

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

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Petition for Exemption of the American
Bankers Association

CG Docket No. 02-278

**REPLY COMMENTS OF ROBERT BIGGERSTAFF TO THE PETITION OF THE AMERICAN
BANKERS ASSOCIATION**

Robert Biggerstaff submits these comments in response to the comments filed on the petition of the American Bankers Association (“ABA”).¹

With the exception of notices for money transfers (discussed separately) all the messages that are the subject of the ABA Petition are messages intended for the financial institution’s *own customers*. This is an important distinction, as since the bank is calling its own customer, and presumably calling at a number that the bank obtained from the customer, the bank is in a perfect position to obtain proper consent for these calls. For example, many banks provide a plethora of options in their on-line banking portals, where the consumer can designate multiple phone, text message, and e-mail addresses to receive the very same alerts that the ABA Petition describes. This is the first and most obvious resolution of the issues the Petition raises. An unnecessary exception to the TCPA should be a last resort, not the first. With respect to reassigned phone numbers, I am contemporaneously submitting comments outlining the contours of a limited safe harbor

¹ *Petition for Exemption of the American Bankers Association*, CG Docket No. 02-278 (filed October 14, 2014) (“Petition”).

addressing calls to reassigned cell phone numbers, that fully addresses the issues of the ABA Petition (and many others) related to reassigned numbers.²

As has been made clear before, consent for robocalls cannot be made a condition of doing business. Yet many financial institutions refuse to do business with you unless you provide a phone number. And the forms by which they collect your phone number from you (particularly websites) do not have a place to limit the use of that phone number, or specify no autodialed or prerecorded calls. The relief the Petition seeks would result in making consent to receive unwanted robocalls and texts a condition of doing business. That result simply cannot be allowed.

I ran into a perfect example with a large bank, which had two incorrect phone numbers for me. I wanted to delete them from my account using the online portal of the bank, but once I deleted the first phone number, the option to delete the remaining one was removed. The bank now has an incorrect phone number for me, but I can't delete it.

Which leads to the most problematic of all the Petition's requests—the "Hotel California" provision where they can send you text messages and robocalls, but you cannot stop them.³ What do I do when I start getting account alerts from Metropolis Megabank that are intended for someone else? How do I, as an innocent bystander, stop those robocalls and texts? And even the bank's customer may object to certain forms of contact. Some consumers may have to pay significant fees to receive these messages.⁴ The ABA

² See *Supplemental Comments of Robert Biggerstaff on the Petition for Expedited Declaratory Ruling filed by United Healthcare Services, Inc.*, dated Dec. 19, 2014.

³ Which is made even more onerous by the fact that banks demand that you provide them a telephone number and will not do business with you if you do not provide one.

⁴ For example one plan I have used recently cost \$2 to receive a text message.

claims that “[i]f a customer should opt out of receiving those critical messages by automated means, the result will be that the same messages will be sent through channels that are less efficient and less likely to permit timely remedial action.” But this is a consumer directly expressing his demand that he affirmatively does not want those messages sent by text message or robocall. This consumer expressly wants them through a different channel, not the channel that the bank wants to cram down the consumer’s throat. The notion advanced by the ABA and several industry commenters—that a consumer cannot be allowed to stop these missives—is patently absurd and other industry commenters, such as Noble Systems, have concurred. On one hand the ABA claims that consumers “prefer” to get these messages via text and robocall. But then when a consumer expresses their actual preference to not receive such messages via text or robocall, the ABA wants to ignore them. The ABA can’t have it both ways—wither they are in favor of satisfying consumer “preferences” or they are in favor of ignoring them.

I for one don’t want text messages for important alerts since I may not receive them for days. I turn off my cell phone for extended periods in order to enjoy quiet time and I spend significant periods of time in places with poor to nonexistent cell phone coverage. E-mail is much more immediate for me. Obviously many other consumers have similar situations that make text message or automated calls less optimal (and less timely) than other methods of contact. The bottom line is that the consumer should be the one who makes that decision based on his or her individual situation and needs.

Money transfer notifications to Recipients

Petitioner seeks to analogize its messages to those from package delivery services, which were granted a limited exemption by the Commission. There are several problems with this attempted analogy:

First, package services are not complying with the conditions of the current exemption. I have received numerous prerecorded package delivery messages since the exemption was in place. Many do not meet the Commission's exemptions. For example, the prerecorded messages I have received for package notifications have been multiple messages per package and did not have an automated opt-out mechanism in the message. As it turns out, I have been charged for receiving several of these prerecorded package delivery calls without my consent.

Another problem with the automated package delivery messages is that many seem to start playing before I answer the call, and thus I don't hear the initial part of the message—often leaving me without important information such as who is making the call or how to contact them.

The lesson here is that any exemption will, in some degree, be improperly implemented. This militates against such exemptions or, at the very least, requires making their terms more explicit and positive, leaving no room for misinterpretation.

A second problem that is more serious with money transfer notices, is misdirected or intercepted messages. For example, someone may need to send money to an abused relative or other vulnerable person to facilitate their extrication from that situation, but what happens if the abuser receives the message or sees it on the victim's phone? What if there is a data entry error, and the information goes to a wrong party, who then has been

provided much of the information necessary to fraudulently intercept the transfer by posing as the original recipient.

People who send money transfers are already adept at communicating the information to the recipient as to how to receive the transfer, and have secure ways to communication with that person so that an abuser will not have access to the contents of the communication.

One final twist of the knife the ABA seeks to impose on consumers, is that it intends to sent text messages and robocalls to telephone numbers that the consumer did not provide to the caller. How a caller is going to “discover” such numbers is unclear, but if I withhold a phone number from a business I do so because I do not want them to use it to call me. Perhaps they intend to capture numbers via callerID, so if I call in to check my balance when visiting someone in a hospital, are they going to robocall that random hospital room a dozen times to try to reach me?

Reply to the Comments of the Internet Association

As is unfortunately common, the Internet Association displays a wholesale lack of comprehension of the Commissions’ rules. It is comments⁵ it believes that the CAA order provided a 30-day period for complying with an opt-out request. This is the type of “seat-of-the-pants” attention to compliance⁶ that is all too common in industry commenters. The

⁵ *Comments of the Internet Association*, at 8, n. 13 and accompanying text (dated Dec. 8, 2014).

⁶ "The days of ‘seat of your pants’ TCPA compliance are over." David O. Klein, *Protect yourself against personal liability under the TCPA*, available at <<http://www.lexology.com/library/detail.aspx?g=2ff25592-0f70-4907-a719-c5ab373c0005>>

Commission should use this example to adjust the target audience grade level for future guidance.

Respectfully submitted, this the 19th day of December, 2014.

/s/ Robert Biggerstaff