

**REPLY COMMENTS  
ON  
NOTICE OF PROPOSED RULEMAKING IN  
CG DOCKET NO. 21-402**

In the Matter of	)	
	)	
Targeting and Eliminating Unlawful Text Messages	)	CG Docket No. 21-402
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	

**Reply Comments on  
SECOND FURTHER NOTICE OF PROPOSED RULEMAKING IN  
CG DOCKET NO. 21-402**

by

**National Consumer Law Center on behalf of its low-income clients  
Consumer Action  
Consumer Federation of America  
Electronic Privacy Information Center  
National Association of Consumer Advocates  
National Consumers League  
Public Knowledge  
U.S. PIRG**

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## Reply Comments

### I. Introduction and Summary

These Reply Comments are respectfully submitted by the **National Consumer Law Center**, on behalf of its low-income clients and **Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, National Association of Consumer Advocates, National Consumers League, Public Knowledge**, and **U.S. PIRG**, in response to the Federal Communication Commission's (FCC or Commission) Second Further Notice of Rulemaking in this docket.<sup>1</sup> We filed comments relating to the text blocking issues raised in this rulemaking,<sup>2</sup> as well as comments in the First Notice of Rulemaking on the appropriate interpretation of the regulation governing consent for telemarketing calls with artificial or prerecorded voice.<sup>3</sup> These Reply Comments are in response to the Commission's questions "on whether and how it can further minimize any potential economic impact on small businesses in

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<sup>1</sup> *In re* Targeting and Eliminating Unlawful Text Messages; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Report and Order, Second Further Notice of Proposed Rulemaking in CG Docket Nos. 02-278 and 21-402, and Waiver Order in CG Docket No. 17-59, CG Docket Nos. 21-402, 02-278, & 17-59, at ¶ 87 (Rel. Dec. 18, 2023), *available at* <https://docs.fcc.gov/public/attachments/FCC-23-107A1.pdf> [hereinafter Second FNPRM]; Targeting and Eliminating Unlawful Text Messages; Implementation of the Telephone Consumer Protection Act of 1991, Proposed Rule, CG Docket Nos. 02-278, 21-402, 89 Fed. Reg. 5177, 5180 ¶ 18 (Jan. 26, 2024), *available at* <https://www.govinfo.gov/content/pkg/FR-2024-01-26/pdf/2023-28833.pdf>.

<sup>2</sup> *See In re* Targeting and Eliminating Unlawful Text Messages, Comments of National Consumer Law Center, Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, National Association of Consumer Advocates, National Consumers League, and U.S. PIRG, on Second Further Notice of Proposed Rulemaking in CG Docket No. 21-402, CG Docket Nos. 21-402, 23-107, & 02-278 (Feb. 26, 2024), *available at* <https://www.fcc.gov/ecfs/document/102260762423180/1>.

<sup>3</sup> *See In re* Targeting and Eliminating Unlawful Text Messages Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Comments of National Consumer Law Center et al. Relating to the Report and Order and Further Notice of Proposed Rulemaking Issued March 17, 2023, CG Docket Nos. 21-402 & 02-278 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/document/1050859496645/1>. *See also* National Consumer Law Center et al., Notice of *Ex Parte* Presentation, CG Docket No. 02-278, CG Docket No. 21-402, CG Docket No. 17-49 (Dec. 1, 2023), *available at* <https://www.fcc.gov/ecfs/document/1202188117200/1>; Comments of National Consumer Law Center et al. Relating to the Report and Order and Further Notice of Proposed Rulemaking Issued March 17, 2023, CG Docket Nos. 21-402 & 02-278 (June 6, 2023), *available at* <https://www.fcc.gov/ecfs/document/10606186902940/1>.

complying with the one-to-one consent requirement for prior express written consent under the TCPA.”<sup>4</sup>

We agree with many commenters in this docket that there will be dramatic economic consequences to small businesses throughout the United States as a result of the Commission’s determination that “that prior express written consent required under the Telephone Consumers Protection Act (TCPA) must be given to one seller at a time.”<sup>5</sup> However, as repeatedly illustrated in the *hundreds* of express comments filed in this proceeding from small businesses that are *not* lead generators or telemarketers, **the “economic consequences” of the Commission’s order will be overwhelmingly positive for small business.** As the hundreds of small business commenters who are not lead generators repeatedly note in their comments filed in this proceeding, telemarketing messages to their telephones cost them— in money, time, and missed calls.<sup>6</sup> We discuss the financial *gains* from the Commission’s order to small businesses, consumers, and the telephone system as a whole in **Section II, *infra*.**

There is no doubt that the lead generators that have been collecting, sharing and selling consents for prerecorded calls to telemarketers will lose money from the Commission’s order—if they choose to obey it. But every one of the lead generators who are complaining about their big losses are also **admitting in a formal filing with a federal agency that they are routinely violating current and preexisting legal requirements** that have applied to them for some time. As described in **Section III, *infra*,** the requirement for one-to-one consent for prerecorded telemarketing calls<sup>7</sup> is **already the law** for prerecorded calls under the FTC’s specific and clear ban in the Telemarketing Sales Rule (TSR).

**Section IV** addresses the numerous misunderstandings that appear to plague the telemarketing industry about the Commission’s order (at least those that have commented in this docket).

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<sup>4</sup> Second FNPRM, *supra* note 1, at ¶ 87.

<sup>5</sup> *Id.*

<sup>6</sup> *See*, § II B, *infra*.

<sup>7</sup> The FTC’s regulation on these calls describes the covered calls as calls with a prerecorded message. 16 C.F.R. § 310.4(b)(1)(v). The FCC’s regulation applies to calls that include an artificial or prerecorded voice. 47 U.S.C. § 227(a)(1). For ease in reference, in these Reply Comments we refer to all of these calls as prerecorded voice calls.

**Section V** provides some suggestions in response to the Commission’s questions about how to assist the telemarketing industry with compliance with the one-to-one consent rule.

**II. The financial *gains* from the Commission’s order to small businesses, consumers, and the entire telephone system must all be considered.**

**A. The statements of potential costs to lead generators from the impact of the Commission’s December 2023 order are inflated and misleading.**

Several comments in the FCC’s record describe in hyperbolic terms the negative consequences that the FCC’s order will have on businesses involved in telemarketing. These allegations are along the following lines:

- “The implementation of this rule will cause significant and life altering harm to the more than 2 million small businesses nationwide in our industry including the loss of high paying and cutting-edge tech jobs as well as negatively impacting hundreds of thousands of good paying jobs in dozens of industries that rely on lead generation services.”<sup>8</sup>
- “The implementation of this regulation seems excessive and could potentially devastate our industry, incurring costs in the tens of thousands of dollars for software development alone, to meet these new requirements.”<sup>9</sup>
- The comment from the REACH group includes a spreadsheet described as “Lead Buyer Survey” purporting to show that the order will trigger a potential loss of 355 employees for the surveyed companies, and result in a revenue loss of \$21,985,000.<sup>10</sup>

These statements completely ignore two important points: First, as addressed more fully in Section III, *infra*, in the Telemarketing Sales Rule (TSR),<sup>11</sup> the FTC has ***already prohibited the sharing of consents for prerecorded telemarketing calls, and these entities complaining about the FCC’s order are already required to comply with the TSR.*** By complaining that the costs to comply with the FCC’s order will be expensive, these commenters are admitting that they have been routinely and consistently violating the FTC’s rules.

Second—and more relevant—nothing in the FCC’s order prevents these businesses from continuing to engage in business exactly as they have been doing all along, with one small exception:

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<sup>8</sup> Comment of Rance Gardner, CG Docket Nos. 21-402, 02-278, & 17-59 (Jan. 19, 2024), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10119287073002>.

<sup>9</sup> Comment of Peak Marketing Service, L.L.C., CG Docket Nos. 02-278 & 21-402 (Jan. 19, 2024), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10119072310031>.

<sup>10</sup> Comment of REACH, CG Docket Nos. 21-402 & 02-278, at 12 (Feb. 26, 2024), *available at* <https://www.fcc.gov/ecfs/document/10227605510323/1>.

<sup>11</sup> 16 C.F.R. § 310.4(b)(1)(v).

they cannot obtain a one-size-fits-all consent and then market it to multiple callers. An agreement to receive prerecorded calls can apply only to a single identified caller.

Nothing in the FCC's rule prevents a lead generator from receiving the consumer's information and then generating a list of sellers that want to contact the consumer, and asking the consumer to check a box and provide a signature for any seller the consumer wants to hear from.<sup>12</sup> It can do this in real time, while the consumer is online, and the agreement can authorize prerecorded messages. Indeed, it is very common for price comparison and shopping websites to operate in this way, giving the consumer a list of options to choose from. As the FCC stated in its order:

[E]ven under our new rule, comparison shopping websites can obtain the requisite consent for sellers to robocall and robotext consumers using easily-implemented methods. For instance, a website may offer a check box list that allows the consumer to choose each seller that they wish to hear from. Alternatively, a comparison shopping website may offer the consumer a clickthrough link to a business so that it may obtain requisite consent from the consumer directly. Our rule does not prohibit websites from obtaining leads and merely codifies reasonable limits on when those leads allow sellers to use robocalls and robotexts to reach consumers.<sup>13</sup>

Moreover, nothing prohibits lead generators, or the sellers to whom they provide referrals, from contacting the consumers through email or snail mail (addresses are often required information), or by simply displaying the information right on the website, as described by the FCC. Many lead generators currently do not require the entry of a telephone number to refer a consumer to a seller,<sup>14</sup> and others ask for minimal information (like zip code) and then refer the consumer right to a seller's website.<sup>15</sup>

Many lead generators already engage in a healthy business directing consumers to appropriate sellers of products and services without collecting and trading consents for robocalls.<sup>16</sup>

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<sup>12</sup> See Second FNPRM, *supra* note 1.

<sup>13</sup> *Id.* at ¶ 41.

<sup>14</sup> See, e.g., <https://www.google.com/travel/flights>.

<sup>15</sup> See, e.g., <https://best.ratepro.co/>; <https://www.esurance.com/>; [www.nerdwallet.com](http://www.nerdwallet.com).

<sup>16</sup> See, e.g., Cybernews, Best VPNs (Mar. 2024), available at <https://us.cybernews.com/lp/best-vpn/>; Top10.com, Top 10 Best Website Builders of 2024 (last updated Mar. 2024), available at <https://www.top10.com/website-builders/comparison>.

This industry can continue exactly as they have been, providing value to sellers and consumers alike. Only those websites that have already been violating the TSR will have to change their practices to comply with both the FTC and the FCC's express requirements.

We acknowledge that compliance with the one-to-one consent rule will cost some elements of the telemarketing industry money—specifically those that are violating the FTC's parallel rule (see § III, *infra*). The FCC's rule may finally motivate these lead generators to modify their websites to comply with the two agencies' one-to-one consent requirement. Lead generators are likely to be modifying their websites frequently, so this modification, to the extent it is necessary, should be an expected part of their budget and their operations. They may also lose money they were gaining by selling the spurious one-size-fits-all consents they were obtaining. But what is truly astounding is that these businesses are actually complaining about lost profits from activities that are already clearly in violation of the law.

### **B. Small businesses will see massive benefits from the reduction in telemarketing robocalls triggered by the FCC's order.**

The lead generators and telemarketers complaining about the FCC's December 18, 2023 order are not the only small businesses impacted by this rule. All the other kinds of small businesses—those that do not *make* money from telemarketing robocalls—will benefit considerably from the Commission's order.

As of March 11, 2024 and since December 18, 2023, over 345 express comments have been filed on the FCC's website in this docket. The vast majority of these express comments come from commenters who identified themselves as small business owners or managers and who support the Commission's order.<sup>17</sup> These commenters routinely noted that telemarketing calls are burdensome, bad for business, and costly. For example, below are just a few of the hundreds of comments filed by small businesses in this docket that are *in favor* of the Commission's order:

- I work in mortgage. I rely on my cell phone to communicate with clients and the amount of telemarketing calls is horrible. I have to answer each one as it MIGHT be a client. This ties up SO MUCH of my time and is so annoying. **And even more so, when I pull credit for**

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<sup>17</sup> This is the list of Express Filings in Docket 02-278, on the FCC's electronic website, filed since December 28, 2023: [https://www.fcc.gov/ecfs/search/search-filings/results?q=\(express+comment:\(%221%22\)+AND+proceedings.name:\(%2202-278%22\)+AND+date+received:\[2023-12-18%20TO%202024-03-11\]\)](https://www.fcc.gov/ecfs/search/search-filings/results?q=(express+comment:(%221%22)+AND+proceedings.name:(%2202-278%22)+AND+date+received:[2023-12-18%20TO%202024-03-11]))

**my clients, they can get upward of SIXTY calls from telemarketing.** It's INSANE and crippling for them. We need to get rid of telemarketing AND trigger leads.<sup>18</sup>

- I am a small business owner (Real estate). My phone is my lifeline. All of my business is either generated or facilitated on my phone. **In the current climate, I get more spam calls in a day than I get business calls.** The spammers have begun spoofing numbers to use local numbers. As a real estate professional, I have to answer these calls for fear of it being a lead or customer call. In the recent past, I've left calls unanswered. Were they spammers, or was it a legit business call? Did I lose business and therefore money from unanswered calls? I would venture to say, yes. I did, and many others are doing the same. As a sales professional, I understand the need for free-market practices, but this has gotten out of hand. There is no regard for people and their lives. Calls at all times of the morning and night. Please help the small business owners of the nation from this plague.<sup>19</sup>
- I own a small locksmith business. We provide an "express service" that primarily helps people locked out of car, home or business. These persons need fast help so they don't wait for a callback if you miss their call. The customer loses, my business loses... and even the obnoxious telemarketer has wasted his time because I never buy anything from them. That they have the legal right to call without my explicit permission makes little sense to me. Neither putting my phone number on the internet, nor giving it to any other company, is an invitation for calls from just anyone. It's almost like a thousand people overheard you telling your number to someone and they figure it's ok for them to call too. It isn't ok at all. Please stop whatever the telemarketers are doing to get my number. I consider all telemarketer calls to be harassment.<sup>20</sup>
- I am the owner of a small business. We rely on our phone lines to communicate with customers, suppliers and others. When telemarketers call, they tie up the phone lines, preventing us from doing business and from receiving other important calls. For 10 years, our company was proud of our record of having a live person answer every call within 3 rings. Three years ago, we were forced by the telemarketing calls to use an "auto-attendant" phone tree to weed out the robo-calls. These calls cost us time, and time is money for small businesses. They are also incredibly annoying, and **damage the morale and attitudes of our employees.** The problem on our company cell phones is worse. We are unable to put an auto attendant on the cell phones, and as a business, we can't just ignore phone calls from numbers we don't recognize. **The telemarketing calls and robo-calls have made our cell phones nearly useless for business purposes.** The FCC must close the lead generator loophole and stop telemarketers from harassing small business owners and cell phone users.<sup>21</sup>

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<sup>18</sup> Comment of Donna Miller, CG Docket No. 02-078 (Mar. 8, 2024), (emphasis added), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/103081094124655>.

<sup>19</sup> Comment of David A. Bramblett, CG Docket No. 02-278 (Mar. 7, 2024), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/1030748480268>.

<sup>20</sup> Comment of Chris Robinson, CG Docket No. 02-278 (Mar. 11, 2024), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10308034167226>.

<sup>21</sup> Comment of Martha White, CG Docket No. 02-078 (Mar. 7, 2024), (emphasis added), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10306101225033>.



- I am the chief executive of a small business that collects input from experts and influencers around the world on behalf of our clientele. To do our work, we must be in rapid contact with hundreds of individuals each month by mobile phone. Typically, we do not have their phone numbers in our phones before they call, meaning that we are not able to white-list them in advance. This means we must answer almost every unknown call that we receive. **Because we have to answer all calls, the increasing number of telemarketing calls that we are receiving are [a] severe economic burden on our business.** Each telemarketing call requires one of our small staff to interrupt what they are doing, answer the call, waste time listening long enough to determine that it is telemarketing call, hang us, and refocus on the task they were doing. There is also the possibility that they will miss an important call while dealing with the telemarketing call. Lately, we are becoming so burdened by telemarketing calls that some of our employees are resorting to ignoring calls from unknown numbers out of sheer frustration. When such a call comes from a genuine contact, this impairs our productivity at best and risks us losing a source of knowledge. A crucial aspect is the economic asymmetry of telemarketing calls. The telemarketer uses a robocaller that costs them virtually nothing per call. But we have to spend actual human staff time dealing with each telemarketing call. **Robocalls cause [telemarketers] not merely to transfer economic value from small businesses to telemarketers, but actually to inflict costs on small businesses far out of proportion to whatever economic gains they themselves receive.** They are huge net value-destroying mechanism for the national economy and especially for small businesses.<sup>22</sup>

Even some of the small businesses that use leads bought from lead generators are likely to benefit from the FCC's order because it may force lead generators to be more circumspect with the sale of their leads. As explained by one small business, lead generators currently "artificially inflate the cost per click figures by selling the lead to multiple buyers. The business will win (with the new requirements) because the current model almost demands immediate follow-up before the customer is saturated. The consumer will win by knowing exactly who and how many people will be contacting them."<sup>23</sup>

Shutting down the lead generator loophole as mandated by the FCC's December 2023 order will cause a significant reduction in the number of telemarketing calls that plague small businesses, as well as individual consumers. All of these telephone users will benefit substantially from the order.

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<sup>22</sup> Comment of William Messenger, Theology of Work Project, Inc. (March 11, 2024) (emphasis added), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10309038626825>.

<sup>23</sup> Comment of Mark Aussieker, CG Docket Nos. 20-402 & 02-278 (Jan. 30, 2024), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/101302326222135>.

**C. Reducing the number of telemarketing calls will help stop scam calls and restore the value of voice calls in the United States.**

A significant reduction in the one billion-plus telemarketing calls made to U.S. telephones each month will have many additional benefits. By reducing the number of these unwanted calls, the communications system will be better able to identify and stop the scam calls. Also, eradicating the majority of unwanted calls will start the process of restoring the value of telephone voice service.

The lead generators complaining about the Commission’s order argue that the “One-to-One consent requirement under the 2023 FCC Order will not stop the fraudulent and spam companies from messaging consumers as these companies do not follow the current rules.”<sup>24</sup> This statement is incorrect.

Currently, the scam calls are able to hide among the profusion of telemarketing calls, making it more difficult for voice service providers to identify and block the real scam calls. This was illustrated in the recent testimony to the U.S. Senate Subcommittee on Communications, Media and Broadband, by Michael Rudolph, Chief Technology Officer of YouMail, Inc.:

One of the difficulties in analyzing communications is determining whether a communication is spam, generally unwanted by most recipients, or is perpetrating a scam or committing fraud. This is particularly challenging as the content of a communication may be nearly identical when it comes from an enterprise such as a bank, utility, or government agency as it is when it originates from an imposter.<sup>25</sup>

Indeed, he points out that scam/fraud calls are typically disguised as telemarketing calls to maximize their success.<sup>26</sup> Moreover, many of the providers responsible for the scam calls are also responsible for a sizeable proportion of the telemarketing calls.<sup>27</sup>

Reducing telemarketing calls will produce significant benefits not only for individual consumers and small businesses, but also for the entire ecosystem of telephone voice service. In a

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<sup>24</sup> Comment of Ideal Concepts, Inc., CG Docket Nos. 02-278 & 21-402, at 12 (Jan. 26, 2024), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/101260127720205>. *See also* Comment of Jesse R. Sherrod III, CG Docket Nos. 02-278, 21-402, & 17-59 (Jan. 17, 2024), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10117011481380>.

<sup>25</sup> Protecting Americans from Robocalls, Hearing before the S. Comm. on Commerce, Science & Transportation, Subcomm. on Communications, Media & Broadband, 118th Congress, 1st Session, at 3 (Oct. 24, 2023) (written testimony of Michael Rudolph, Chief Technology Officer of YouMail, Inc.), *available at* <https://www.commerce.senate.gov/services/files/AB431156-739B-46FE-98F3-FAAEB4145F60>.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 13.

time when a minority of people answer calls from unknown numbers,<sup>28</sup> the benefits of reducing the number of telemarketing calls will provide positive ripple effects for the entire system.

### III. The FTC has already required one-to-one consent for prerecorded telemarketing calls.

Regulations from both the FCC<sup>29</sup> and the FTC<sup>30</sup> govern prerecorded telemarketing calls. Regardless of the issue of whether the FCC's current regulations require one-to-one consent for prerecorded calls, there can be no doubt that the FTC's regulations have required this for some time.

With respect to prerecorded calls, the TSR declares:

It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in the following conduct:

...

(v) Initiating any outbound telephone call that delivers a prerecorded message, . . . unless:

(A) In any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that:

- (i) The seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person;
- (ii) The seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;
- (iii) Evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and
- (iv) Includes such person's telephone number and signature; . . .

The TSR's requirement that "the seller" obtain the consumer's consent, and that the consent allows delivery of prerecorded messages "by or on behalf of a specific seller," make it clear that a third party that is not the seller's agent cannot obtain the consumer's consent, and that consent applies

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<sup>28</sup> See Businesswire, TNS Survey: 75 percent of Americans Will Never Answer Calls from Unknown Numbers (July 26, 2022), available at <https://www.businesswire.com/news/home/20220726005226/en/TNSSurvey-75-of-Americans-Will-Never-Answer-Calls-from-Unknown-Numbers>; Octavio Blanco, Consumer Reports, *Mad About Robocalls?* (Apr. 2, 2019), available at <https://www.consumerreports.org/robocalls/mad-about-robocalls/> (seventy percent of phone subscribers no longer answer the phone for numbers they do not recognize).

<sup>29</sup> 47 C.F.R. § 64.1200(a), (f).

<sup>30</sup> 16 C.F.R. § 310.4(b)(1)(v).

only to the specific, named seller so cannot be sold or transferred. The FTC has explicitly reiterated this point in its Business Guidance,<sup>31</sup> which explains:

**Does a consumer’s written agreement to receive prerecorded message calls from a seller permit others, such as the seller’s affiliates or marketing partners, to place such calls?** No. The TSR requires that the written agreement identify the single “specific seller” authorized to deliver prerecorded messages. The authorization does not extend to other sellers, such as affiliates, marketing partners, or others.

**May a seller obtain a consumer’s written permission to receive prerecorded messages from a third-party, such as a lead generator?** No. The TSR requires the seller to obtain permission directly from the recipient of the call. The seller cannot rely on third-parties to obtain permission.

**Are there specific procedures for obtaining a consumer’s written agreement to receive calls that deliver prerecorded messages?** There are three essentials:

1. Before the consumer agrees, the seller must **clearly and conspicuously disclose the consequences** of agreeing — namely, that the agreement will result in the seller delivering prerecorded messages to the consumer via telemarketing calls;
2. The seller may **not** require, directly or indirectly, that a consumer agree to receive prerecorded message calls as a precondition for purchasing or receiving any good or service; and
3. The seller must give the consumer an opportunity to designate the telephone number to which the calls may be placed.

Sellers bear the burden of demonstrating that these prerequisites have been met, and that they possess the required written agreements from consumers to receive prerecorded calls for all such calls that they place.

These requirements in the TSR have been enforced in highly visible cases brought by the FTC along with “more than 100 federal and state law enforcement partners nationwide, including the attorneys general from all 50 states and the District of Columbia.”<sup>32</sup>

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<sup>31</sup> Federal Trade Comm’n, Business Guidance, Complying with the Telemarketing Sales Rule, *available at* <https://www.ftc.gov/business-guidance/resources/complying-telemarketing-sales-rule#prerecordedmessages>.

<sup>32</sup> Press Release, Federal Trade Comm’n, FTC, Law Enforcers Nationwide Announce Enforcement Sweep to Stem the Tide of Illegal Telemarketing Calls to U.S. Consumers (July 18, 2023), *available at* <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-law-enforcers-nationwide-announce-enforcement-sweep-stem-tide-illegal-telemarketing-calls-us>.

The FTC’s 2023 complaint against Fluent, LLC noted that the defendant was a “consent farm lead generator” that purported “to collect, through a single click of a button or checkbox on their websites, consumers’ broad agreement to receive marketing solicitations, including robocalls and other telemarketing calls, from dozens or even hundreds of third parties.”<sup>33</sup> The case settled when Fluent agreed to pay a \$2.5 million civil penalty and, among other things, to be banned from engaging in, assisting, or facilitating robocalls.<sup>34</sup>

A similar case, with similar results, was filed against Viceroy Media Solutions, LLC, which was accused of operating “lead generation websites, quick-jobs.com and localjobindex.com, that act as consent farms to gather consumers’ personal information along with their supposed consent to receive robocalls.”<sup>35</sup> The FTC noted that “In reality, consumers have not consented to receive robocalls, as the defendants claim when selling their leads to telemarketers.”<sup>36</sup>

This is the exact behavior that is explicitly banned by the FCC’s one-to-one consent rule and has been explicitly banned by the FTC since the TSR went into effect in 2010.<sup>37</sup> The lead generators that have been flagrantly ignoring the requirements of the TSR should not be permitted to roll back the FCC’s order just because they have not yet been targeted by the FTC for their non-compliance.

#### **IV. The telemarketing industry appears to misunderstand critical aspects of the Commission’s order.**

The comments filed in this docket by the lead generators illustrate that the telemarketers and lead generators complaining about the FCC’s December 2023 order misunderstand important points about both the meaning and effect of that order, as well as current requirements in the FTC’s regulations. We list below these misunderstandings.

- 1. The misunderstanding that the order imposes new requirements applicable to the telemarketing industry.** As described in Section III of these comments, *supra*, even ignoring the question of whether the FCC’s regulations have previously required one-to-one consent for calls to the DNC list, there is no doubt that the

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<sup>33</sup> *Id.*

<sup>34</sup> See Joint Motion for Entry of Proposed Stipulated Order, United States v. Fluent, L.L.C., No. 9:23-cv-81045 (July 17, 2023), *available at* [https://www.ftc.gov/system/files/ftc\\_gov/pdf/1923230fluentjointmotionforentryofproposedstipulatedfinalorder.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/1923230fluentjointmotionforentryofproposedstipulatedfinalorder.pdf).

<sup>35</sup> FTC Press Release, *supra* note 32.

<sup>36</sup> *Id.*

<sup>37</sup> See 75 Fed. Reg. 48,458 (Aug. 10, 2010).

FTC's Telemarketing Sales Rules have imposed these exact same requirements for prerecorded telemarketing calls on lead generators for a long time.

2. **The misunderstanding that the order impacts any activity of the lead generation industry other than its collection of consents for prerecorded telemarketing rules.** As described in Section II.A of these comments, *supra*, the FCC has already explicitly explained that the only change the industry needs to make is in the gathering of consents for prerecorded telemarketing calls.<sup>38</sup> All of the other services that the industry provides to sellers and consumers is unaffected by this order.
3. **The misunderstanding that compliance with the FCC's order will necessarily lead to pointing consumers more to national brands than to local sellers.**<sup>39</sup> There is simply no data to support this idea. Indeed, when given the choice, consumers often choose local businesses over national brands.<sup>40</sup> Further, it appears that social media is the most popular way for most local small businesses to advertise and obtain business, not through lead generators.<sup>41</sup>
4. **The misunderstanding that the order limits the number of business referrals that a lead generator can provide to a consumer.** LendingTree's comments illustrate this confusion, "LendingTree offers curated comparison-shopping. It supports consumers within its online marketplace by matching them only with a handful of relevant lenders and providers who will compete for their business."<sup>42</sup> It then requests an exception from the one-to-one consent rule for curated comparison shopping.<sup>43</sup> Yet, there is nothing in the Commission's order that impacts the curated comparison-shopping service described in this comment. The order requires only that, before the "relevant lenders and providers" can send prerecorded telemarketing

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<sup>38</sup> See Second FNPRM, *supra* note 1, at ¶ 41.

<sup>39</sup> See, e.g., Comment of The Lead Company, Inc., CG Docket Nos. 02-278, 21-402, & 17-59 (Feb. 27, 2024), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10227815013183>; Comment of Astoria Company, CG Docket Nos. 21-402 & 02-278 (Feb. 23, 2024), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/1022347359170>; Comment of iLeads.com LLC, CG Docket Nos. 21-402 & 02-278 (Feb. 22, 2024), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/102210233011621>.

<sup>40</sup> Consumers aren't turning to local businesses out of necessity, but out of preference. See Rieva Lesonsky, Score, *What Do Customers Want from Local Businesses?* (Apr. 29, 2022), available at <https://www.score.org/resource/blog-post/what-do-customers-want-local-businesses>. Shoppers are drawn to small businesses primarily because that is where they can find unique gift ideas (56%) and better customer service (54%). In addition, 44% of those surveyed said shopping small fosters a sense of *community*. Pamela N. Danziger, *Local Retailers are Counting on Consumer Largesse on Small Business Saturday 2023*, Forbes, Nov. 19, 2023, available at <https://www.forbes.com/sites/pamdanziger/2023/11/19/local-retailers-are-counting-on-consumer-largesse-on-small-business-saturday-2023/?sh=7c87e95b5bb7>.

<sup>41</sup> Luisa Zhou, Small Business Statistics: The Ultimate List in 2024 (updated Jan. 21, 2024), available at <https://www.luisazhou.com/blog/small-business-statistics/>.

<sup>42</sup> Comment of Lending Tree, LLC, CG Docket Nos. 02-278 & 21-402 (Feb. 27, 2024), at 4, available at <https://www.fcc.gov/ecfs/search/search-filings/filing/10226180796087>.

<sup>43</sup> *Id.* at 7.



calls to the consumer, the consumer must have signed an agreement with each of those lenders and providers consenting to receive calls. Other than repeatedly stating that it cannot, Lending Tree does not identify any way in which its curated offer service could not comply with the new rule.

5. **The misunderstanding that the order will not have an important impact on reducing scam calls.**<sup>44</sup> As described in Section II.C, *supra*, because scam calls can hide among the flood of telemarketing calls, reducing these the telemarketing calls will facilitate the efforts of the telephone industry to identify and block the scam calls. This is a primary reason that the trade association for the telephone providers—USTelecom-The Broadband Association—vigorously supported the Commission’s proposal in this proceeding.<sup>45</sup>
6. **The misunderstanding that brokers are not “sellers” of services, such that in live calls the brokers are limited in their discussion of products provided by different companies.**<sup>46</sup> Comments submitted by the group known as “REACH” indicate confusion over whether an insurance broker, who should be considered a seller of services under 47 C.F.R. § 64.1200(f)(10), can discuss with the consumer insurance policies from different companies. The consent at issue in the order covers only the content of *prerecorded* telemarketing calls, and it seems unlikely that prerecorded calls from a broker would include a discussion of specific products that the broker might sell. However, nothing in the Commission’s rule would prohibit inclusion of those products in the message. The consumer would have consented to receive information about the referrals the broker can provide; the consent to receive calls from the broker would not have been for the purchase of a particular product. Subsequent live conversations between the consumer and the broker would not be considered telephone solicitations covered by the regulations governing calls to lines registered to the DNC list, because the consumer had provided prior express written consent.<sup>47</sup>
7. **The misunderstanding that the order affects prior express consent for non-telemarketing calls, as is reflected in the comment on political texts.**<sup>48</sup> There is nothing in the order that applies to non-telemarketing texts.

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<sup>44</sup> Comment of Ideal Concepts, Inc., CG Docket Nos. 02-278 & 21-402, at 12 (Jan. 26, 2024), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/101260127720205>.

<sup>45</sup> See Comments of USTelecom-The Broadband Association, *In re* Targeting and Eliminating Unlawful Text Messages Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 21-402 & 02-278 (May 8, 2023), *available at* <https://www.fcc.gov/ecfs/document/10508915228617/1>. See also Letter from Margot Saunders, National Consumer Law Center & Josh Bercu, USTelecom-The Broadband Association to Marlene Dortch, Federal Commc’ns Comm’n, Notice of *ex parte* Presentation, CG Docket No. 02-278 (June 14, 2023), *available at* <https://www.fcc.gov/ecfs/document/10615228275141/1>.

<sup>46</sup> Comment of REACH, CG Docket Nos. 21-402 & 02-278 (Feb. 26, 2024), *available at* <https://www.fcc.gov/ecfs/document/10227605510323/1>.

<sup>47</sup> See 47 U.S.C. § 227(a)(4).

<sup>48</sup> Comment of Brent Eskew, CG Docket Nos. 02-278 & 21-402 (Jan. 17, 2024), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/101150716523226>.

Given their misperceptions about the nature of the FCC’s one-on-one consent rule, the FCC should give little weight to the telemarketers’ and lead generators’ complaints. The main thing that the telemarketers’ and lead generators’ comments demonstrate is that the FCC needs to undertake various efforts to educate lead generators and telemarketers regarding the requirements of its rule, as discussed in the next section.

**V. Suggestions for how the FCC might assist the telemarketing industry with compliance with the one-to-one consent rule.**

In paragraph 87 of the December 18, 2023 order, the FCC asked “Are there ways to further clarify or refine this requirement to further minimize any compliance costs? What impact would such refinements have on consumers? Are there further outreach efforts or other ways the Commission can assist small businesses in complying with our one-to-one consent rule?”<sup>49</sup>

We offer the following suggestions:

1. The FCC could issue guidance dispelling the misunderstandings that pervade the industry comments and concerns.
2. The FCC could publish a compliance guide like the FTC’s.
3. The FCC could provide mock-ups of some website configurations that would comply with the rule.
4. The FCC, alone or in partnership with the FTC, could hold webinars or other events to explain the new rule.
5. The FCC could bring selective enforcement actions against telemarketers and lead generators that violate the Commission’s order once it is effective to provide further clarification to the industry.

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<sup>49</sup> Second FNPRM, *supra* note 1, at ¶ 87.



## **VI. Conclusion**

We urge the Commission not to revisit its rule, but to continue with its plan to provide guidance and assistance to small businesses about how to comply with it.

**Respectfully submitted March 11, 2024, by**

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