

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

In the Matter of

Petition for Declaratory Ruling Filed by Retail
Industry Leaders Association

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

COMMENTS OF ROBERT BIGGERSTAFF ON THE PETITION OF RILA

As a threshold matter, the Petitioner (Retail Industry Leaders Association¹) perpetuates a false tautology of the TCPA that only “telemarketing” calls and message are the target of the statute and the Commission’s rules. Quite the contrary, the restrictions on calls and text messages to cell phones in subsection 227(b) apply irregardless of the nature of the call or message. Solicitations and marketing messages to cell phones are just as violative as political messages.² All of them require express consent.³

The claim in the Petition that the consumer “initiates” the transaction is irrelevant. All “consent” must be initiated by the consumer. If a marketer solicits consent for a future solicitation, the initial request for consent is, itself, a solicitation.⁴ Without a solicitation of the consumer, the consumer would be unaware of the text-message offer. In this case, the

¹ Formerly known as the International Mass Retail Association.

² See *Enforcement Advisory*, No. 2012-06 (FCC 2012).

³ The only difference is that due to propensity for abuse, express consent for *marketing* calls and messages must be in writing, while express consent for other calls can be obtained orally. But both require express consent.

⁴ 10 FCC Rcd 12391, 12408, ¶ 15 (1995).

transaction is initiated by the “action message” advertising the offer for the discount to the consumer. Indeed, if that action message did not exist, then the consumer would never know about the offer.

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. But there are several caveats described below.

What is the content of the “action display?”

First, how does the consumer know to send the initial text message in the first place? In the example provided by Petitioner, the action display states “text ‘offer’ to 12-345 for 20% off your next purchase.”⁵ Nowhere does this “action display” example state that a *text message* will be sent to the consumer or that an *autodialer* will be used.

If the “action display” stated “text ‘offer’ to 12-345 and receive an autodialed text message with a coupon for 20% off your next purchase” then a text from the consumer accepting that proposal could constitute express consent for the subsequent text message with the coupon code.

What is sent to the consumer?

Petitioner avers that the messages sent to a consumer “contain only the specific information requested by the consumer” and if true, such a message might comply with the consent obtained from that consumer. The devil is in the details. What the sender *thinks* the consumer requested might be different from what the consumer *actually* requested,

⁵ Petition at 3.

based on the contents of the action display. In the prior example, if a 20% off coupon code was sent, the advertiser may have complied. If, however, a 20% coupon is sent along with any other contents (such as instructions for joining a frequent-shopper club or for subscribing to additional text messages for discounts) that would **not** be consistent with the consent obtained from the consumer.

CONCLUSION

The Petition is unnecessary and should be denied. All of the issues raised by the Petition are already addressed by existing Commission rules, guidance, and policy. Such individual fact-intensive questions are best reserved to a court where the specifics of the action display and resulting text message can be evaluated by a fact-finder. A blanket exemption based on the limited and “sanitized” hypothetical in the Petition would invite scofflaws and abuse.

Existing Commission rules, guidance, and policy have already provided the answer to this and similar petitions: The “action display” which is the advertisement that asks a consumer to send a text message, must adequately inform the consumer as to what is being consented to in a “clear and conspicuous” manner following existing Commission guidance. The sender of the one-time text message to the consumer in response must ensure that the contents of the message do not exceed the scope of what the Consumer consented to.

Respectfully submitted, this the 21st day of February, 2014.

/s/ Robert Biggerstaff