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

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

COMMENTS OF QUINSTREET, INC.

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May 8, 2023

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EXECUTIVE SUMMARY

The Commission's proposal to amend the definition of "prior express written consent" under the Telephone Consumer Protection Act ("TCPA") to sellers that are "logically and topically associated" with the website that solicits the consent strikes an appropriate balance between the preferences of consumers, advertisers that are trying to reach those consumers, and marketers that connect the two groups. This aspect of the Commission's proposal should be adopted, with only slight clarifying modifications; *see* **Annex A**.

The proposal to prohibit the use of hyperlinks should not be adopted. Prohibiting the use of hyperlinks would limit consumer choice and hurt legitimate businesses, especially smaller and local businesses that may be a consumer's best option. Once the Commission limits the list to sellers "logically and topically associated," the length of the list becomes irrelevant to reducing unwanted calls and texts. Even today, the length of the list has almost no impact on the number of sellers that will receive consumer data, let alone the number of times any consumer is contacted, or whether that contact is unwanted.

Publishers and marketers currently list all *potential* sellers in the hyperlinked list *because they do not (and in some cases cannot) know at that instant of consumer engagement which limited subset of the sellers may meet that specific consumer's needs*. Consumer contact information is ultimately transmitted only to a small subset of the listed sellers (*i.e.*, 3-5). Requiring that all prospective seller names be shoehorned into the consent text is not only at odds with other regulatory approaches to online contracts, but also will impose substantial costs on consumers, publishers and advertisers, particularly smaller and local businesses.

Those adverse consequences include that: (x) thousands of businesses will need to incur additional costs and hire companies to manage their consent and advertising processes, (y)

limited consent slots will be sold to the highest bidder (an auction that will further disadvantage the thousands of small businesses (*e.g.*, insurance agents and home improvement contractors who would struggle to compete for consumer attention in real time)), and (z) consumer searches will not only be harder, but also will result in fewer and less optimal alternatives, particularly local alternatives. Against all of these costs, the resulting decrease in unwanted calls and texts will be likely *de minimis*.

The better fix with respect to the hyperlink would be to require that consent forms using hyperlinks for potential matches clearly and conspicuously disclose that, by consenting, the consumer agrees to be matched with a specific number of companies that are identified in the hyperlink, and that each matched company may call or text them.

Instead of attempting to reduce unwanted calls and texts indirectly by focusing on the hyperlink, the Commission could do so with respect to multi-party consents in the performance marking context by limiting (or requiring disclosure with respect to) (i) the number of parties that receive a consumer's contact information, (ii) the number of times a consumer can be contacted for marketing purposes, and (iii) the duration of consent for marketing efforts. The foregoing could be achieved by federally mandated limits or disclosure (where such authority exists), as well as by encouraging the development of auditable industry standards.

These simple steps would be easy for legitimate businesses to adopt; QuinStreet and other industry participants have already adopted elements of each.

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QuinStreet, Inc. ("QuinStreet") submits these comments in response to the Commission's proposal in its *Further Notice of Proposed Rulemaking* ("*FNPRM*") to amend the definition of "prior express written consent" in its rules.[1]

I. INTRODUCTION AND BACKGROUND

QuinStreet is a publicly traded performance marketing company (Nasdaq: QNST). Its mission is to connect high-intent, in-market consumers with advertisers whose products and services meet the consumers' specific needs.[2] QuinStreet does this via its own websites (*e.g.*, insurance.com, modernize.com), by managing websites owned by other publishers, and by

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[1] *In the Matter of Targeting and Eliminating Unlawful Text Messages; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Further Notice of Proposed Rulemaking, FCC 23-21 at ¶ 61, CG Docket Nos. 21-402, 02-278, (rel. Mar. 17, 2023) (hereinafter, "*FNPRM*") ("We seek comment on amending our TCPA consent requirements to require that such consent be considered granted only to callers logically and topically associated with the website that solicits consent and whose names are clearly disclosed on the same web page").

[2] The TCPA refers to advertisers, and those contacting consumers on their behalf, as "sellers" or "callers."

contracting with publishers and advertisers to create a marketing network. QuinStreet's award-winning compliance team continually monitors its network to ensure that all parties comply with applicable laws, contractual commitments, and industry standards.[3]

The Online Consumer Journey. Imagine a consumer in a small town in upstate New York searching online for auto insurance. They end up on a web site with auto insurance content. That site might be owned by a large auto insurance carrier. Or it could be an insurance comparison site owned by a large or small company. Or it could be one of the thousands of websites created by small business owners or individuals whose content, by dint of commerce (*e.g.,* paid search, brand advertising) or quality (*i.e.,* ranking high in organic results) brought the consumer to them. Businesses like these, who create content consumers engage with, are generally referred to as "publishers."[4]

Most online publishers do not, and cannot, charge for website access. Only a small subset of publishers (*e.g., The New York Times*) can establish and enforce paywalls or rely on subscriptions as a primary source of revenue.[5] Content creation, site maintenance costs and search engine optimization and marketing efforts need to be paid for. As has been the case for

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[3] *See* CTIA Short Code Monitoring Program, *Short Code Monitoring Handbook*, Version 1.8 (Jan. 1, 2021), available at https://www.wmcglobal.com/hubfs/CTIA%20Short%20Code%20Monitoring%20Handbook%20-%20v1.8.pdf; s*ee also* **Annex B**.

[4] When publishers contract with marketers (or, less likely, advertisers) they often are called "affiliates" or are characterized as being part of an "affiliate network." Their status as an "affiliate" of one or more marketers or advertisers is not a negative quality; it simply is a reflection that content creation is not free.

[5] *See* Yudhijit Bhattacharjee, *Who's Making All Those Scam Calls?*, NY Times (Apr. 21, 2021), available at https://www.nytimes.com/2021/01/27/magazine/scam-call-centers.html.

decades, advertising is the primary source of publisher revenue, whether off- or on-line. Sellers have paid publishers for advertising since at least the 18th century.

In the 21st century, substantially all online publisher revenue ultimately comes from advertisers.[6] Banner advertising is one approach, although inquiry-based advertising (*e.g.*, clicks, leads and calls) predominates in cases where the products and services the consumer is seeking will almost inevitably require real-time communication to complete their research and buying journey.[7] Accordingly, advertising involving calls and texts simply is a subset of the ways legitimate publishers are paid by legitimate advertisers.

Performance Marketing. Performance marketing is a form of online marketing in which advertisers pay for specific actions or outcomes, such as clicks, leads, or sales, rather than simply paying for ad space. Performance marketers then pay a portion of those proceeds to the publishers whose content those consumers engaged with. By connecting publishers and advertisers, performance marketing enables publishers to optimize revenue and advertisers to optimize advertising spend. [8]

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[6] In a sense, all websites are in some sense "comparison websites" in that product comparisons may either be in the foreground (*e.g.,* editorial content) or in the background (*e.g.*, in the competition to be the advertiser that is displayed on or linked from that website).

[7] For example, while contemporary consumers have become comfortable buying airline tickets online, most consumers still prefer some human contact as they evaluate considered purchases for items such as mortgages, life insurance, home insurance or home improvement products. Scheduling, including scheduling a mutually convenient time for a call, is increasingly conducted by text exchanges between consumers and businesses.

[8] Performance marketing is also known as pay-for-performance marketing or affiliate marketing. It is typically achieved using various metrics and performance tracking tools that allow advertisers to monitor the success of their campaigns in real-time. Performance marketing can be done through a variety of channels, including search engine advertising, social media advertising, email marketing, and affiliate (multi-publisher) marketing programs. This type of

Most online publishers *have no direct contractual or technological connection with sellers or advertisers*.[9] Instead, performance marketers create, maintain and police multi-publisher and -advertiser networks. The Commission has already recognized that federally mandating a single-advertiser environment would be inconsistent with consumer preferences.[10] It is important to note that a single advertiser environment would also *destroy the primary monetization pathway for thousands of legitimate publishers who are connected to thousands of legitimate advertisers*.[11] Even technologically sophisticated publishers would struggle with monetization if advertising were only limited to a single advertiser.[12] Moreover, thousands of small advertisers (*e.g.,* local insurance agents, home improvement contractors), would effectively become invisible in a single-advertiser regime, even if they could be the best match for a consumer, and are locally owned and operated.[13]

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marketing is particularly popular in e-commerce and other online businesses where direct response and measurable results are important to consumer satisfaction and commercial success.

[9] The online marketing ecosystem consists of many thousands of publishers and many thousands of advertisers. There is no simple, universal way to connect all of these parties directly, either technologically or contractually. This is even more true when an advertiser is subject to regulation (*e.g.,* financial services products such as loans and credit cards). Performance marketers fill these technological and contractual gaps, including with respect to compliance with applicable laws, regulations and brand guidelines.

[10] *See, e.g., FNPRM* at ¶ 61 (acknowledging and seeking comments on, but not proposing to adopt, the Public Knowledge request that consent be secured by one entity at a time).

[11] *See* SolarReviews.com Comments, CG Docket No. 02-278 (April 20, 2023), at 4 (explaining how lead generators help small businesses compete against larger companies).

[12] Imagine what online search engine results pages would look like, and what the impact would be, if only a single advertiser could be displayed.

[13] As the saying goes, "If you're not online, you don't exist." Imagine a small insurance brokerage in upstate New York, which has sponsored youth sports teams, parades, and local charities for decades. Before online advertising existed, those efforts (and ads published in the local paper) constituted sufficient advertising efforts. As consumers increasingly search online, however, that agency needs an online presence to meet its prospective customers where they are.

Economics. Advertisers have little interest in engaging with consumers who do not want their products and services. They are even less interested in having those consumers be called or texted. Neither calling nor texting is free, and irritating consumers is not in any advertiser's interest.[14]

Advertisers use performance marketing to identify high-intent, in-market consumers who *are* interested in their products and services. Performance marketers like QuinStreet specialize in the online identification, matching, and compliance capabilities required to sort consumer preferences and advertiser offers. These capabilities are typically neither core nor scalable skillsets for most advertisers. The Commission's proposal to limit consent in multi-party circumstances to sellers "logically and topically associated" will reinforce what legitimate advertisers already want and performance marketers seek to deliver: real, in-market, high-intent consumers. Converting what is already a commercial standard for many industry participants into a legal requirement will contribute to a reduction in calls and texts that advertisers do not want to make, and consumers do not want to receive.

And if that agency wants a chance at writing local business, they need to appear online, including in the list of sellers that might end up contacting a consumer.

[14] This is especially true when litigation, warranted or otherwise, is a possible outcome of such contact. The misuse of the TCPA's private right of action by portions of the plaintiff's bar is beyond the scope of this submission. *See, e.g., The Juggernaut of TCPA Litigation*, U.S. Chamber Institute for Legal Reform (October 2013) at 2, 10, available at https://instituteforlegalreform.com/wp-content/uploads/2020/10/TheJuggernautofTCPALit_WEB.pdf. It remains a real problem. It effectively requires that all potential sellers be listed in hyperlinks to online consent forms. Any seller not on the list it is a potential litigation target. Even where class certification is unlikely, the steady drip of four- and five-figure settlements to avoid the costs of defending against what may be frivolous claims causes most advertisers to require that their brands, subsidiaries, and even individual insurance agents and contractors be listed in hyperlinks from the consent form.

Unwantedness. Calls and texts can be unwanted in two respects. First, they can be unwanted at the product level; a consumer searching for Product A may well not want or expect to be contacted about Product B.[15] The Commission's proposal to limit consent to sellers "logically and topically associated" with the consumer's search for Product A will do great work in eliminating this kind of unwantedness, sometimes referred to as "co-registration."

Calls and texts can also be unwanted due to their frequency and duration. This can result from (i) too many parties obtaining contact information based upon a single consumer consent, as well as (ii) parties contacting the consumer too often or for too long. If it were practicable to estimate the volume of this kind of unwantedness cause by legitimate U.S. businesses vs. bad actors, foreign and domestic, we would.[16] Unfortunately, it is not. Our sense is the vast majority of U.S. businesses only want to engage with consumers who want to engage with them; engagement is not free. In any event, it is critical that the Commission consider the distinction between bad actors (who have no intention of complying with applicable law), and responsible companies, especially when the adverse consequences of even well-intended federal regulation will fall almost exclusively on U.S. consumers and businesses.

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[15] A consumer interested in Product A *may* be interested in Product B. For example, a consumer interested in auto insurance may also be interested in home insurance. That conversation about home insurance can occur if the consumer so chooses (*e.g.*, in connection with a call or text discussing Product A). In most cases, if a consumer is also interested in Product B, the consumer will initiate a separate search for Product B online, which may then lead to separate consent to be contacted about Product B.

[16] *See*, *e.g.*, Yudhijit Bhattacharjee, *Who's Making All Those Scam Calls?*, NY Times (Apr. 21, 2021), available at https://www.nytimes.com/2021/01/27/magazine/scam-call-centers.html.

II. PERMITTING CONSENT TO APPLY TO MULTIPLE ENTITIES IF THEY ARE "LOGICALLY AND TOPICALLY ASSOCIATED" WITH THE WEBSITE THAT SOLICITS THE CONSENT WOULD BENEFIT CONSUMERS.

The Commission's proposal that consent be "logically and topically associated" with the website that solicits the consent represents a significant step forward in facilitating compliance efforts by legitimate publishers and sellers. It addresses an issue sometimes referred to as "co-registration": contacting a consumer who expressed an interest in Product A about Product B. Requiring consent to be "logically and topically associated" will substantially eliminate co-registration, which we believe can at times be a source of unwanted contact.[17]

While QuinStreet supports this aspect of the Commission's proposal, it respectfully submits that the amendments the Commission has proposed to the specific language in the definition of "prior express written consent" should be modified slightly to hew more closely to the Commission's intent. The first such modification would involve making it clearer that in the multi-seller context sellers should be "logically and topically associated *with the website that solicits the consent"* (emphasis added). The addition of these italicized words to the definition would better reflect what the Commission proposed in the text of the *FNPRM* and provide clarity which will enhance industry compliance efforts.[18] The second such modification would involve changing the word "entity" to "seller" in the Commission's proposed amendment to conform

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[17] A consumer interested in Product A may in fact be interested in Product B. For example, a consumer interested in auto insurance may also be interested in home insurance. That conversation about home insurance can occur if the consumer so chooses. But when a consumer provides initial consent to be contacted about auto insurance it is appropriate to limit that consent to contacts from sellers that are "logically and topically associated" with the website discussing auto insurance. In most cases, if a consumer also is interested in Product B (*e.g.*, home insurance), the consumer will either be amenable to an upsell via call or text.

[18] *Compare FNPRM* at ¶ 61 *with id.* at **Annex A**.

more closely to the terminology in the rest of the definition. These proposed changes are illustrated in **Annex A** hereto.

III. REQUIRING SELLERS TO BE DISPLAYED "CLEARLY AND CONSPICUOUSLY" ON THE WEBSITE CONSENT FORM WITHOUT THE USE OF A HYPERLINK WOULD LIMIT CONSUMER CHOICE AND HARM LEGITIMATE BUSINESSES.

The Problem is not the Hyperlink. Advertising and performance marketing existed prior to the TCPA. The TCPA, however, through the Commission's rules, imposed a requirement that a seller secure a consumer's "prior express written consent" before transmitting a telemarketing call or text message to that consumer in certain circumstances.[19] Accordingly, use of a hyperlinked page became the minimal, *legally-required* way to identify all *potential* sellers in a multi-seller context.[20]

Reasonable but Invalid Assumptions. Some parties appear to assume that each (or even many) of the sellers identified via the hyperlink receive each consumer's contact information. That assumption is incorrect. Legitimate publishers and marketers transfer consumer contact information only to *a limited subset of sellers who have been appropriately matched to a consumer's request* (*e.g.*, 3-5 sellers). This limit is called the "match rate."

Most online publishers, advertisers and marketers establish match rates as part of their standard commercial and internal practices. Match rates are applied via contract and business processes across private marketing networks to all of the participants. Some publishers and

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[19] 47 C.F.R. § 64.1200(a)(2).

[20] *See id.* at § 64.1200(f)(9) (requiring clear and conspicuous disclosure that the consumer authorizes the seller(s) to deliver a telemarking call, which may be completed by electronic or digital signature).

marketers publish match rates in the text of the consent (*e.g.*, "you agree to be contacted by up to five [lenders]/[insurance agents]/[contractors]"). Match rates are driven by a combination of consumer attributes and advertiser filters, as well as by product cost and complexity. [21]

For example, our upstate New York consumer looking for auto insurance would receive no benefit from being matched to a national advertiser not offering coverage in New York or for a consumer with that driving record. Auto insurance alone requires sorting over 20 consumer attributes in 50 states against the in-market capabilities of hundreds of national, regional carriers and local carriers and agents. Whether National Advertiser A is "on" in NY may vary by the minute; whether Local Agent B is interested in new business may vary by the day or week.[22]

It is not currently commercially or technologically practicable for *each* consumer at *every* publisher site to be matched with the optimal *available* advertiser *in real-time*. The hyperlink overcomes this hurdle by listing all *potentially matched advertisers*. Matching to a limited subset of sellers is then completed as the network sorts what product or service the consumer wants and is likely to qualify for, as well as which seller is interested in and able to deliver that product or service.

Eliminating the hyperlink terminates sorting too early in the process. Mandating that all publishers, marketers and advertisers display only valid real-time in-market matched sellers in the text of the consent would probably benefit QuinStreet and certain other large performance marketing companies, but would harm smaller publishers and industry players. This is because

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[21] Consumers typically prefer to see two or more choices; contact and closure rates are often higher when consumers are shown more than one choice. Sellers typically prefer to only contact a consumer if the record shows there are two or fewer other sellers who are aware of that consumer's interest in a particular product and service at a particular time.

[22] Performance marketers give individual agents and contractors the capability to toggle their interest in engaging with potential customers in near real-time.

publishers, marketers and advertisers would be forced to participate in one or more private networks to obtain the required real-time matching and compliance capabilities. Forcing publishers to purchase additional services from private companies may not be the optimal or appropriate policy outcome in the absence of a meaningful countervailing benefit, which a prohibition on hyperlinks would not provide.

Alternatively, publishers and marketers may just elect to show a small subset of large, national brands in the text of the consent form. This could trigger a bidding war (as is already the case with search keywords) that could benefit QuinStreet and large performance marketing companies. But it would also disenfranchise smaller and local advertisers who would lose the opportunity to engage with prospective customers, including local customers for whom they may be the best fit.

The Better Fix. The FCC could require that consent forms using hyperlinks for potential matches clearly and conspicuously disclose that by consenting, the consumer agrees to be matched with a specific number of companies that are identified in the hyperlink, and that each matched company may call or text them.

Helping by Hassling? Some commentators appear to believe that requiring all potential sellers be listed in the text of the consent form would be off-putting to the consumer, thus decreasing the volume of consumer consent and, indirectly, thereby reducing the volume of unwanted calls and texts. Maybe. But requesting a federally mandated consumer scrolling requirement is a convoluted (and we believe ultimately ineffective) attempt to achieve that goal. It is not clear that mandated inconvenience works; companies that have elected to have

consumers scroll through even lengthier and more consequential Privacy Notices and Terms of Service often do not see material reductions in consent.[23]

The assumption that attempting to shorten the list of prospective callers will lead to a reduction in unwanted calls and texts is not only invalid but also creates significant harm to consumers and businesses, especially small businesses. For these reasons it should not be adopted.[24]

IV. THE COMMISSION SHOULD CONTINUE TO REJECT PUBLIC KNOWLEDGE'S PROPOSAL THAT PRIOR EXPRESS WRITTEN CONSENT TO RECEIVE CALLS OR TEXTS MUST BE MADE DIRECTLY TO ONE SELLER AT A TIME.

As outlined above, Public Knowledge's proposal is an extreme version of the ostensibly reasonable but actually invalid assumption that a shorter list of potential sellers leads to a better consumer experience. Instead, Public Knowledge's proposal would do the most damage of the proposals that proceed from that assumption, harming not only consumers, but also hurting small businesses, and expanding the power of the larger industry participants.

Public Knowledge's proposal would harm consumers because it would require them to take constant, affirmative steps to get – at best – the same information they currently can access

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[23] *See* Jonathan A. Obar & Anne Oeldorf-Hirsch, *The biggest lie on the Internet: ignoring the privacy policies and terms of service policies of social networking services*, Taylor & Francis Online (Nov. 2017), available at https://www.tandfonline.com/doi/abs/10.1080/1369118X.2018.1486870 ("Qualitative findings suggest that participants view policies as nuisance, ignoring them to pursue the ends of digital production, without being inhibited by the means.").

[24] As discussed in Section V below, the simpler, easier and more effective way to achieve the goal of ensuring only a small subset of listed sellers is the benefit of consumer consent is to limit the match rate, or at least require it to be stated in the text of the consent (*e.g.*, "no more than five").

and – at worst – cause them to receive less information than otherwise may be available to make educated, informed purchasing decisions.

Today, consumers can access resources that help them quickly and easily compare prices, quotes, services, or products. Under Public Knowledge's proposal, a consumer would have to access every seller website separately, or consent to hear from each individual seller they might be interested in hearing from, especially when shopping for products and services where communication by phone or text is almost inevitable.[25] This would only serve to increase consumer fatigue when attempting to seek out the best deal, product or service. Moreover, studies have shown that increased fatigue on consumers makes it more likely that a consumer will buy from larger and familiar brands,[26] another consequence that would make it more difficult for smaller businesses to compete.

While online shopping has made it easier for consumers to visit multiple sites online, the reality is that consumers are more likely to visit bigger, established sites that can offer more variety in less time. Performance marketers help solve this problem for smaller sellers by giving them deserved advertising shelf space at thousands of publishers they would otherwise struggle to connect and contract with. Public Knowledge's approach would not only eliminate this marketing channel for small advertisers, but also lead to less competition and ultimately less

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[25] *E.g.*, financial products and services such as mortgages and other loans; home services that require appointment setting, etc.

[26] Raluca M. Ursu et al., *Search gaps and Consumer Fatigue*, UCLA (Dec. 2021), available at https://www.anderson.ucla.edu/sites/default/files/document/2022-01/SearchGaps_UrsuZhangHonka_Dec2021.pdf ("We find that not being able to reset fatigue during a break leads to a significant reduction in the number of products consumers search and purchase: searches decrease by approximately 20% and purchases by more than 6%. Most importantly, larger and more popular websites are hurt less in such a situation. In other words, consumers become more likely to buy from larger and more familiar websites.").

consumer choice. There is no reason to impose these additional limitations and costs once the Commission adopts the "logical and topically associated" standard.

V. ALTERNATIVE METHODS TO PREVENT UNWANTED CALLS AND TEXTS

The goal of reducing unwanted calls and texts could be advanced through more direct methods. Specifically, in the multi-seller performance marketing context, the Commission could encourage the adoption of limits on, or disclosure with respect to, match rate, contact cadence and consent duration.

Match Rate. It may make sense to require disclosure with respect to, or expressly limit, or urge the industry to limit, the number of matches that can be made between a consumer and potential sellers based on a single multi-seller consent form.

The FTC[27] and others have acknowledged and documented that consumers typically compare multiple offers for specific products and services.[28] The number of comparisons is based on numerous factors and varies by consumer, product, and industry. Any approach the Commission takes should consider being flexible to meet various consumer preferences, product requirements and industry capabilities. Match rates are developed through consumer surveys, industry research, and data analytics; publishers, marketers, and sellers could be required to document and publish the basis for their match rates. They could be required to disclose, in the

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[27] *See* Staff Perspective, *"Follow the Lead Workshop"*, FTC (Sep. 2016), available at https://www.ftc.gov/system/files/documents/reports/staff-perspective-follow-lead/staff_perspective_follow_the_lead_workshop.pdf.

[28] *See, e.g.*, Raluca M. Ursu et al., *Search gaps and Consumer Fatigue*, UCLA (Dec. 2021), available at https://www.anderson.ucla.edu/sites/default/files/document/2022-01/SearchGaps_UrsuZhangHonka_Dec2021.pdf (study reviewing consumer shopping and comparison habits and how breaks in searching for products affect consumer behavior).

text of the consent, the number of parties who will receive the consumer's contact information.[29] Documentation and disclosure are already part of the solution to other issues in online advertising.[30] A federal requirement to document and disclose match rates would act to drive industry behavior at the margins toward the type of limited match rates that legitimate publishers and marketers already impose, and advertisers and consumers reasonably expect.

Contact Cadence. An additional alternative would be limiting, or requiring disclosure with respect to, contact cadence. Many marketers and sellers already set limits on calling they conduct or have conducted on their behalf. For these industry participants, recently enacted state laws[31] limiting contact cadence had no material adverse effect, as the new standards were at or below existing internal limits that had already been demonstrated to make commercial and

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[29] QuinStreet has done this for years.

[30] *See CFPB Issues Guidance to Protect Mortgage Borrowers from Pay-to-Play Digital Comparison-Shopping Platforms*, CFPB (Feb. 07, 2023), available at https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-protect-mortgage-borrowers-from-pay-to-play-digital-comparison-shopping-platforms/ (the Consumer Financial Protection Bureau has issued guidance saying that websites that advertise for mortgage lenders based on referral payments violate the Real Estate Settlement Procedures Act); *see Operators of Comparison Shopping Website Agree to Settle FTC Charges Alleging Deceptive Rankings of Financial Products and Fake Reviews*, FTC (Feb. 3, 2020), available at https://www.ftc.gov/news-events/news/press-releases/2020/02/operators-comparison-shopping-website-agree-settle-ftc-charges-alleging-deceptive-rankings-financial; *see also Victory Media Settles FTC Charges Concerning Its Promotion of Post-Secondary Schools to Military Consumers*, FTC (Oct. 19, 2017), available at https://www.ftc.gov/news-events/news/press-releases/2017/10/victory-media-settles-ftc-charges-concerning-its-promotion-post-secondary-schools-military-consumers.

[31] *See* Fla. Stat. § 501.616(6)(b) (2022) (preventing commercial telephone sellers from making more than three phone solicitation calls over a 24-hour period, regardless of the phone number used to make the call.); *see also* Okla. Stat. tit. 15, § 775C.4(A)(2) (2022) (imposing the same limits).

reputational sense.[32] Federal regulators have also proposed limits on contact cadence that would be similarly below the thresholds for most legitimate U.S. businesses.[33] Again, in the absence of a mandated regulatory limit or disclosure with respect to contact cadence, commercial incentives exist at the margin for callers to make additional calls in the hope that those calls will result in a sale.[34]

Consent Duration. The third additional alternative would be to limit the duration of *marketing* consents. For example, contact after 90 days could be prohibited if consent is not extended or no business relationship is established.[35] In setting any such limit regulators would need to be careful to distinguish between marketing contact (*i.e.*, no business relationship exists) and *customer* contact (*i.e.*, businesses communicating with their existing customers, including

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[32] QuinStreet did not need to make any changes to its internal calling practices to comply with any of the new state laws. As a publicly-traded national performance marketer, we often apply the most stringent state or advertiser standards across our entire network. We call this approach using the "highest common denominator." It reflects not only an approach to business, but also the fact that, again, in many cases it is not clear early in the consumer's journey which seller is best ready, willing and able to serve them.

[33] *See* Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising, 88 Fed. Reg. 3668 (Jan. 01, 2023) (to be codified at 47 C.F.R. § 64.1200(a)(3)) (announcing a July 20, 2023 effective date for the amended Commission rules that, among other things, impose numerical call limits on certain calls to a residence).

[34] For commercial reasons it is difficult to impose this obligation on the party who obtains the consent, who is often the publisher or marketer; not the caller. This is simply the application of the golden rule; callers, sellers and advertisers are sources of revenue for marketers and publishers. It is rarely the case in commerce that vendors can dictate to their clients the terms on which *those clients* will contact *their prospective customers*. Legitimate sellers likely already have established internal contact cadence limits; regulatory mandates would just make these uniform.

[35] QuinStreet generally limits its contact duration to 60 days or less. Due to the impact of QuinStreet's internal contact cadence limits, however, contact is typically effectively limited to 30 days. Moreover, for all practical purposes contact that is not met with an affirmative response typically results in contact ending within a week, and sometimes the same day.

about new products). Put differently, such limits should apply only when a consumer has not purchased a product, good, or service from the business.[36]

In the case of each of the above alternatives, the Commission would need to consider whether it possesses adequate authority to impose such limits and disclosures, and whether even then there may be policy reasons to not do so. In those cases, it may be best to encourage the adoption of industry standards and best practices, and support industry efforts to audit compliance with those standards and best practices.[37]

VI. CONCLUSION

Risks can rarely be eliminated. Instead, they are managed by identification and mitigation, with an eye toward avoiding unintended consequences.[38]

We agree unwanted calls and texts are a problem. After a problem is identified, the next step is understanding the source. In online advertising, this is difficult; assessing the degree to which the problem is driven by U.S.-based companies abusing the consent portion of the contact process is a hard problem. We believe many of the most virulent sources of unwanted call and text activity are offshore, and effectively beyond the reach of federal or state regulatory action.

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[36] The risk of unwanted contact is much lower when businesses are contacting their existing customers. Competitive, reputational and other factors create strong incentives for businesses to avoid alienating their existing customers. Most businesses give their existing customers granular control over how, whether and when they wish to be contacted for exactly these reasons.

[37] *See Consumer Consent Council Announces New Industry Best Practices*, AP News (Dec. 13, 2022), available at https://apnews.com/article/1f5f553b290b978c42a1af517cc5b9ba; *see also Lead Generation Standards*, C3, available at https://consumerconsent.org/standards/ (last visited May 8, 2023).

[38] Especially when some of the suggested mitigations might create greater problems than the risks they are designed to address. *See*, *e.g.*, Public Knowledge Reply, CG Dockets Nos. 21-402 and 02-278 (Nov. 28, 2022), at 5-6.

Most domestic U.S., businesses endeavor to comply with clear regulatory requirements.[39] They are selling not consumer contact information to non-compliant offshore call centers. Those call centers do not need them to; they can obtain consumer contact information without the support of any legitimate U.S. business, or, indeed, any consumer consent.[40] The Commission's proposals and actions with respect to mandatory blocking are more likely to reduce unwanted calls and texts from these sources.

There is wide and overlapping set of existing requirements with respect to online consumer engagement/consumer consent and contact,[41] and architecting additional requirements should be done thoughtfully. It should also not be done based upon false premises. Federally-mandated solutions in particular need to be developed thoughtfully and targeted appropriately. It may be difficult to achieve that solely via publicly-filed advocacy over a three-to-six month period. Accordingly, QuinStreet remains ready to be a resource and partner to the regulators, consumer advocates and industry participants in addressing the problems, identifying alternative solutions, and calculating the costs and benefits of each.

QuinStreet does not want to make, or assist anyone in making, unwanted calls and texts. QuinStreet does not want its employees, their families, or, indeed, anyone to receive unwanted calls and texts. Those preferences are inherently aspirational; no network or system has 100% availability. But QuinStreet endeavors daily to apply technology and business processes to

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[39] *See*, *e.g.*, the extensive guidance already issued by federal regulators on the topics of online advertising and consent listed on **Annex B**.

[40] This is why the call and text blocking components of the *FNPRM* are likely the most powerful mechanism of reducing unwanted calls and texts. Regulating consent gathering by U.S. companies, including where certain text will appear in the consent, is likely to have a deeply secondary impact on reducing unwanted calls and texts.

[41] *See* **Annex B**.

continuously improve the consumer's experience, meet advertiser expectations and manage compliance with law, commercial contracts, and industry standards.

Thank you for initiating the *FNPRM* in support of that effort.

Respectfully submitted,

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May 8, 2023

ANNEX A

FCC PROPOSAL

Amend § 64.1200 by revising section (f)(9) to read as follows (FCC proposed amendments in blue):

(9) The term ***prior express written consent*** means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered. Prior express written consent for a call or text may be to a single ~~entity~~ seller, or to multiple ~~entities~~ sellers logically and topically associated with the website that solicits the consent. If the prior express written consent ~~is~~ applies to multiple ~~entities~~ sellers, the entire list of ~~entities~~ sellers to which the ~~consumer is giving~~ consent applies must be clearly and conspicuously displayed to the consumer at the time consent is ~~requested~~ provided. To be clearly and conspicuously displayed, the list ~~must, at a minimum,~~ may be displayed on the same web page where the consumer ~~gives~~ provides consent, or through an easily accessible hyperlink on that web page.

> **(i)** The written agreement shall include a clear and conspicuous disclosure informing the person signing that:
>
> > **(A)** By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and
> >
> > **(B)** The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

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ANNEX B

Authority	Cite	Year	Title	Notes
			Statutes, Rules, and Regulatory Guidance	
Federal Law	15 U.S.C. § 45		Federal Trade Commission Act (FTC Act)	Prohibits ‘‘unfair or deceptive acts or practices in or affecting commerce.’’
Federal Regulation	16 C.F.R. § 310		Telemarketing Sales Rule (TSR)	Prohibits calling a consumer on the do-not-call registry without an established business relationship or PEWC. Prohibits misrepresentations; sets limits on the times telemarketers may call consumers; and prohibits calls to a consumer who has asked not to be called again.
FTC Notice of Penalty Offenses		2021	Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct in the Education Marketplace	Compilation of acts/practices that are deceptive or unfair and therefore unlawful under Section 5 of FTC Act.
FTC Letter		2006	Lending Tree Letter	FTC staff guidance indicating that the FTC staff would not be likely to recommend enforcement action against a lead generator that clearly informs a consumer of the number and identity of merchants that may contact the consumer, as long as the number of merchants is consistent with the consumer’s expectations in visiting the lead generator’s website.
			FTC Enforcement Actions	
FTC Enforcement	Case No. 2:22-cv-00073-DSF-E	2022	FTC v. ITMedia Solutions LLC	FTC alleged that lead generation company collected sensitive personal information from consumers under the guise of connecting them with lenders. Order requires defendants to: 1) not make misleading statements to consumers about how their personal information will be used, 2) not sell personal information outside of a limited set of circumstances, 3) screen the recipients of that information.
FTC Enforcement	Case No. 1:19-cv-05739	2019	FTC v. Career Education Corporation	FTC alleged CEC used sales leads from lead generators that falsely told consumers they were affiliated with the U.S. military, induced consumers to submit their information under the guise of providing job or benefits assistance, told consumers

Authority	Cite	Year	Title	Notes
				information would not be shared, and illegally called consumers on DNC Registry. Order requires CEC to: 1) launch a system to review all materials that lead generators use to market its schools, 2) investigate complaints about lead generators, 3) not use or purchase leads obtained deceptively or in violation of the TSR, 4) not make misrepresentations about any other benefits of any post-secondary school or any other of the defendants' products or services.
FTC Enforcement	Case. No. 1:19-cv-01984	2019	FTC v. EduTrek, LLC [Complaint, filed April 2019]	FTC charged a telemarketing operation and its owners with making illegal, unsolicited calls about educational programs to consumers who submitted their contact information to websites promising help with job searches, public benefits, and other unrelated programs.
FTC Enforcement	Case No. 3:18-cv-01444-HNJ	2018	FTC v. Sunkey Publishing and Fanmail.com	FTC alleged defendants operated websites posing as military recruiters to generate leads for post-secondary schools. Proposed orders required defendants to: 1) not make misrepresentations about military affiliation or extent of sharing consumers' information, 2) disclose websites are not affiliated with military and solicit consumers' acknowledgement of that, 3) receive permission to disclose consumer information collected in connection with lead generation.
FTC Enforcement	Case No. 2:17-cv-02117-ESW	2017	FTC v. Blue Global and Christopher Kay	FTC alleged defendants operated websites that enticed consumers to complete loan applications that were then sold as leads to a variety of entities, most of which were not lenders. The FTC alleged that the company claimed it would search a network of 100 or more lenders, and connect each loan applicant to the lender that would offer them the best terms, but in

Authority	Cite	Year	Title	Notes
				fact the defendants sold very few of the loan applications to lenders. Settlement/order requires defendants to: 1) not make misrepresentations relating to financial products or services, 2) protect and secure consumers' personal information, 3) investigate and verify identity of businesses to which they disclose consumers' information, 4) obtain consumers' express, informed consent for disclosures.
FTC Enforcement	Case No. 6:16-cv-00714-CEM-TBS	2016	FTC v. Expand, Inc. (Gigats)	Action against education lead generator. FTC alleged that company claimed it was "pre-screening" job applicants for hiring employers when actually generating leads for education programs. Order prohibits defendants from: 1) promoting job openings without a reasonable basis to expect that employers are currently hiring for those jobs, 2) transferring consumers' personal information to third parties without clearly disclosing that it will be transferred, and their relationship with the third party, 3) using the information covered under the order unless consumers affirmatively opt in to their services.
FTC Enforcement	Case No. 4:14-cv-1262	2014	FTC v. GoLoansOnline.com, Inc.	FTC alleged that defendant advertised low interest-rate loans as fixed-rate mortgages, when in fact they were adjustable-rate mortgages that could become more expensive for borrowers over time. Settlement forbids lead generator from: 1) misrepresenting the terms and conditions of any financial product or service, and any term or condition of a mortgage credit product, 2) assisting others to misrepresent any material fact about a mortgage credit product, 3) disclosing, selling, or transferring consumer data, 4) violating the FTC Act; the MAP Rule and Regulation

Authority	Cite	Year	Title	Notes
				N; and the Truth in Lending Act and Regulation Z.