long history of application of the TCPA to text messages. The Commission has drawn this analogy many times by applying a statute and rules intended to curb abusive telemarketing voice calling practices to SMS message marketing.⁹ To the extent the

2 (Feb. 21, 2014) (“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.”). All comments cited herein were filed in CG Docket No. 02-278.

⁴ Reply Comments of Robert Biggerstaff to RILA Petition at 2 (Mar. 10, 2014) (“Biggerstaff RILA Reply Comments”). Despite arguments in the record that RILA’s petition covers other forms of text marketing, *see* Supplemental Comments of Robert Biggerstaff on the Petition of RILA at 2 (Apr. 9, 2014), it is very clear that RILA has requested clarity *only* on *one-time*, on-demand text offers.

⁵ *See* Comments of Joe Shields on the Petition for Declaratory Ruling of the Retail Industry Leaders Association at 2 (Feb. 21, 2014) (citing *SoundBite Declaratory Ruling*).

⁶ *SoundBite Declaratory Ruling* ¶ 9.

⁷ *See* Comments of Vibes Media, LLC at 6.

⁸ Biggerstaff RILA Reply Comments at 1.

⁹ *See Rules and Regulations Implementing the Tel. Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, ¶ 165 (2003); *SoundBite Declaratory Ruling* ¶ 2; *Rules &*

Commission continues to treat text messages like voice calls under its TCPA regulations, it must ensure that treatment is equitable and non-discriminatory and carefully consider scenarios where, as with one-time, on-demand texts, application of its rules to SMS messages would create a different result than if it were to apply the same rules to voice messages. Because it is clear that the TCPA rules would not prohibit businesses from responding by telephone call to a customer request for information, nor would they require consent for the provision of this information to customers, requiring consent for one-time, on-demand text messages that provide the same information would result in disparate treatment of text message marketing with no logical basis.

Vibes continues to believe that text marketing is fundamentally different from telemarketing via voice calls. To that end, it urges the Commission to act quickly on the pending petition for declaratory ruling of the Coalition of Mobile Engagement Providers¹⁰ as well as the numerous other petitions in this docket addressing mobile marketing issues. As the Commission continues to review the numerous petitions in this docket—as well as takes a hard look at its application of the TCPA more generally¹¹—Vibes also asks that it move quickly to grant RILA's petition and clarify that one-time, on-demand text messages are not subject to the prior express written consent rules.

Sincerely,



Jennifer Bagg
Kristine Laudadio Devine
Counsel to Vibes Media, LLC

Regulations Implementing the Tel. Consumer Protection Act of 1991, Groupme, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling, Declaratory Ruling, FCC 14-33, CG Docket No. 02-278, ¶ 2 (Mar. 27, 2014).

¹⁰ Petition for Declaratory Ruling of a Coalition of Mobile Engagement Providers, GC Docket No. 02-278 (Oct. 17, 2013).

¹¹ See Commissioner Michael O'Rielly, *TCPA: It is Time to Provide Clarity*, Official FCC Blog (Mar. 25, 2014), <http://www.fcc.gov/blog/tcpa-it-time-provide-clarity>.