

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington D.C. 20554**

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
	)	
Advanced Methods to Target and Eliminate	)	CG Docket No. 17-59 Unlawful Robocalls
	)	
	)	
Targeting and Eliminating Unlawful	)	CG Docket No. 21-402 Text Messages
	)	
	)	

**COMMENTS BY NATIONAL CONSUMER AND PRIVACY GROUPS IN RESPONSE  
TO PETITION  
TO STAY EFFECTIVE DATE OF ONE-TO-ONE RULE**

**By**

**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  
U.S. PIRG**

Submitted January 22, 2025

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## Introduction and Summary.

This filing is 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** to urge the Federal Communications Commission (FCC or Commission) *not to act* on the “Emergency Petition for Commission to consider a stay of effective date of one-to-one rule in light of Executive Order” filed by the group known as Responsible Enterprises Against Consumer Harassment, MBC (R.E.A.C.H.).<sup>1</sup> Given the harm to consumers and small businesses that would result from granting this petition, the undersigned national consumer and privacy groups thought it prudent to respond to the petition immediately.

In this response we point out that the one-to-one regulation amending 47 C.F.R. § 64.1200(f)(9) issued by the Commission on December 18, 2023,<sup>2</sup> was appropriately adopted pursuant to the Telephone Consumer Protection Act. The regulation is widely supported by consumers and small businesses, a bipartisan coalition of 28 state Attorneys General, as well as the telephone industry. A delay of the effective date of the regulation as proposed by the petition requires full compliance with the Administrative Procedures Act, and thus even it was warranted (which it is not), cannot be adopted in time to delay the effective date of the one-to-one regulation, which is January 27, 2025.<sup>3</sup>

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<sup>1</sup> Petition filed by R.E.A.C.H., *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 (January 21, 2025). <https://www.fcc.gov/ecfs/document/10121419311212/1>

<sup>2</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), <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), <https://www.govinfo.gov/content/pkg/FR-2024-01-26/pdf/2023-28833.pdf>.

<sup>3</sup> Consumer Guide, One-to-One Consent Rule for TCPA Prior Express Written Consent Frequently Asked Questions. <https://docs.fcc.gov/public/attachments/DOC-408396A1.pdf>

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**I. The public has spoken: the one-to-one consent regulation is essential to stop invasive and illegal telemarketing calls, and to facilitate the blocking of scam calls.**

**A. The one-to-one consent regulations will significantly reduce unwanted telemarketing calls.**

The new regulation is widely viewed by the telemarketing call recipients, the telecommunication providers, and the enforcement community, to be a highly effective mechanism that will cut down on the proliferation of unwanted telemarketing calls. In 2024, there were generally an average of 1.4 **billion** telemarketing calls every month, but these calls escalated in late 2024 to be over 1.8 billion in November (the latest month for which information is available).<sup>4</sup>

The regulation will close what is referred to as the "lead generator" loophole by requiring that telemarketers must obtain one-to-one consent from consumers for robocalls. Once in effect and enforced, the regulation will have the effect of dramatically reducing the number of unwanted telemarketing calls we receive on our telephones. That will help restore the usefulness and the value of the telephone system in the U.S.

Dramatically reducing the number of unwanted telemarketing calls will also enable the telephone industry to block many of the illegal *scam* calls—which plague Americans, and trigger losses of several billions of dollars a year to seniors and other consumers. This dynamic is illustrated by the strong support for this rule by US Telecom<sup>5</sup> and a bipartisan group of 28 state attorneys general.<sup>6</sup>

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<sup>4</sup> *U.S. Consumers Received Just Over 4.7 Billion Robocalls in November, According to YouMail Robocall Index*, PR Newswire (Dec. 5, 2024), <https://www.prnewswire.com/news-releases/us-consumers-received-just-over-4-7-billion-robocalls-in-november-according-to-youmail-robocall-index-302323522.html#:~:text=IRVINE%2C%20Calif.%2C%20Dec.,to%20show%20a%20meaningful%20decline.%22>.

<sup>5</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), <https://www.fcc.gov/ecfs/document/10508915228617/1> [hereinafter USTelecom Comment].

<sup>6</sup> Reply Comments of 28 State Attorneys General, *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 (June 6, 2023), <https://www.fcc.gov/ecfs/document/10606091571575/1>.

**B. The misuse of consumers’ “consents” by lead generators and others is a major factor contributing to the increasing number of illegal telemarketing calls and texts.**

R.E.A.C.H., which describes itself as an organization filing on behalf its “direct-to-consumer marketing, lead generation and performance marketing members,” admitted in its comments that lead generators are responsible for a “meaningful percentage” of entirely fabricated consent agreements.<sup>7</sup> R.E.A.C.H.’s comments in the proceeding regarding the one-to-one consent rule provide particularly telling information about how the lead generator industry works to enable a plethora of unwanted telemarketing robocalls. Its comments explain that “once the consumer has submitted the consent form the company seeks to profit by reselling the “lead” multiple—perhaps hundreds—of times over a limitless period of time. Since express written consent does not expire, the website is free to sell the consent forever.”<sup>8</sup>

R.E.A.C.H.’s comments also point out that lead generators and aggregators may sell the record of a consumer’s consent to receive calls from one seller to “multiple buyers . . . (or) to other aggregators, who hope that they can sell the [consent to be called] to others within its network.”<sup>9</sup> And, as explained by R.E.A.C.H.,<sup>10</sup> after each sale, all the owners of the consent, including the original lead generator and every subsequent purchaser of the consent, “is free to sell it again.”<sup>11</sup> The result of all these sales: “Each time the website operator—or an intermediary “aggregator” . . . sells the consumer’s data a new set of phone calls will be made to the consumer.”<sup>12</sup> These admissions illustrate how lead generators currently abuse the “consents” they purport to obtain from consumers—behavior which will no longer legal once the one-to-one consent regulation is effective.

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<sup>7</sup> Comment of Responsible Enterprises Against Consumer Harassment, CG Dockets Nos. 21-402, 02-278, at 1 (May 9, 2023), <https://www.fcc.gov/ecfs/document/10509951114134/1>.

<sup>8</sup> *Id.* at 3 (emphasis added).

<sup>9</sup> *Id.* at 6.

<sup>10</sup> *Id.* at 3 (emphasis added).

<sup>11</sup> *Id.* at 6 (emphasis added).

<sup>12</sup> *Id.* at 3 (emphasis added).

### C. The regulation will bring substantial benefits to consumers and small businesses.

Substantial *financial gains* will flow from the Commission's order to small businesses, consumers, as well as the entire telephone system. 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 see massive benefits from the Commission's order.

After the Commission requested comments on the impact of the rule on small businesses,<sup>13</sup> almost **400 small business owners** and employees filed express comments on the FCC's website in this docket *strongly supporting the order*. All the comments from small businesses supporting the rule can be accessed through a previous filing submitted by the national consumer and privacy groups on whose behalf this filing is provided.<sup>14</sup>

These small business commenters routinely noted that telemarketing calls are burdensome, bad for business, and costly. For example, below are just a few of the 397 comments filed by small businesses *in favor* of the new regulation:

- 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 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>15</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>16</sup>

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<sup>13</sup> Second FNPRM, *supra* Note 2, at ¶ 87.

<sup>14</sup> Appendix to Letter from Margot Saunders, National Consumer Law Center to Marlene Dortch, Federal Comm'ns Comm'n, Notice of *ex parte* Presentation, CG Docket No. 02-278 (January 14, 2025), <https://www.fcc.gov/ecfs/document/1011408605428/2>

<sup>15</sup> Comment of Donna Miller, CG Docket No. 02-078 (Mar. 8, 2024), <https://www.fcc.gov/ecfs/search/search-filings/filing/103081094124655> (emphasis added).

<sup>16</sup> Comment of David A. Bramblett, CG Docket No. 02-278 (Mar. 7, 2024), <https://www.fcc.gov/ecfs/search/search-filings/filing/1030748480268>.

- 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>17</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>18</sup>
- 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**

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<sup>17</sup> Comment of Chris Robinson, CG Docket No. 02-278 (Mar. 11, 2024), <https://www.fcc.gov/ecfs/search/search-filings/filing/10308034167226>.

<sup>18</sup> Comment of Martha White, CG Docket No. 02-078 (Mar. 7, 2024), <https://www.fcc.gov/ecfs/search/search-filings/filing/10306101225033> (emphasis added).

**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>19</sup>

Even some of the small businesses that use leads bought from lead generators are likely to benefit from the FCC’s order because the new regulation should 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>20</sup>

#### **D. Reducing unwanted telemarketing calls will facilitate blocking of scam calls.**

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

The trade association for the telephone providers—USTelecom-The Broadband Association—vigorously supported the Commission’s proposal in this proceeding.<sup>21</sup> The industry support for the regulation is because the flood of telemarketing calls makes it more difficult for voice service providers to detect which calls are telemarketing—and potentially legal—and which calls are scams.

A dramatic reduction in the number of telemarketing calls will facilitate the efforts of the telephone industry to identify and block the scam calls. This dynamic was illustrated in the 2023 testimony to the U.S. Senate Subcommittee on Communications, Media and Broadband, by Michael Rudolph, Chief Technology Officer of YouMail, Inc.:

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<sup>19</sup> Comment of William Messenger, Theology of Work Project, Inc. (March 11, 2024), <https://www.fcc.gov/ecfs/search/search-filings/filing/10309038626825> (emphasis added).

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

<sup>21</sup> See USTelecom Comment *supra* note 5; see also Letter from Margot Saunders, National Consumer Law Center & Josh Bercu, USTelecom-The Broadband Association to Marlene Dortch, Federal Comm’n’s Comm’n, Notice of *ex parte* Presentation, CG Docket No. 02-278 (June 14, 2023), <https://www.fcc.gov/ecfs/document/10615228275141/1>.



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>22</sup>

Indeed, he points out that scam/fraud calls are typically disguised as telemarketing calls to maximize their success.<sup>23</sup> Moreover, many of the providers responsible for the scam calls are also responsible for a sizeable proportion of the telemarketing calls.<sup>24</sup>

## **II. A stay or a delay of the effective date of a regulation is substantive rulemaking that requires notice and comment.**

The Administrative Procedure Act (APA) requires that a stay or a delay of a final regulation by a federal agency can be issued only after compliance with full rulemaking procedures.<sup>25</sup> This principle was reiterated by the U.S. Court of Appeals for the D.C. Circuit in the case of *Clean Air Council v. Pruitt*, 862 F.3d 1 (D.C. Cir. 2017). That case dealt with the Environmental Protection Agency's (EPA) decision to stay the implementation of a rule regulating methane emissions from the oil and gas industry, which had been finalized during a previous administration. After environmental organizations moved to vacate the EPA's decision to stay the rule, the court held that the underlying law—the Clean Air Act—did not authorize a stay and prohibited the EPA from staying the effective date of the regulation. The court noted that “by staying the rule's effective date and its compliance duties, EPA has determined “rights or obligations ... from which legal consequences will flow.”<sup>26</sup>

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<sup>22</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.), <https://www.commerce.senate.gov/services/files/AB431156-739B-46FE-98F3-FAAEB4145F60>.

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.* at 13-14.

<sup>25</sup> *See e.g.*, *State of California et al. v. Bureau of Land Management et al.*, 286 F. Supp. 3d 1054, 1076 (N.D. Cal. 2018). (rejecting the suspension of a Bureau of Land Management (BLM) rule because, among other things, the suspension lacked reasoned analysis and failed to provide a meaningful opportunity for notice and comment.)

<sup>26</sup> *Clean Air Council v. Pruitt*, 862 F.3d 1, 7 (D.C. Cir. 2017).

There are numerous decisions confirming that a delay of a regulation's effective date is substantive rulemaking subject to the notice-and-comment requirements of the APA. This was clearly articulated in a case challenging another attempted freeze of regulations in 2017:

“[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked and may not alter such a rule without notice and comment. *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (alterations and internal quotation marks omitted). “[A]n order delaying [a] rule's effective date” is “tantamount to amending or revoking a rule.” *Id.* at 6; *see also Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 194 (2d Cir. 2004) (“[A]ltering the effective date of a duly promulgated standard could be, in substance, tantamount to an amendment or rescission of the standard[.]”); *Env'tl Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) (“[S]uspension or delayed implementation of a final regulation normally constitutes substantive rulemaking under APA § 553.”); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 n.28 (D.C. Cir. 1981) (concluding that an order “deferring the requirement that coal operators supply life-saving equipment to miners, [that] had palpable effects upon the regulated industry and the public in general,” is “a substantive rule”); *Nat. Res. Def. Council, Inc. v. U.S. EPA*, 683 F.2d 752, 762 (3d Cir. 1982) (“If the effective date were not part of an agency statement such that material alterations in that date would be subject to the rulemaking provisions of the APA, ... an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date.” (internal quotation marks omitted)).<sup>27</sup>

Numerous other courts have reinforced these rules: a delay of a regulation by an agency is a regulatory action that must be in full compliance with the notice and comment rules of the APA.<sup>28</sup>

Further, the notice and comment period must be meaningful and sufficient to allow public comment. In the past, at least one federal agency attempted to evade the APA requirements for notice and comment by allowing a four-day period for the public to comment. In *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, the court noted that this brief comment period was insufficient to comply with the APA's requirement for a meaningful opportunity to comment.<sup>29</sup>

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<sup>27</sup> *Open Communities All. v. Carson*, 286 F. Supp. 3d 148, 162–63 (D.D.C. 2017).

<sup>28</sup> *See, e.g. Pineros y Campesinos Unidos del Noroeste v. Pruitt* is 293 F. Supp. 3d 1062 (N.D. Cal. 2018) (The Environmental Protection Agency (EPA) acted unlawfully when it delayed the implementation of the Certified Pesticide Applicator (CPA) rule without providing adequate notice and opportunity for public comment, as required by the Administrative Procedure Act); *Becerra v. United States Dep't of Interior*, 276 F. Supp. 3d 953 (N.D. Cal. 2017), (DOI's postponement of implementation of its final rule violated APA's notice-and-comment rulemaking requirements.).

<sup>29</sup> *Pineros y Campesinos Unidos del Noroeste v. Pruitt*, 293 F. Supp. 3d 1062 (N.D. Cal. 2018).

**Conclusion.**

We urge the Federal Communications Commission to *not* open a rulemaking in response to the petition submitted by R.E.A.C.H. and to *not* delay the effective date of the one-to-one regulation issued on December 18, 2023.

Respectfully submitted, this the 22<sup>nd</sup> day of January, 2025, by

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