

May 9, 2023<sup>1</sup>

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
45 L Street, NE  
Washington, D.C. 20554

RE: Targeting and Eliminating Unlawful Text Messages, CG Dckt No. 21-402;  
Implementing the Telephone Consumer Protection Act of 1991, CG Dckt No. 02-278.

Dear Ms. Marlene Dortch,

Responsible Enterprises Against Consumer Harassment, Mutual Benefit Corporation (R.E.A.C.H.), on behalf of its direct-to-consumer marketing, lead generation and performance marketing members, thanks the Commission for the opportunity to comment on its important consideration of the contours of express written consent in the context of webform consent disclosures.

## **I. Introduction**

Without question, the robocall epidemic has been fueled to some degree by unscrupulous conduct in the lead generation industry. Specifically, a meaningful percentage of online webform submissions are entirely fabricated. As to legitimate online webform submissions, the industry lacks any meaningful standards in terms of the content or layout of disclosures, the number of times consent information may be transferred, and the duration of time for which consent remains valid. The last two pieces—in particular—have led to exploitative conduct that needs to be addressed as the Commission aims to close the “lead generation loophole.”

As the Commission proceeds to tighten regulation on this industry—which, to responsible players in the space, is viewed as long overdue—R.E.A.C.H. reminds the Commission that many legitimate businesses operate in this space that drive important value to consumers and the broader U.S. economy alike. R.E.A.C.H. members are allied with the Commission in its ongoing battle against the robocall epidemic and serve as front-line guards assuring that consumer privacy is respected and compliance is top-of-mind for industry participants.

As a friend to the Commission’s efforts, R.E.A.C.H. recommends adoption of the R.E.A.C.H. standards—which assure, *inter alia*, transparent disclosures to consumers, fraud detection to deter fraudulent lead activity, and various other consumer-friendly limits and practices are followed—

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<sup>1</sup> R.E.A.C.H. respectfully amends its original comment of May 8, 2023, with two corrections to the REACH Members’ signatures: replace Travis Prouty’s association to The Call Gurus, LLC., with the corresponding company logo and the proper spelling of REACH Member, Richard Kahn of Anura Solutions.

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as the new industry gold standard. For those businesses that adhere to these remarkably strict standards—designed to assure that every call made to a consumer from a good or service provider is an *anticipated and welcomed* call, in addition to a call to which the consumer has provided express written consent—the Commission should afford a safe harbor, as explained below.

The Commission should also assist R.E.A.C.H. in assuring the nation’s wireless carriers do not improperly block these *anticipated and welcomed* calls—a clear violation of the Communications Act—and do not otherwise deter consumer engagement with R.E.A.C.H. members with unlawful and defamatory labeling activities.

## **II. About R.E.A.C.H.**

R.E.A.C.H. is the dawn of a new era where responsible enterprises pursue a common objective of ensuring that consumers receive those calls which they have actually consented to and restore consumers’ ability to answer their phone. R.E.A.C.H.’s standards—attached hereto— would alleviate much of the concerns identified in this proposed rule while allowing beneficiaries the freedom to shop and benefit from responsible marketing yet allowing businesses – small and large – to compete in a transparent and trustworthy manner.

R.E.A.C.H. – a Mutual Benefit Corporation – has been formed to advance the interests of direct-to-consumer marketers by: i) establishing guidelines, best practices and protections for such companies in order to prevent fraudulent lead sales and reduce the industry-wide damage caused by unwanted robocalls; ii) working to increase contact rates and lower carrier resistance to direct to consumer marketing traffic; and iii) providing education regarding, and advocacy to limit, unfair litigation and media attention targeting such marketing companies.

R.E.A.C.H. seeks to restore credibility to the lead generation industry by requiring all members to earn a certification of compliance with R.E.A.C.H. standards which are more restrictive than current regulations thereby earning the recognition of good actors in revolutionizing the lead generation industry and assuring zero fraud tolerance.

## **III. A Quick Roadmap: The Lead Generation Industry’s Regrettable Roll in the Robocall Epidemic**

R.E.A.C.H. is an industry trade organization composed largely of entities who have grown tired of seeing largely unregulated industry running amuck. As such, it freely guides the Commission in an effort to help it to understand the true root of the problem so that it may assess comprehensive solutions, as R.E.A.C.H. has.



A. The Ugly, the Bad, and the Good

While the famous title provides “The Good” and “The Bad” ought to be mentioned before the “Ugly,”<sup>2</sup> a proper discussion of robocalling merits discussing these matters in reverse order.

Let’s take “the Ugly” first. When most consumers think of unwanted robocalls they naturally think of scam calls—such as the classic IRS scam. Many will also think of the totally non-consented calls made by unscrupulous auto warranty sellers. Others will think of calls they received due to a bad actor that fraudulently sold their data—with no consent whatsoever—to a telemarketer, who purchased the data believing it was legitimate and consented consumer information. These types of calls—perpetrated by wholly bad actors who have no regard for the law—must be addressed by law enforcement and call blocking efforts by the carriers. Further revisions to the TCPA’s express consent rules will have limited effect on these “true” bad actors—the “Ugly” element—although mandated fraud detection can help certain categories of this unlawful activity, as discussed below.

That brings us to the “Bad”—legitimate companies who operate in the gray area of the law, protected by ambiguities in the TCPA. These companies might use semi-deceptive means to have a consumer fill out a form—promising, for instance, a consumer can “calculate a new payment” but delivering only an advertisement for a lender at the end of a multi-page flow<sup>3</sup> — or suggesting a consumer is only “email[ing] an agent” to obtain information regarding a property but really they are consenting to calls from mortgage lenders and “others.”<sup>4</sup> Regardless, 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.

Perhaps the worst part of the “Bad” in the lead generation industry is that the consumer can never effectively stop the calls. Since the website operator is generally *not* the caller—just a company selling data to others—the consumer can do nothing but play a horrendous game of whack-a-mole. Each time the website operator—or an intermediary “aggregator” (more on these companies below)—sells the consumer’s data a new set of phone calls will be made to the consumer. The consumer asks *that caller* to cease calls, but that request only requires *that caller*

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<sup>2</sup> *THE GOOD, THE BAD, AND THE UGLY* (Produzioni Europee Associati 1966).

<sup>3</sup> See e.g., *American Homeowners Could Save Big with the Help of U.S. Mortgage Experts*, LOWER MY BILLS.COM refinance.lowermybills.com (last visited May 7, 2023).

<sup>4</sup> See e.g., <https://www.realtor.com/realestateandhomes-detail> (last visited May 7, 2023).



to stop calls.<sup>5</sup> Indeed, the caller is forbidden from advising the lead source of the do not call request because the applicable regulation mandates that the request not be shared with third-parties.<sup>6</sup> This means the consumer’s data may be sold an indefinite number of times over a limitless timeframe and there is simply nothing a consumer can do to stop the calls once they supply their online consent.<sup>7</sup>

Still there is “Good” in this industry. Companies that pledge to never trick consumers into providing consent. Companies that *clearly* disclose to consumers precisely what the effect of providing consent will be. Companies that agree to transfer consumer data only a *limited and disclosed* number of times and for a *limited* period of time. Companies that provide consumers a way to opt out of consent to *any company* that has purchased a lead. Those companies are R.E.A.C.H. members.

As can easily be seen, however, R.E.A.C.H. members—the true good players in the industry—are at a stark competitive disadvantage. They are clearly disclosing information to consumers that others hide.<sup>8</sup> They are limiting themselves in ways others in the industry are not. This means they risk losing market share to bad players unless the Commission—and other regulators—help to level the playing field by requiring all industry participants to play by the same rules.

## B. Why Do We Need a Lead Generation Industry Anyway?

Who are these odd companies that generate consumer interest online and sell consent? They are the backbone of a large portion of ecommerce in the country and an engine that drives a huge number of small and independent companies that do not have their own robust marketing team.

Imagine a local insurance agent named Sally. She would love to expand her business. But money is tight—perhaps Sally has only \$500.00 a month to spend on marketing. With a budget like that, traditional advertising efforts will go nowhere. T.V., radio, billboards, even newspaper ads are out of reach. *But* Sally can buy leads—consumer intent or contact information sold by

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<sup>5</sup> 47 C.F.R. § 64.1200(d)(5) (“In the absence of a specific request by the subscriber to the contrary, a residential subscriber’s do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.”)

<sup>6</sup> 47 C.F.R. § 64.1200(d)(3) (“A person or entity making a call for telemarketing purposes must obtain a consumer’s prior express permission to share or forward the consumer’s request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.”)

<sup>7</sup> Any company or trade organization that opposes the Commission’s efforts to limit consent to subject matters “logically and topically” related to the website (or webpage) the consumer provides consent upon has outed itself as a “bad” member of this ecosystem. No legitimate practices exist to exceed a consumer’s intended consent.

<sup>8</sup> See R.E.A.C.H. Standards (Feb. 2023)—Attached Hereto as Exhibit A.



online lead generators (or “performance marketers”) who are experts in connecting small insurance agents like Sally with consumers in her area that are in need of the type of insurance product Sally can offer.

But the process of bringing an interested consumer to Sally’s door is more complicated than it may seem. Indeed, there may be numerous players serving as a bridge between the consumer and Sally. Understanding each of these companies and their roll is essential for the Commission to understand in seeking to effectively regulate in this space and close the “lead generation loophole.”

At the “top of the funnel”—i.e., the point at which the consumer enters into the lead generation world—is generally either i) an “organic” web engine search; or ii) a click through to a targeted social media advertisement. Each entry point may lead to a different consumer experience.

In the web engine search scenario, a consumer interested in insurance enters words reflecting his or her intent into a search engine. Perhaps it is something very direct—such as “best insurance agents in my area.” But more often it is something indirect—“is it a good idea to have insurance?” or “what are good rates for the insurance I need?” These sorts of searches show a consumer is interested in information about a product that might be valuable to them. And this is where the lead generation industry steps in to provide information and bridge the gap between the consumer and agents like Sally.

There are literally hundreds of thousands of websites out there—most operated by very small businesses—crafted to provide free answers to consumers who have questions about every product or service under the sun. The proliferation of all of these websites—again affording free, accurate, and often times entertaining content related to a consumer’s inquiry—is enabled due to the lead generation industry, which takes information provided by consumers on these websites, filters results and connects consumers who ultimately express interest in insurance in specific geographic region with agents like Sally who can meet their needs. This is good for Sally and good for all American consumers who have access to a huge amount of free information as a result.

But things do not always operate perfectly. Many—indeed most—times the consumer will visit a website run by a company (known as a “publisher”) that does not have a direct relationship with independent insurance agents like Sally. Indeed, for a website operator to connect with independent agents across the country is quite rare and very difficult. So too, an agent like Sally does not want to have access to only *one* website but as many as possible—to assure she can field inquiries from as many interested consumers as possible.

This is where lead *aggregators* come into play. Lead aggregators are networks that publishers—sometimes called “affiliates”—can join that may collect tens of thousands of leads a





day from thousands of different websites. Lead aggregators serve the often valuable role of a wholesale buyer of leads that can then sell to the end-user as a retailer might.

Lead aggregators tend to be larger companies that will operate large numbers of “owned and operated” sites in addition to their “affiliate” networks. Aggregators may run comparison shopping websites and may have huge budgets for social media targeted advertisements—the other form of top-of-funnel consumer experience—that drive traffic to these websites. But ultimately lead aggregator websites operate just the same as other websites—seeking to obtain consent from a consumer to be contacted by companies that can offer the goods and services the consumer is seeking and to sell those consents for a profit.

### C. The Problem of the Quantum Soup Can and the Audacity of Hope

But there is a problem.

In a standard wholesale model, a supplier makes an item—say a can of soup. The can of soup is sold to a wholesaler who buys 100,000 similar cans of soup in an unsightly pallet and then sells those cans of soup to consumers on a nice clean grocery store shelf in a small quantity the consumer desires and at a retail price to turn a profit.

In the lead generation industry, however, the purchaser of the soup can is not actually buying soup but only the *possibility* of soup. A lead buyer like Sally, after all, is never assured a sale—the consumer connected with Sally may ultimately choose to buy insurance from Jim down the street. So what Sally is buying is a *chance* of obtaining value from the lead—a *chance* of soup.

This reality creates an interesting dynamic in the sale of leads. Unlike an actual physical soup can—which can only be sold once—the “lead gen” soup can quantum in nature in that it exists merely as a possibility in numerous places at once. Only once the lead converts can the soup truly have been delivered. But since no one is actually buying soup in this odd industry—merely the possibility of soup—multiple versions of the soup can be floating throughout the universe at once. And since no one is keeping track of when the soup is actually obtained, the Quantum Soup Can may continue to float around in multiple places at once long after there is no soup to be had.

The publisher may sell a single soup can—here a consumer’s consent record—to multiple lead aggregators. The lead aggregators may then sell each that same soup can to multiple buyers like Sally. Or the aggregators may sell that same soup can to other aggregators, who hope that they can sell the soup can to others within its network. But all the while the original publisher and every aggregator in the chain still retains the same soup can and is free to sell it again. They have sold something—and nothing—at the same time.



On and on it goes. A single soup in this industry can exist in multiple hands at once, being sold repeatedly and entirely independent of others who are also selling the same soup can at the exact same time. Indeed a soup can may actually be sold to a company that already has the same soup can. And a single soup can may be purchased by *hundreds* of hungry agents just like Sally but only one—or perhaps none—of these agents will ever actually get the soup.

Extending the metaphor further, the can opener in this scenario—i.e., the tool that must be wielded to determine whether soup is present or not—is outbound phone calls. Every time an agent like Sally buys the soup can they try to open it using as many outbound calls as they can muster. And since Sally is competing—in most instances—with other agents who have bought the same soup can, Sally is incentivized to call *quickly* and *repeatedly* in an effort to connect with the consumer. And so the single lead—the single soup can—might result in hundreds or even thousands of calls that a consumer might have never expected.

The problem of the “Quantum Soup Can” is the driver of *billions* of unwanted (and needless) calls per year in this country. Yet *no one* in this scenario has violated the law. The reality of the situation is just as preposterous as using the metaphor of a soup can to describe it.

But the underlying mechanics of the problem are easy to understand. Agents like Sally are paying for hope. They’re paying for the possibility of a sale. They are not bad actors—yet they unfairly shoulder the TCPA risk created by others in the ecosystem.

Bad acting lead sellers are profiting off those hopes, without ever really needing to deliver anything of value—plus they are largely immune to TCPA risk since they are not making calls themselves.

Consumers, of course, are stuck in the middle. And since *no one* is incentivized or required to keep track of how many times the lead has been sold, to whom, or when there is no way for consumers to stop the calls. The result—consumers are blasted by a huge barrage of calls they did not expect and left to pursue remedies solely against people like Sally who are not the true wrongdoer. This is a situation that cries out for repair.

#### D. The R.E.A.C.H. Solution

As evidenced by its standards, R.E.A.C.H. members are committed to solving the problem at its source.



Consumers must be CLEARLY told—in a manner akin to a surgeon’s general warning label—precisely how many times their lead information will be sold, to whom, and for how long.<sup>9</sup> And the warranties provided the consumer must be enforceable *against the publisher*—assuring that the consequences of illegal calls are on the website operators and not just end users like Sally, who are typically morally blameless, even if ultimately legally responsible for unwanted calls.

The R.E.A.C.H. standard assures that website operators keep track of how many times a lead is being sold and how many calls are being made. They assure that consumers can opt out of calls by *everyone* in the lead generation ecosystem with a single point of contact. They assure “robocalls” are not used as the first effort to contact a consumer based upon a webform submission. And they assure consumers can opt out of their consent with a single point of contact.

In short, the R.E.A.C.H. standards empower the consumer to determine precisely how many times their information will be sold, to whom, for how long—and to *stop* calls once they no longer desire to be contacted or exit the market. The R.E.A.C.H. standards reflect the comprehensive solution to the Quantum Soup Can problem the industry (and consumers) desperately need.

#### **IV. The Public Knowledge Proposal Should be Rejected Wholesale**

As just recited, the lead generation industry has many problems and abuses. But it also serves valuable purposes while employing hundreds of thousands of people.

The wholesale destruction of the industry would have wide ranging (unintended and unforeseeable but detrimental) consequences on consumers, industry participants and lead buyers—like Sally—that would destroy tens of thousands of businesses (at least) and result in an inestimable number of job losses. Yet, Public Knowledge makes just such a regrettable proposal in requesting the Commission to find “prior express consent to receive calls or texts must be made directly to one entity at a time.”

##### **A. The Consequences of the Public Knowledge Proposal Are Truly Enormous, Unforeseeable and Potentially Catastrophic**

As laid out above, hundreds of thousands of people are employed working in the lead generation industry reliant on the notion that consumer express consent can be transferred from one entity to another. It is the bedrock legal assumption that has led to the creation of hundreds of thousands of websites, most of which are run by small businesses, that gather consent. It enables the tens of thousands of individuals who work at lead aggregators to build networks with lead

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<sup>9</sup> R.E.A.C.H. submits that no firm limitations should be set here—the consumer should be free to visit different websites that provide protections the consumer prefers.





buyers to facilitate their networks and bring consumers one step closer to the goods and services they desire. And, ultimately, it allows hundreds of thousands of independent agents—like Sally—who have the audacity to hope for a brighter tomorrow to start their own businesses, reliant on leads they purchase in this industry.

Wiping out this entire ecosystem—a massive ecommerce infrastructure that powers the web engines and huge social media companies—would cause absolutely massive job losses. The first and most obvious companies to fail would be the hundreds of thousands of small businesses operating websites that generate consents. The lead aggregators—smaller in number but much larger in size—would follow. So would thousands of vendors and data analytics companies that assist these companies. With the aggregators down, the large-scale social media buys would end—causing massive losses to social media platforms like Twitter and Facebook. Communications platforms also take a hit. And of course, hundreds of thousands of small businesses with agents like Sally no longer have an affordable way to connect with consumers who may need or want their goods or services.

It is tough to say precisely how bad the economic carnage here would be, but suffice to say that Public Knowledge’s proposal is a massive overcorrection. The underlying problem in the lead generation industry is not the transfer of consent in the first instance, but rather the *endless* and *unlimited* transfer of consent. The Commission should first *regulate* that activity rather than *banning* it as a first measure.

B. Industry Actors Are Not Entirely Blameworthy as the The Lack of Any Regulatory Activity to Date has Exacerbated the Problem

While it is easy to cast blame on the various players in the lead generation industry, it must be repeated that the “bad”—as opposed to the “ugly”—actors in this space are not actually acting in an illegal manner.

Their conduct has been enabled—one might cynically say encouraged—by an outright failure of regulators to recognize the root of the robocall problem and attempt to address it. This is so because, as already explained, the hammer of the TCPA falls only upon the ultimate lead buyer—usually a mostly innocent party, and the party in the chain least capable of effectuating change.

It is unfair, therefore, to assume actors in this space are incapable of change or becoming good actors. The fact that an organization like R.E.A.C.H. exists—whose members face massive market headwinds in trying to treat consumers properly—is testament to that. R.E.A.C.H. submits that the industry ought to be provided an opportunity to prove it can conform to clear standards to be set by the Commission.



Since regulatory limits on the transfer of consent have never yet been imposed, it is appropriate to first try some lower level of oversight and punishment rather than leaping to the death penalty—for all actors, good and bad alike. Players in this space should be given the opportunity to operate according to clear regulatory standards that have been simply missing to date. And industry participants that fail to adhere to the Commission’s standards should, indeed, face consequences. But those that align with the law should be permitted to provide their valuable services to consumers and small businesses alike.

C. Public Knowledge is Simply Wrong on the Law—And Provides No Rational (Much Less Compelling) Policy Basis to Apply a Different Rule.

Public Knowledge asserts “telemarketers ignore the requirement that the express invitation or permission can only be provided by the consumer directly to the seller.”<sup>10</sup> But no such requirement exists under the law.

As already explained in R.E.A.C.H.’s previous ex parte submission, the Commission<sup>11</sup> and Courts<sup>12</sup> have repeatedly determined that consent can be provided to a caller via an intermediary. More broadly, it is well settled that contractual rights can be assigned and transferred with consent of the parties.<sup>13</sup>

There is simply no basis to reconsider this longstanding and widely relied upon law, at least not without trying some lesser potential remedy first. Public Knowledge’s concerns are seemingly limited to abuses—such as website operators tricking consumers into providing far broader

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<sup>10</sup> *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, Further Notice of Proposed Rulemaking, FCC 23-21, n. 163 (Mar. 17, 2023) (NPRM)

<sup>11</sup> *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act*, 30 FCC Rcd. 7961, 7990–91 (July 10, 2015) (“the TCPA does not prohibit a caller from obtaining a consumer’s prior express consent through an intermediary.”); *Ruling, Matter of GroupMe, Inc./Skype Commc’ns S.A.R.L Petition for Expedited Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 FCC Rcd 3442 at \*4, para. 11. (March 27, 2014).

<sup>12</sup> *Fober v. Mgmt. & Tech. Consultants, LLC*, 886 F.3d 789, 793 (9th Cir. 2018) (“a party that receives an individual’s phone number indirectly may nevertheless have consent to call that individual[.]”); *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1124 (11th Cir. 2014) (“a person can consent to calls from a creditor by affirmatively giving an ‘intermediary’ [ ] permission to transfer her number to the creditor for billing purposes.”). *Baisden v. Credit Adjustments, Inc.*, 813 F.3d 338, 344 (6th Cir. 2016) (“...consent may be obtained by and conveyed through an intermediary.”)

<sup>13</sup> Restatement (Second) of Contracts § 317(2) (1981) (“[a] contractual right can be assigned unless (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor; or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or (c) assignment is validly precluded by contract.”).



consent than anticipated—which are better addressed with standards and regulation, not with a wholesale destruction of an industry.

As Public Knowledge has not yet put forth any logical rationale supporting the requirement of “direct” transmission of consent to good or service providers—other than an apparent misread of the law—R.E.A.C.H. reserves further discussion on this topic for its reply comment.

**D. The Public Knowledge Proposal Massively Inhibits the Commission’s Goals Related to Diversity, Equity, and Inclusion**

The Commission specifically sought “comment on how our proposals may promote or inhibit advances in diversity, equity, inclusion, and accessibility.”<sup>14</sup>

It must be stated directly—the Public Knowledge proposal would have a massive and terrible impact on these advances. The lead generation industry is an incredibly diverse industry featuring very powerful women initiatives<sup>15</sup> and groups that advance minorities.<sup>16</sup> Moreover a disproportionate number of small businesses—those most likely to run lead generation websites and purchase leads as independent sales professionals—are run by minorities and women.<sup>17</sup>

The Public Knowledge proposal would be catastrophic for these small women and minority-owned businesses—again both those in the lead generation ecosystem and those that rely on the lead generation industry to provide customers—a result wholly inconsistent with the Commission’s stated goals.

**V. The Commission Should Adopt the R.E.A.C.H. Standards as the Industry Gold Standard and Grant a Safe Harbor to Those Using It**

R.E.A.C.H. whole-heartedly supports—with small modifications proposed below—the FCC’s proposal “to ban the practice of obtaining a single consumer consent as grounds for delivering calls and text messages from multiple marketers on subjects beyond the scope of the original consent.”<sup>18</sup> But, it respectfully submits it does not go far enough.

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<sup>14</sup> 87 FCC Rcd. 195, 61273 ¶ 22. (2022).

<sup>15</sup> See e.g., *LinkUnite*, <https://linkunite.live> (last visited May. 8, 2023); *Women of Martech*, <https://womenofmartech.com> (last visited May. 8, 2023).

<sup>16</sup> *Blacks in Performance Marketing*, <https://www.blacksipm.com> (last visited May. 8, 2023).

<sup>17</sup> *Set Aside Alert 8(a) on Minority and Woman-Owned Businesses*, <https://www.sba8a.com/inix5418.htm> (last visited May. 8, 2023).

<sup>18</sup> *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, Further Notice of Proposed Rulemaking, FCC 23-21, ¶¶ 48, 58, 64. (Mar. 17, 2023) (NPRM).



In order to solve the “Quantum Soup Can” problem, the Commission should adopt the R.E.A.C.H. standards as the required webform submission rule and grant a safe harbor to those using it.

A. The Commission’s Topically and Logically Related Rule Is Fine but Leaves Much to be Desired and Should be Enhanced

R.E.A.C.H. applauds the Commission’s efforts to commence regulating the lead generation industry but urges it to do more than merely dip a toe in the water.<sup>19</sup>

Yes, consumers should not be duped into providing a broader consent than intended. So consent should be “topically” and “logically” limited to the website they visit.<sup>20</sup> But that is not nearly enough to solve the problem of the Quantum Soup Can.

First, what does it mean to be “logically” and “topically” related? To a hammer everything looks like a nail, and to a lead generator every product is “logically” and “topically” connected to every other. Give an inch, and a mile will be taken here. The Commission should clarify that “logically” and “topically” means that the consumer is only consenting to the *precise* product or service the consumer is viewing information on. Hence, only a specific *type* of insurance—not insurance generally. Only a specific *type* of loan—not lending generally. And “logic” does not extend to downstream services—i.e., if a consumer needs a realtor to find a house it is not “logical” to say their consent extends to a mortgage loan to buy that house, and solar panels to power it.

Second, a consumer’s consent should be limited based on the specific *webpage* the consumer provided consent on—not on the contents of the entire *website* the consumer visited. A website may contain numerous topics and subject matter. But just because a consumer visits a bank’s website does not mean the consumer intended to consent to information on every financial product the bank offers—a mortgage loan customer does not necessarily need to hear about student loan offers or personal loans.

Third, and most importantly, protecting consumers from overly expansive consent forms does nothing to protect consumers from the constant re-sale of leads, or the limitless timeframes during which a lead may be sold. These issues are the primary driver of unwanted calls—the Quantum Soup Can problem—and these issues too must be addressed. So, in answer to the Commission’s question “[w]ould our proposal better protect consumers from receiving large numbers of calls and texts they do not wish to receive when they visit websites such as comparison-

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<sup>19</sup> It appears to R.E.A.C.H. members that the options presented by the Commission in the NPRM are either complete annihilation of the industry—the Public Knowledge proposal—or the slightest regulation that will change nothing—the proposed CFR edit. Less and more is required.

<sup>20</sup> Anyone who says differently is dependent upon a non-viable status quo and is likely a bad industry actor.



shopping websites?”<sup>21</sup> the answer is a tepid: “probably to some degree, but so much more can be done!”

Fourth, very clear and transparent disclosures—again of the sort required by the R.E.A.C.H. standards—should be mandated to assure consumers are not tricked into providing consent in the first instance.

B. The R.E.A.C.H. Standards Are the Comprehensive Solution Consumers Deserve –and the Time to Require their Adoption is Now.

The NPRM asks Commenters to “discuss whether... there alternatives to our proposal that would better protect consumers from the harms we have identified?”<sup>22</sup> Additionally the Commission seeks “comment on the extent of the problem, our proposed rule, and whether the proposed rule will clarify consent and help to eliminate illegal text messages and calls.”<sup>23</sup> Finally, the Commission asks “[a]re there different or additional limitations on multi-party consent we should consider?”

R.E.A.C.H. has sought to respond in a fulsome and transparent manner to the Commission’s concerns. Getting to the root of the problem is critical. Multi-party consents are *part* of the problem, sort of. But really the issue is the Quantum Soup Can problem—consumers never really knowing how many times their consent can be sold and for how long.

The R.E.A.C.H. standards seek to solve *every* problem stemming out of the lead generation industry as it relates to unwanted phone calls. Consumers are empowered. All of the benefits of lead generation remain. And unwanted calls stop.

C. The Focus on Hyperlinks is a Red Herring—Aged Leads and Limitless Re-Sale of Consumer Data is the Real Problem.

The Commission also seeks comment on whether “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.” While this proposal is a bit vague, R.E.A.C.H. understands the Commission to be contemplating an end to the use of hyperlinks.

R.E.A.C.H. members can discern no benefit to ending the use of hyperlinks. Hyperlinks are commonly used by consumers and enforced by courts. They are readily understood by website visitors.

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<sup>21</sup> *Id.* at. ¶61.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at. ¶62.





The issue is not the hyperlink, of course, it is the potential for unlimited sale of the lead that the hyperlink may hide. For instance, if the hyperlink masks 8,000 marketing partners then the hyperlink may obscure the massive number of times a consumer may end up being called as a result of accepting that disclosure.

The solution, then, is not to ban hyperlinks. It is to mandate a clear disclosure to the consumer of how many times the lead may be sold and how many calls they should expect to receive.

Further, it is important to recognize that some companies will have a perfectly valid reason to have thousands of people on their partner page. For instance those who help independent agents like—Sally—will need to have many thousands of names on their list. Indeed, limiting the number of names on a list hurts small businesses like Sally’s and only benefits bigger businesses whose dollars are higher and more attractive to website operators to partner with. (i.e., if only 10 names can appear on a disclosure the website operator will be incentivized to constantly drop the smallest of the 10 on their list in favor of bigger spend.) That’s not what the Commission should encourage.

Instead consumers are best served when *many* potential companies can serve the consumer’s needs and the website is actively attempting to find *the best* choice for that consumer amongst those many partners. Indeed, it is actually *best* for a consumer when *thousands* of names appear on a marketing list—so long as the end result is that the consumer is connected only with the best of those companies to meet the consumer’s needs.

R.E.A.C.H. submits that the consumer should be left to choose just how many of those companies they want to hear from—so long as they understand that choosing 20 companies may result in far more calls than choosing 2 companies. But ultimately the individual consumer should be left to make that choice—once fully informed.<sup>24</sup>

D. The Commission Should Grant a Safe Harbor to Companies that Abide by the R.E.A.C.H. Standards

In the past the Commission has wisely afforded a safe harbor to callers making use of consumer-friendly technology that might otherwise impose a cost on the caller or damage their market position.<sup>25</sup> Courts enforce these safe harbors.<sup>26</sup>

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<sup>24</sup> See generally R.E.A.C.H. Standards Nos. 4, 6 and 13. (Feb. 2023).

<sup>25</sup> See *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Report and Order, 33 FCC Rcd 12024 ¶53 (2018) (Reassigned Numbers Database Order).

<sup>26</sup> See e.g., *Hylton v. Titlemax of Virginia, Inc.*, No. 4:21-CV-163, 2022 WL 16753869, at \*7 (S.D. Ga. Nov. 7, 2022) (noting that the FCC intentionally limited the safe harbor to those who “reasonably relied on the *database* when making a particular call” in order to “incent greater usage, thereby further protecting more consumers from unwanted calls.”); *Johansen v. Efinancial LLC*, No. 220CV01351RAJBAT, 2021 WL 7161969, at \*11 (W.D. Wash. June 11,



The Commission has already found that a caller can “reasonably” rely on consent.<sup>27</sup> R.E.A.C.H. submits that callers that rely on consent records matching the R.E.A.C.H. standards be entitled to a presumptive finding of “reasonableness” in making outbound calls in reliance on these consents. This will aid companies to avoid manufactured lawsuits by repeat litigants that fill out online forms and then deny having provided consent.

Offering this safe harbor will greatly increase adoption of the R.E.A.C.H. standards to the wide benefit of consumers. Indeed, R.E.A.C.H. estimates that adoption of its standards by industry will stop between 500MM and 1BB robocalls per month—more than any other single robocall mitigation effort (private or public) to date.

## **VI. The Commission Must Assist R.E.A.C.H. in Reigning in the Out-of-Control Call Blocking and Labeling Being Undertaken by the Nation’s Wireless Carriers.**

While we’re chatting, R.E.A.C.H. submits that the wireless carriers in this nation are simply out of control when it comes to call blocking and labeling.

The latest word is that carriers are entirely refusing to carry traffic where calls arise out of consents provided on a website. This is absurd, a plain violation of the Communications Act<sup>28</sup> and “unreasonable” under the Commission’s earlier call blocking directives.<sup>29</sup>

Further, callers reaching out to consumers who have submitted online forms are being labeled—thoughtlessly and reflexively—as “scam likely” or “spam” despite the lack of any reasonable basis to label the calls. Indeed there is wide industry chatter that the carriers are *knowingly* mislabeling callers in a bid to enroll callers into pricey “white list” and branded caller Id solutions.<sup>30</sup>

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2021), *report and recommendation adopted*, No. 2:20-CV-01351-DGE, 2022 WL 168170 (W.D. Wash. Jan. 18, 2022) (holding that the application of the safe harbor defense because it substantially complies with the regulation in a manner that fulfills the TCPA’s purpose).

<sup>27</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 30 FCC Rcd 7961, 7992, para. 54 (2015) (*2015 TCPA Declaratory Ruling and Order*).

<sup>28</sup> 47 U.S.C. § 201.

<sup>29</sup> *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, 36 FCC Rcd 9180 (2021); *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, 35 FCC Rcd 15221 (2020); *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, 35 FCC Rcd 7614 (2020); *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, 34 FCC Rcd 4876 (2019); *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, 32 FCC Rcd 9706 (2017).

<sup>30</sup> See e.g., *Branded Communication Solutions – Caller ID Reimagined*, FIRST ORION, <https://firstorion.com/branded-communication/> (last visited May. 8, 2023); *Hiya: Caller ID, Call Blocker & Protection for a Better Voice Experience*, HIYA, <https://www.hiya.com> (last visited May. 8, 2023).



Obviously intentionally mislabeling calls to drive up profits is an unlawful business practice and the wholesale blocking of *legal* traffic arising out of webform submissions is a serious First Amendment concern, in addition to enabling a private right of action under the Communications Act.<sup>31</sup>

R.E.A.C.H. asks the Commission to advise wireless carriers *not to block or label* voice or SMS traffic from lead generators pursuant to webform submissions that meet the Commission’s new NPRM guidelines—whatever they end up being.

## VII. Conclusion

For these reasons R.E.A.C.H., on behalf of its members, respectfully submits that the adoption of the R.E.A.C.H. standards would meet the concerns before the Commission.

Respectfully submitted,

/s/ Eric J. Troutman

Eric J. Troutman  
R.E.A.C.H.

The following members have requested and authorized their signatures on behalf of R.E.A.C.H.:

Scott Thompson  
Astoria Company



Brien Jones-Lantsy  
Sinch



Steve Kaplan  
Health Plan One



Peter Vitale  
Encore Insurance



Travis Prouty  
The Call Gurus



Richard Kahn  
Anura Solutions



Angela Cherrill  
Tesico

*TESICO LLC*

Kevin Wagoner  
Balboa Digital



Gayla Huber  
IntegriShield



<sup>31</sup> 47 U.S.C. § 201.

