

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:

Rules and Regulations Implementing the Telephone
Consumer Protection Act of 1991

CG Docket No. 02-278

DA Docket No. 18-548

Petition for Expedited Declaratory Ruling Under the
Telephone Consumer Protection Act of Insights
Association, Inc., and the American Association for
Public Opinion Research

**ADAMS AUTO CORPORATION'S COMMENTS ON THE PETITION FOR
EXPEDITED DECLARATORY RULING UNDER THE TCPA
OF INSIGHTS ASSOCIATION, INC., AND THE AMERICAN ASSOCIATION FOR
PUBLIC OPINION RESEARCH**

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Commenter Adams Auto Corp., d/b/a Adams Toyota's ("Adams Toyota") by its undersigned counsel, respectfully requests that the Commission issue a declaratory ruling in accordance with the October 30, 2017 Petition for Expedited Declaratory Ruling Under the TCPA (the "Petition") filed by Insights Association, Inc., and the American Association for Public Opinion Research (collectively, "Petitioners").

I. INTRODUCTION.

Adams Toyota is a small business that has served the community in Jackson County, Missouri since 1970.¹ Adams Toyota operates an auto dealership and sells and services new and certified pre-owned Toyota brand vehicles.

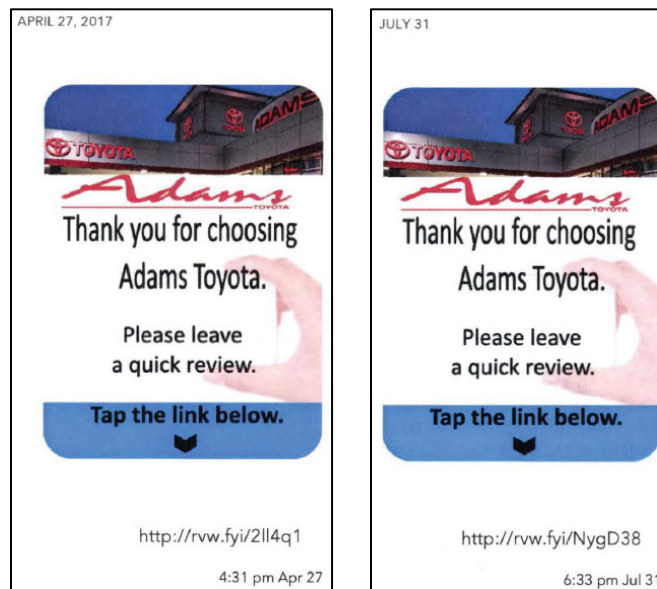
As noted by Petitioners, many small businesses participating in the U.S. economy, like Adams Toyota, "rely on outside market research and analytics firms, or internal market research and analytics practitioners, to learn more about their customers," and to improve their customer service experience. *See* Petition, p. 19 ("Pet."). However, due to "some courts' [recent] conflation of marketing and research activities," small businesses increasingly find themselves subjected to frivolous lawsuits under the Telephone Consumer Protection Act ("TCPA" or the "Act") resulting from even very basic informational, "survey, opinion, and market research" communications. *Id.*, p. 6-8, 19.

Adams Toyota is the subject of such a lawsuit, and joins Petitioners in seeking a declaratory ruling to clarify the "distinction between 'advertisements' or 'telemarketing' on one hand," and customer-focused "survey, opinion, and market research" communications on the other. *Id.*, p. 6-8. The Commission's guidance on this issue and the topics presented by the Petition is "urgently needed" to "clear up confusion in the courts, curb abusive TCPA litigation practices, and prevent the large-scale waste of resources." *Id.*, at 2, 28.

¹ *See* Adams Toyota, *About Us*, (last visited June 20, 2018), <https://www.adamstoyota.com/about-us/>

II. RELEVANT BACKGROUND.

Adams Toyota is currently facing a putative class action lawsuit arising under the TCPA, seeking potentially millions of dollars in damages because it allegedly sent two text messages to a customer *with* his prior express consent. This lawsuit, captioned *Jonathon Layden et al., v. Adams Auto Corp.*, is pending in the United States District Court for the Western District of Missouri, Western Division (the “Court”), at Case No.: 4:18-CV-00065-ODS (the “Layden Case,” or the “Action”). The plaintiff in the Action, Jonathon Layden (“Plaintiff” or “Layden”)—who is an existing customer of Adams Toyota—received two text messages asking him to leave a review (or provide feedback) about the service he received on the telephone number he knowingly provided to the dealership in connection with the servicing of his vehicle. *See* 47 U.S.C. § 227(b)(1)(A)(iii); (*see also* Layden Case, Compl., Dkt. No. 1 at ¶¶42-44.) Specifically, the two text messages read:



(Layden Case, Dkt. No. 16-2 at ¶ 2, Ex. 1.) Layden contends the two text messages he received “thank[ing him] for choosing Adams Toyota” and inviting him to “leave a quick review” about that service experience “are advertisements and/or constitute telemarketing as defined by the

TCPA.” (Layden Case, Dkt. No. 1, ¶45; Dkt. No. 16-2 at ¶ 2, Ex. 1.) Although nothing in the text messages or on the landing pages for online or private reviews/feedback is offered to Plaintiff, and nothing is being promoted, Layden alleges the text messages intended to “advertise and market [Adams Toyota’s] products and services.” (Layden Case, Dkt. No. 1, ¶ 9.)

III. DISCUSSION

A. “Prior Express Consent” Within The Meaning Of The TCPA.

The TCPA provides, in relevant part, that it is “unlawful for any person within the United States (A) to make any call (other than a call made for emergency purposes or made with the *prior express consent* of the called party) using any automatic telephone dialing system [“ATDS”] ... (iii) to any telephone number assigned to a ... cellular telephone service.” 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added); *see also* 47 C.F.R. § 64.1200(a)(1). If a call “includes or introduces an advertisement” or “constitutes telemarketing,” prior express consent must be in writing. *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 FCC Rcd. 1830 (2012) (“2012 FCC Order”). Conversely, the prior express consent of the called party “can be either oral or written if the call is informational.” *In re Rules & Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7971 (2015) (“2015 Report and Order”); *see also* 47 C.F.R. § 64.1200(a)(2). The latter includes general written and oral consent vis-à-vis the mere provision of a phone number to a business.

In 2015, the Commission again reaffirmed that “persons who knowingly release their phone numbers [as Layden admittedly did with Adams Toyota] have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.” *2015 FCC Order* (citing 7 FCC Rcd at 8769, ¶ 31 (1992)). The Commission has further noted that “neither the [its] rules nor its orders require any specific method by which a caller must obtain such prior express consent.” *Id.* at 7990, ¶ 49; *see also* Pet., p. iii (“[b]ecause

the TCPA has higher consent requirements for ‘telemarketing’ calls—requiring prior express written consent if [a] call ‘includes or introduces an advertisement’ or ‘constitutes telemarketing,’ ...—this distinction has been critical to allowing survey, opinion, and market research firms and practitioners to do their work without the threat of litigation”).

In the Action, Layden admits that he provided his phone number to Adams Toyota in connection with receiving service on his vehicle. (Layden Case, Dkt. No. 1, ¶ 43.) Accordingly, a core issue in the Action will be whether the text messages thanking Layden for his patronage and surveying his customer service experience and opinion constitute “advertisements” or “telemarketing” under the TCPA. (Layden Case, Dkt. No. 29, p. 4.) The declaratory ruling sought by the Petition would directly inform and clarify this determination.

B. The Commission Should Issue a Declaratory Ruling to Correct the “Argument From the Profit Motive.”

Adams Toyota joins the Petitioners in respectfully requesting that the Commission issue a declaratory ruling that communications are not presumptively “advertisements” or “telemarketing” under the TCPA “simply because they are sent by a for-profit company, or might be for an ultimate purpose of improving sales or customer relations.” *See* Pet., p. 17. As addressed by the Petition, recent cases like *Katz v. Am. Honda Motor Co.*,² which Layden cited in opposition to Adams Toyota’s motion to dismiss in the Action, have broadly assumed that “any communications from for-profit businesses are made with the ultimate goal of ‘promot[ing] their wares’...” *Id.*, p. 14; (*see also* Layden Case, Dkt. Nos. 25, 29.) This loose approach neglects the larger business picture, as well as the purpose underling the communication(s) at issue, and further threatens to wildly broaden the scope of TCPA litigation. As addressed in the Petition, the Commission’s guidance is needed “to bring federal jurisprudence back in line,” and

² No. 15-cv-4410-CBM-RAOx, 2017 U.S. Dist. LEXIS 114160, at *5 (C.D. Cal. May 12, 2017).

to correct this simplistic view of the profit motive which will harm small business and restrict basic informational communications and consumer feedback activities—which are “traditionally exempted from telemarketing.” *See* Pet., p. 19.³

C. The Commission Should Issue a Declaratory Ruling to Clarify Previous Guidance on “Dual Purpose” Communications.

The Commission has recognized, albeit in the context of facsimile messages, that “surveys that serve as a pretext to an advertisement are subject to the TCPA’s [...] advertising rules.”⁴ However, as addressed in Section IV of the Petition, clarification is required to prohibit plaintiffs from abusing the intent of the TCPA, by “comb[ing] through a defendant’s ancillary documents and web pages for some [remote] link to advertising...” in order to create a second purpose for an otherwise non-telemarketing informational or research based communication. *Id.*, p. 23; *see also Comprehensive Health Care Sys. of the Palm Beaches, Inc., v. M3 USA Corp.*⁵ This particular issue is manifest in the Action, where Layden has alleged that the two text messages sent by Adams Toyota contain a “hyperlink to a website containing solicited reviews of [Adams Toyota’s] goods and services.” (Layden Case, Dkt. No. 1, ¶¶ 8, 10.) Layden’s expressed intention to improperly rely on ancillary documents and web pages in an attempt to manufacture a “second” telemarketing purpose for the text messages at issue in the Action is further evident in his opposition to Adams Toyota’s motion to dismiss. (Layden Case, Dkt. No. 25.)

³ See also *In re Rules & Regulations Implementing the TCPA of 1991*, 27 FCC Rcd 1830, 1831, 2012 FCC LEXIS 794, *1-4, 55 Comm. Reg. (P & F) 356 (F.C.C. February 15, 2012) (“None of our actions change requirements for prerecorded messages that are non-telemarketing, informational calls”).

⁴ 21 FCC Rcd 3787, 3815, 2006 FCC LEXIS 1713, *76, 38 Comm. Reg. (P & F) 167 (F.C.C. April 6, 2006).

⁵ No. 16-cv-80967 (S.D. Fla. June 10, 2016) (Originally captioned *Comprehensive Health Services, Inc. v. M3 USA Corporation*, No. 16-cv-80874 (S.D. Fla. May 31, 2016)); *see also Comprehensive Health Care Sys. of the Palm Beaches, Inc. v. M3 USA Corp.*, 232 F. Supp. 3d 1239 (S.D. Fla. 2017).

This brand of extraneous dot-connecting, if left unchecked, would empower and encourage frivolous litigation. The Commission’s guidance is urgently needed to limit the amount of leeway afforded in such circumstances and to clarify the reasonable bounds for determining whether a communication is an “advertisement” or “telemarketing” under the TCPA. Businesses should be able to survey their customers for opinion and feedback to improve their services without being questioned about motivation to make a profit, and/or tagging a marketing purpose to such communication. Accordingly, public interest would be best served by a declaratory ruling confirming that “the presence in a communication, or some other ancillary document or webpage, of a marginal element that might arguably be considered advertising does not convert the [otherwise exempt] communication into a ‘dual-purpose’ communication.” *See* Pet., p. 1.

IV. CONCLUSION.

For these reasons, Adams Toyota respectfully requests that the Commission issue a declaratory ruling consistent with the Petition for Expedited Declaratory Ruling Under the TCPA filed by Insights Association, Inc., and the American Association for Public Opinion Research.

Respectfully submitted,

Dated: June 22, 2018

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