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

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. CG 02-278
	)	
	)	
Petition for Declaratory Ruling of a Coalition of Mobile Engagement Providers	)	
	)	

To: The Commission

PETITION FOR DECLARATORY RULING OF A COALITION OF MOBILE ENGAGEMENT PROVIDERS

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EXECUTIVE SUMMARY

Millions of consumers have, over the years, provided written consent governed by rigorous industry standards in order to receive certain mobile marketing communications. It is imperative that the Federal Communications Commission clarify expeditiously that the Telephone Consumer Protection Act ("TCPA") rules effective October 16, 2013, do not nullify those written express consents that have already been provided by consumers. Specifically, it is critical for the Commission to declare explicitly that in those cases where a mobile marketer has, prior to October 16, already received a consumer's express consent in writing to receive certain mobile marketing communications, consistent with the TCPA rules already in place at the time consent was given, the consumer does not have to take additional steps in order to continue receiving those messages, and the mobile marketer does not need to take steps to obtain the revised forms of written consent applicable to *new* customers starting October 16.

This conclusion is supported by the language of the Order, the fundamental principle that new rules are prospective in nature, and practical policy considerations, including the fact that the FCC did not perform any impact analysis related to numerous small businesses attempting to go through the process of re-opting in their customer bases. Given the unchecked and extraordinary growth of frivolous class action litigation in the mobile marketing industry, it is imperative that the Commission explicitly clarify this issue to eliminate uncertainty and guard against the potential for unnecessary and wasteful TCPA litigation.

TABLE OF CONTENTS

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	)	
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Millions of consumers have, over the years, provided written consent governed by rigorous industry standards in order to receive desired mobile marketing communications. A coalition of mobile engagement providers ("Coalition") urges the Federal Communications Commission ("FCC" or "Commission") to clarify expeditiously that the Telephone Consumer Protection Act ("TCPA") rules effective October 16, 2013,[1] do not nullify those written express consents already provided by consumers before that date. Specifically, it is critical for the Commission to declare explicitly that in those cases where a mobile marketer has, prior to October 16, already received a consumer's express consent in writing to receive mobile marketing communications, consistent with the TCPA rules already in place at the time consent was given, the consumer need not take additional steps in order to continue receiving those communications he or she has already requested to receive. And, the mobile marketer need not take steps to obtain from existing customers who have already provided written express consent the revised forms of written consent

[1] *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.

applicable to new customers starting October 16. Given the unchecked and extraordinary growth of frivolous class action litigation in the mobile marketing industry, it is imperative that the Commission clarify this issue to eliminate uncertainty and guard against unnecessary and wasteful TCPA lawsuits. Accordingly, pursuant to Section 1.2 of the Commission's rules,[2] the Coalition hereby submits this Petition for Declaratory Ruling.

Not only is this simple, narrow clarification supported by the language of the *2012 TCPA Order*, but the clarification is essential to promote practical policy considerations that will: (1) avoid consumer confusion associated with receiving new opt-in requests for programs when the consumer has *already* provided written consent to opt-in and has *already* been receiving the requested communications; (2) mitigate unnecessary burdens on companies in the mobile marketing space (many of whom are small businesses) who have expended significant time and resources over many years to obtain written consent compliant with the rules in effect; and (3) limit potential frivolous class action lawsuits that could seek to exploit the absence of definitive language in the *2012 TCPA Order* on how the new rules impact written forms of express consent already obtained from existing customers.

I. BACKGROUND.

This coalition of mobile engagement providers consists of communications infrastructure, technology, and professional services companies that work with brands, retailers, banks, online services, and companies of all types to engage with and interact with their customers using mobile messaging and other channels available for communication with consumers via mobile phones. These companies include: 4INFO, Inc. (www.4info.com); ePrize (www.eprize.com); Genesys (http://www.genesyslab.com/); Hipcricket (www.hipcricket.com); Mobile Commons (www.mobilecommons.com); Mobile Marketing Association (MMA) (www.mmaglobal.com); payvia

[2] 47 C.F.R. § 1.2.

(www.usepayvia.com); Tatango (www.tatango.com); Tetherball (www.tetherball360.com); Vibes (www.vibes.com); and Waterfall (www.waterfallmobile.com).

The Commission should understand that these companies, and all senders and recipients of messages through the short code channel, are subject to comprehensive wireless industry standards that serve as de facto rules. The three main sources of these industry guidelines are CTIA – The Wireless Association® ("CTIA"),[3] the Mobile Marketing Association ("MMA"),[4] and the major wireless carriers (which include AT&T, Sprint, T-Mobile and Verizon Wireless) which have published and enforce industry best practices for offering compliant programs to wireless subscribers on short codes.[5] These de facto rules contain rigorous requirements before a mobile text messaging telemarketing campaign can be launched, including a requirement that express written consent must be obtained before a mobile marketer can send any telemarketing messages to a consumer.

In addition, before a mobile marketing campaign is launched and as part of the required preliminary approval, carriers and aggregators[6] engage in extensive approvals, testing, and auditing (sometimes conducted by a third-party monitor or aggregator) to ensure the functional requirements

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[3] CTIA, CTIA Compliance Assurance Solution Mobile Commerce Compliance Handbook (effective Aug 1, 2013), *available at* http://wmcglobal.com/assets/ctia_handbook.pdf.

[4] Mobile Marketing Association, U.S. Consumer Best Practices for Messaging, Version 7.0 (October 16, 2012), *available at* http://www.mmaglobal.com/bestpractice.

[5] Short code campaigns are either premium (extra charge associated with the campaign, e.g. a donation to Red Cross) or standard rate (no charge above messaging rates, e.g. entering a contest at a local radio station). An example of a standard rate campaign made available through a short code can be found at: http://www.mobilemarketer.com/cms/news/messaging/16254.html.

[6] Aggregators are the select companies which operate single gateways into the messaging facilities of all of the wireless carriers. This provides major marketers and service providers a single connection that permits interaction with subscribers to all of the carriers via two-way text and multimedia messaging that operates seamlessly on almost all mobile phones in America. To continue in operation, carriers require that all aggregators observe and enforce the CTIA, MMA and carrier rules for commercial messaging.

set forth in the MMA's Best Practices Guidelines and carrier-specific guidelines are followed. A program is approved by a carrier only if preliminary testing determines that its functional elements abide by the industry guidelines. The carrier also has a role in reviewing the campaign before it is actually launched. Furthermore, because there is continuing monitoring of such campaigns through their lifecycle by carriers and aggregators, there is additional protection for stopping any program after launch if the campaign becomes out of compliance.

The industry standard is also subject to CTIA Industry Guidelines and CTIA audit standards. CTIA conducts live, in-market audits of SMS messaging providers on behalf of its carrier members, including Verizon Wireless, AT&T, Sprint, T-Mobile, and U.S. Cellular. If an SMS messaging provider is found to be out of compliance with the CTIA audit standards, the SMS messaging provider is notified of the error and could face significant consequences, up to and including suspension or termination of their SMS short code.

Pursuant to these rigorous requirements, a consumer must affirmatively take action through a structured opt-in process before being sent any promotional or telemarketing content through text messages. For standard rate messages (those with no charges above the text messaging rate in the consumer's plan), in response to a call to action ("CTA"),[7] a consumer must affirmatively text the keyword advertised in a CTA to start the engagement.[8] The guidelines require specific disclosures to be displayed clearly and legibly under a CTA[9] and prohibit a company from sending an initial

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[7] A CTA is something a consumer sees that provides instructions for how to begin receiving specific marketing messages. A consumer could see a CTA to sign up for text alerts in any number of ways, e.g. on a website or in a print advertisement.

[8] *See* Mobile Marketing Association, U.S. Consumer Best Practices for Messaging, Version 7.0, Guidelines 1.4, 2.5 (October 16, 2012), *available at* http://www.mmaglobal.com/bestpractices.pdf.

[9] CTIA, CTIA Compliance Assurance Solution Mobile Commerce Compliance Handbook (effective Aug 1, 2013), Compliance Principles, page 2, section C. Terms and Conditions, *available at* http://wmcglobal.com/assets/ctia_handbook.pdf.

message outside a consumer's response to a CTA. Second, the consumer receives a reply message confirming that the consumer has signed up for mobile alerts.[10] This structured, consumer-initiated text opt-in process ensures consumers fully understand what they are signing up for and serves as evidence of express written consent compliant with the E-SIGN Act.[11] Additionally, the industry-required opt-in process protects consumers from receiving unwanted or "spam" texts because texts will only be received after consumers have taken an affirmative step to initiate contact, and even then only after (1) the required terms and conditions and appropriate disclosures are displayed in the CTA and (2) the appropriate disclosures are made in a confirmation text.

In addition, under the guidelines, any subscriber is informed of and enabled to stop participating in and receiving messages from any program at any time. Programs are required to recognize and respond to all reasonably clear opt-out attempts. At a minimum, programs must respond to the keywords STOP, END, CANCEL, UNSUBSCRIBE, and QUIT (and not be case-sensitive) by sending a confirmatory opt-out message and ceasing any further messages be sent to the consumer.[12] Also, programs operating in languages other than English must support a STOP keyword in their native language in addition to these English keywords. And, if a user is inactive in any recurring program for eighteen months, the opt-in automatically expires.

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[10] A compliant opt-in confirmation message contains the following disclosures: product description and quantity; pricing and billing frequency (premium rate messages only); program name; help and opt-out instructions (premium and recurring standard rate); customer care contact information; and message and data rates may apply. In a double opt-in process, the sponsor name, alert description, frequency, confirmatory reply instructions, and a notice that message and data rates may apply is included in the subscription validation message.

[11] The Commission has concluded that consent obtained via text message satisfies the requirements of prior express written consent in accordance with the E-SIGN Act. *See 2012 TCPA Order,* ¶ 34. *See also* Electronic Signatures in Global and National Commerce Act ("E-SIGN Act"), 15 U.S.C. § 7001 *et seq.* (preamble); *see* 15 U.S.C. § 7001(a).

[12] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 27 FCC Rcd 15391 (2012).

Finally, companies wishing to perform SMS messaging over short codes also need to undergo an evaluation prior to obtaining a short code through the short code registry. Specifically, during the procurement of a short code, new registrants must go through CTIA vetting to ensure they are in good business standing and will perform in a manner consistent with the industry guidelines.[13]

II. CONSUMERS WHO HAVE ALREADY PROVIDED PRIOR EXPRESS CONSENT IN WRITING ARE NOT REQUIRED TO RE-OPT-IN.

A. The Order Allows Entities to Rely on Written Forms of Prior Express Consent Obtained Under the Rules In Effect Prior to October 16.

Although the *2012 TCPA Order* specifically states that covered telemarketers could be liable for relying on previously obtained non-written express consent, the Commission intended to allow entities to rely on previously obtained written consent:

> ... in cases where a telemarketer has not obtained prior written consent under our existing rules, we will allow such telemarketer to make autodialed or prerecorded voice telemarketing calls until the effective date of our written consent requirement, so long as it has obtained another form of prior express consent. Once our written consent rules become effective, however, an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls, and thus could be liable for making such calls absent prior written consent.[14]

Given this language, it is reasonable and logical to conclude that the Commission intended that updated written consent would only be needed from consumers who previously had provided only non-written express consent. By explicitly stating that "an entity will no longer be able to rely on non-written forms of express consent to make autodialed or prerecorded voice telemarketing calls," the Commission necessarily implies that an entity will be able to rely on written forms of consent previously obtained from existing customers. Otherwise, that language would be

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[13] https://www.usshortcodes.com/index.php

[14] 2012 TCPA Order, ¶ 68 (emphasis added).

superfluous. Furthermore, in ending this paragraph, the Commission chose not to use the defined term in the rules – "prior express written consent" – which it could have used to indicate that going forward all consent must conform to the required new language contained in the definition of "prior express written consent." Instead, by using the undefined term - "prior written consent" - the Commission implies that an alternative form of previously obtained written consent would be sufficient to shield an entity from liability.

Under this language, if an entity only has a non-written form of express consent from an existing customer, then that would be insufficient and the entity would be required to obtain written consent in compliance with the new rules by October 16, 2013. However, if an entity has already obtained verifiable written consent from a customer, such as a text message opt-in, then those customers would not (and should not) have to provide an additional written opt-in under the new rules. If the Commission had intended otherwise, then there would have been no reason to specify "non-written" when describing how previously obtained consent from existing customers would be treated under the new rules.

In addition, there is an inherent difference between previously obtained express written consent and non-written forms of express consent: unlike written consent, non-written consent does not produce a verifiable record. Thus, it is not surprising that the Commission explicitly stated in the *2012 TCPA Order* that companies would be unable to rely on existing non-written forms of consent once the new rules become effective because in such cases there would be no verifiable record of consent. However, with previously obtained written consent, a verifiable record is produced. This important distinction explains why the Commission treated the two classes of existing consent differently.

Finally, in establishing the implementation period for the new rules, the Commission explicitly stated that a twelve month transition period was appropriate in order to give businesses

time to prepare consent forms and related materials for **new** customers: "it will take time for businesses to redesign web sites, revise telemarketing scripts, and prepare and print new credit card and loyalty program applications and response cards to obtain consent from **new** customers, as well as to use up existing supplies of these materials and create new record-keeping systems and procedures to store and access the new consents they obtain."[15] The Commission did not in any way suggest that this year-long period was needed to re-obtain the new form of written consent from existing consumers who had previously provided written consent, or that the previously obtained written consent was nullified under the new rules. Otherwise, the reference to "new" customers would have been superfluous.

B. Retroactive Application of the New Rules Would Be Inconsistent With the Fundamental Principle That New Rules Are Prospective In Nature.

Moreover, retroactive application of the new rules would be inconsistent with the general principle, recognized by the FCC and the courts, that rules adopted by administrative agencies may only be applied prospectively.[16] For example, in *Verizon Tel. Cos. v. FCC*, the court stated that "in considering whether to give retroactive application to a new rule ... the courts have held that the governing principle is that when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospective-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule."[17] This is especially true where there is no assertion that the prior rules were unlawful.

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[15] 2012 TCPA Order, ¶ 67 (emphasis added).

[16] *See, e.g., High-Cost Universal Service Support, et al.*, Report and Order and Memorandum Opinion and Order, 25 FCC Rcd 3430, ¶ 11 (2010) ("Generally, rules adopted by administrative agencies may be applied prospectively only.").

[17] *Verizon Tel. Cos v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

Consistent with this fundamental principle, covered entities who have relied on the previous prior express consent rules to obtain verifiable written consent from their customers must not be required now to go back to those same customers to obtain a second written opt-in, especially because (1) the previous rules regarding prior express consent were "reasonably clear;" (2) requiring re-opt-ins would disrupt the "settled expectations" of consumers who have already provided their written consent and covered entities who have already lawfully obtained written consent;[18] and (3) the express consent previously obtained in writing is consistent both with the statute, the rules in place at the time consent was given, and the E-SIGN Act.

Moreover, if the Commission had intended to apply the new rules retroactively, it would have been required by the Administrative Procedures Act to include this proposal in the underlying Notice of Proposed Rulemaking in order to provide stakeholders with the requisite notice or opportunity to comment. Furthermore, while it is reasonable for the Commission to adopt new interpretations based on evolving conditions, it would not be reasonable to nullify properly obtained written consent in the absence of any indication that the previous interpretation was unlawful.

Finally, the fact that the *2012 TCPA Order* is devoid of any indication that the Commission intended to apply the new rules to existing customers who have already provided express consent in writing is further evidence that the FCC did not intend to nullify written forms of consent previously obtained.

For all of these reasons, there is no basis to nullify written consent lawfully obtained prior to October 16, 2013.

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[18] *See id.*

C. Given the Practical Ramifications of Requiring Entities to Obtain Re-Opt-Ins from Millions of Customers Who Have Already Provided Express Written Consent, the Commission Would Have Addressed the Clear Widespread Impact If It Had Intended the New Rules To Nullify Prior Written Consent.

If the Commission had intended to require consumers to re-opt-in with the language required under the new rules, the Commission would have analyzed and addressed the inevitable widespread consumer confusion and substantial industry impact that would occur as a result.

As a practical policy matter, such a broad requirement would mean millions of existing customers, who have already provided written express consent to receive desired mobile marketing messages, would have to opt-in again to continue to receive the same communications that they have already been receiving. This could not have been what the FCC intended. If a consumer has already provided consent in writing, and has already been receiving messages, then the consumer already is aware of the messages he or she will continue to receive and already knows that he or she is not required to purchase any goods or services to receive such messages. Thus, instead of adding any protections for consumers, requiring consumers who have already provided written express consent to provide an additional consent via a second written opt-in would only result in confusion and inconvenience without being counterbalanced by any substantial benefit to the consumer. Moreover, these consumers have been and remain free at any time to revoke their consent to receive marketing messages for any reason, further ensuring existing consumers are protected through already provided written express consent.

Beyond the negative impact to consumers, the amount of time and resources it would require from companies operating in this space to comply with such a broad requirement would be significant, particularly to numerous small businesses which have spent tremendous resources to diligently develop and maintain customer lists over the course of many years. At a minimum, in order to re-opt-in existing customers who have already provided written consent, entities would need to develop new opt-in SMS messaging campaigns to re-capture consumer opt-ins; new

keywords may need to be exercised in order to "track" all new opt-ins; and software enhancements may need to be developed and implemented in order to remove prior recorded opt-ins and replace them with newly acquired and recorded opt-ins.

Because these developments would be extremely burdensome to implement and result in enormous costs, such a change would have required notice and a Regulatory Flexibility Act (RFA) analysis by the Commission. The RFA requires agencies to consider the impact of their regulatory proposals on small entities and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities.[19] The *2012 TCPA Order's* Final Regulatory Flexibility Analysis contained no such analysis. If the Commission had intended for all entities, including small entities, to go through the process of re-obtaining written consent for all existing customers, even from those who have previously provided express consent in writing, then pursuant to the RFA the Commission would have analyzed how imposing such a broad requirement would impact small businesses. Instead, the Commission concludes in the RFA section of the *2012 TCPA Order* that the new rules "strike an appropriate balance between maximizing consumer privacy protections and avoiding imposing undue burdens on telemarketers."[20] Requiring existing customers who have already provided written consent to re-opt-in under the new rules would not only impose undue burdens on mobile marketers, but it would in no way increase consumer privacy protections.

Thus, the fact that such a broad interpretation would conflict with the Commission's stated goals, coupled with the absence of any discussion in any part of the *2012 TCPA Order* of the clear impact of such broad applicability, further reflects that the Commission did not intend to nullify previously obtained written consent.

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[19] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (*SBREFA*), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[20] *See* 2012 TCPA Order, Appendix C, ¶ 5.

III. CLARIFICATION IS NECESSARY TO ELIMINATE THE HIGH RISK OF FRIVOLOUS CLASS ACTION LAWSUITS.

Given the exponential growth of TCPA litigation, without this clarification there will be an increased risk for frivolous lawsuits. In 2008, there were 14 TCPA cases filed, while last year, that number shot up to over 1,000. One study estimates that TCPA lawsuits rose by 63 percent in 2012 alone.[21] The numbers are on track to be even higher this year. In addition to the rising number of lawsuits, because Federal courts nationwide have been reluctant to dismiss TCPA suits at the pleadings stage, even frivolous claims that will not be meritorious typically result in costly and disruptive discovery.[22]

Given this extraordinary backdrop, there is a high risk of class action lawsuits with every TCPA rule change. As a result, it is crucial that the Commission expeditiously make this simple requested clarification in order to ensure that companies who are making diligent efforts to comply with the TCPA are not unfairly targeted for frivolous lawsuits. While a company may ultimately be successful in defending against frivolous litigation, the amount of time and money necessary to prepare a defense is tremendous and potentially too much to bear for many small businesses. A narrow but specific clarification by the Commission would avoid this unintentional, wasteful consequence. Ultimately, without the requested clarification, companies will be forced to either accept the risk of defending against frivolous TCPA litigation or adopt unnecessary, expensive, consumer-unfriendly approaches that the Commission never intended.

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[21] WebRecon, *FDCPA and Other Consumer Lawsuit Statistics, Dec 16-31 & Year-End Review*, 2012, *retrieved from* https://www.webrecon.com/b/fdcpa-case-statistics/for-immediate-release-fdcpa-and--other-consumer-lawsuit-statistics-dec-16-31-year-end-review-2012/.

[22] Many frivolous lawsuits are based on facts that do not run afoul of the TCPA, but are not dismissed early on because the specific issue has not been explicitly addressed by the statute or rules. This uncertainty has created a loophole for plaintiffs' attorneys to try to exploit.

IV. CONCLUSION

The *2012 TCPA Order* makes clear that beginning on October 16, 2013, all new customers and all existing customers who have previously provided only non-written forms of express consent must provide prior express written consent in conformance with the new TCPA rules. However, it is essential for the Commission to clarify explicitly that entities which have already obtained prior express consent in writing under the pre-October 16 TCPA rules are not required to re-obtain written consent under the new rules. This is a narrow clarification that is supported by the *2012 TCPA Order*, makes practical sense from a consumer and a business perspective, and would provide much-needed certainty for companies to adopt appropriate compliance strategies that balance what is required by the rules with defensive strategies to protect against the onslaught of frivolous litigation in the TCPA area.

Respectfully submitted,

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