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February 21, 2014

Before the
Federal Communications Commission
Washington DC 20544

In the matter of **Petition of Retail Industry Leaders Association's Petition for Declaratory Ruling**	**CG Docket No. 02-278** **Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991** **DA 14-75** **January 22, 2014**

Gerald Roylance's Comments re Retail Industry Leaders Association's Petition

I. Introduction

In DA 14-75,[1] the FCC seeks comment about the Petition of Retail Industry Leaders Association's (RILA) December 30, 2013 petition.[2] Generally, RILA wants the FCC to say that responses to text offers do not fall under the proscriptions of the TCPA.

The Petition lacks detail. It suggests that text offer responses are likely targets for "frivolous and costly TCPA class action lawsuits",[3] but it does not actually say there has been such a class action lawsuit. If there are pending lawsuits, then it is asking for the FCC to rule in the dark. Petitions are often light on details or state their version of contested facts.

[1] FCC, 22 January 2014, *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling filed by Retail Industry Leaders Association*, http://apps.fcc.gov/ecfs/document/view?id=7521067293.
[2] Retail Industry Leaders Association, *Petition for Declaratory Ruling of the Retail Industry Leaders Association*, 30 December 2013, http://apps.fcc.gov/ecfs/document/view?id=7521067293.
[3] Petition, page ii.

In the RILA scenario, I walk into a store and see an advertisement that says for 20% off your next purchase, text “OFFER” to a short code. If I text “OFFER” to that short code, then I would reasonably be expressing consent for an automated text response with a coupon the 20% coupon.

It is essential that the response be limited to exactly the subject of the advertisement. I would not be expressing consent for a return call that included other offers. The FTC has ruled that upsells during a customer-initiated voice call change the character of the call. The response needs to be single subject; it should not include any other advertising material. There should not be any hidden requirements such as texting back a survey before releasing the coupon.

Even if the single subject requirement is met, I’m leery of the machinery that goes on behind the offer. Lots of things are unsaid in the RILA petition.

In the old paper-based world, an advertiser would just print a coupon. It doesn’t cost a lot of money to do that. The Sunday paper is still loaded with such coupons. Those coupons have the advantage that they are anonymous in the same sense that cash is anonymous. If I use a Sunday paper coupon, I haven’t told the retailer who I am.

A local retailer often runs weekend sales. Come in Saturday or Sunday, buy anything, and get 10 percent off. Those sales are also anonymous.

In RILA’s modern world, the advertiser doesn’t print the coupon but instead prints an invitation to text for a coupon. Why does RILA want to go through the extra step? RILA doesn’t tell us.

I suspect the answer is data mining. Modern GS1 coupons can have serial numbers; they are not the mass-printed coupons in the newspaper. When such a coupon is used at the checkout counter, the retailer knows who used the coupon. Admittedly, that information is valuable to the retailer. The retailer can get a better picture of customers and a better idea of how to improve its business.

I give my identity to several retailers when I shop. My local grocery store will give me substantial discounts if I use my preferred customer card. It’s a deal I make. I’ve also given the grocery store my telephone number (but I haven’t given it permission to make automated calls to me). I have a preferred customer card at a pharmacy, too, but I have not given the pharmacy my telephone number.

To obtain RILA’s automated text response coupon, I must provide my telephone number. When I actually use the coupon, the retailer can match the purchase with my telephone number.

The response texts hit some contradictory points. The FCC might deem that I have voluntarily “released” my telephone number during the transaction because I expected a reply. However, the FCC has also required that consumers consciously release their telephone numbers; an ANI capture is not sufficient. What can the retailer do with telephone number it acquired during the transaction?

Does today's consumer understand the consequences of that release? I would say no. Many teenagers have cellular phones. Once a retailer gets a cellular telephone number, is it ever going to throw the number away? If the retailer or the credit card company does not get paid, then will the number be used for dunning calls? There may not be a directory for cellular telephone numbers, but there's a huge market for advertising information. Is the retailer going to sell the information?

Frankly, I don't like the consequences. And RILA is not putting any limits on those consequences. RILA claims its members won't make any other automated calls to that cellular telephone, but RILA does not say the cellular telephone number is destroyed. The transaction does not end with the automated text response.

RILA claims that it does not initiate the consumer's text, but RILA members started the text advertising campaign and sought the consumer's texts: the short code offer didn't materialize out of thin air. California's telemarketing statutes consider both cases: calls made by a telemarketer and calls made by a consumer in response to specific advertisements. I don't see RILA being able to claim the call is not telemarketing. RILA's members intend to sell goods and services.

Telemarketing campaigns have specific requirements. RILA doesn't tell us if I can text "DONOTCALL" to the short code and get my telephone number placed on the company-specific do-not-call list. Can I text "PRIVACYPOLICY" to the short code to learn what they will do with my information?

RILA wants a blanket get-out-jail-free card. If the text was sent in response to a consumer's inquiry, then the response text is never a violation. That request is overbroad. If the on demand texts are done as RILA says they are used, then RILA's members should not be subject to class actions. But there are pending petitions before the FCC when the petitioner has painted a pretty picture but the actual details are quite different. What response is actually sent to an offer message can make a world of difference, so any blanket statement should be qualified.

The petition should be denied. RILA itself argues that its "on demand texts in no way impinge on a consumer's privacy".[4] If consumers have indeed "come to rely upon on demand text offers to meet their growing expectation for personalized, convenient offers available on the spot," then those reliant consumers will not complain about the response texts. If RILA members operate as RILA claims they do, then they are in little danger of class action lawsuits. The FCC need do nothing here. RILA has not posited a creditable threat.

[4] Petition, page 6.