

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Targeting and Eliminating Unlawful) CG Docket No. 21-402
Text Messages)
)

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

by

National Consumer Law Center on behalf of its low-income clients
Electronic Privacy Information Center
&
Appleseed Foundation
Center for Responsible Lending
Consumer Action
Consumer Federation of America
Jacksonville Area Legal Aid, Inc. (FL)
Legal Services of New Jersey
Mobilization for Justice (NY)
Mountain State Justice (WV)
National Association of Consumer Advocates
National Consumers League
Shriver Center on Poverty Law (IL)
South Carolina Appleseed
Texas Appleseed
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Reply Comments

I. The Commission must act to preserve and expand protections against text messages that are unwanted, dangerous, or illegal.

These Reply Comments are filed by the **National Consumer Law Center (NCLC)** and **Electronic Privacy Information Center (EPIC)** on behalf of NCLC's low-income clients and the following national, state, and regional consumer and privacy advocacy organizations: **Appleaseed Foundation, Center for Responsible Lending, Consumer Action, Consumer Federation of America, Jacksonville Area Legal Aid, Inc. (FL), Legal Services of New Jersey, Mobilization for Justice (NY), Mountain State Justice (WV), National Association of Consumer Advocates, National Consumers League, Shriver Center on Poverty Law (IL), South Carolina Appleaseed, Texas Appleaseed, Tzedek DC, U.S. PIRG, and Virginia Poverty Law Center.** In these Reply Comments we reiterate that protecting subscribers from both unwanted texts and illegal texts should be the primary goals of the Federal Communications Commission ("Commission" or "FCC") in this proceeding.¹ As universally recognized by the commenters in this proceeding, texting currently remains a valuable and trusted method of communication in the United States.² However, as also recognized by the Commission when initiating this proceeding, the steady escalation of complaints about unwanted texts, as well as mounting losses to consumers from scam texts, necessitate that more be done to protect consumers. Yet, despite the clear need to do more, many commenters have instead urged the Commission to undo many of the current protections so that texters can send more texts uninhibited by the current limits imposed by the carriers.³

¹ Federal Commc'ns Comm'n, *In re Targeting and Eliminating Unlawful Text Messages*, Notice of Proposed Rulemaking in CG Docket No. 21-402, 87 Fed. Reg. 61,271 (Oct. 11, 2022), *available at* <https://www.federalregister.gov/documents/2022/10/11/2022-22049/targeting-and-eliminating-unlawful-text-messages>.

² *See, e.g., In re Targeting and Eliminating Unlawful Text Messages*, Comments of T-Mobile USA, Inc., CG Docket No. 21-402, at 2 (filed Nov. 10, 2022), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/1110515408223>; *In re Targeting and Eliminating Unlawful Text Messages*, Comments of WMC Global, *Unlawful Text Messaging: Understanding What's Really Happening and Evolving Industry Defenses*, CG Docket No. 21-401, at 2 (filed Oct. 21, 2022), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/1021541512756>. The Commission has noted this fact as well. *See In re Targeting and Eliminating Unlawful Text Messages*, Notice of Proposed Rulemaking, CG Docket No. 21-402, at 7 (Rel. Sept. 27, 2022), *available at* <https://docs.fcc.gov/public/attachments/FCC-22-72A1.pdf>.

³ *See, e.g., In re Targeting and Eliminating Unlawful Text Messages*, Comments of State Voices, CG Docket No. 21-402 (filed Nov. 10, 2022), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/1110252526118> (stating that the current system overburdens some text message senders, and

The commenters who seek to unwind and reduce existing protections fail to recognize that the reason that the text method of communication is currently so valuable is directly related to the protections the carriers require for these messages, particularly the control that these protections give consumers over the text messages they receive. If the Commission were to bend to the wishes of these commenters and constrain the current protective measures, text communications would unquestionably follow the sad path of voice calls⁴—people would no longer trust the mechanism and would no longer open and communicate by texts nearly as frequently as they do now.⁵ Text messages that consumers want and need would be lost in a sea of unwanted messages.

These Reply Comments are submitted by multiple national and state consumer and privacy groups representing a broad swath of individual telephone subscribers across the United States. We can assure the Commission that **our clients, members, and constituents are NOT clamoring for more text messages for which they have not provided consent.**

In our original comments,⁶ we identified three different types of robotexts that harm consumers, and we urged the Commission to address each type specifically. In these comments, we supplement our previous comments on these three types. We urge the Commission to address these different types of unwanted or illegal texts specifically:

- 1) **Unconsented-to texts sent by non-scam groups** for political engagement or contributions, surveys, or similar messages, as well as debt collection texts sent by creditors and debt collectors. We encourage the Commission to explicitly support the use of rules and strict protocols imposed by CTIA and its carrier-partners, as these protocols are both legal and essential to protect cell phone subscribers from unwanted texts, as described further in section II, *infra*.
- 2) **Scam texts, especially those that include URLs**, which seek to steal funds or personal identity information from recipients. These highly dangerous texts need more attention. We urge the Commission to work more systematically with the FTC and other agencies to eliminate the vectors responsible for facilitating these texts, and to create and enforce

complaining that the system requires the same rules for P2P texting by organizations as it does for businesses sending texts to customers).

⁴ Seventy percent of phone subscribers no longer answer the phone for numbers they do not recognize. See Octavio Blanco, Consumer Reports, Mad About Robocalls? (Apr. 2, 2019), *available at* <https://www.consumerreports.org/robocalls/mad-about-robocalls/>.

⁵ See e.g. Samantha Hawkins, Bloomberg Law, *Frontier Communications Sues Mobi Telecom Over Robocalls* (Feb. 9, 2022), *available at* <https://news.bloomberglaw.com/privacy-and-data-security/frontier-communications-sues-mobi-telecom-over-robocalls>.

⁶ See *In re Targeting and Eliminating Unlawful Text Messages*, Comments on Notice of Proposed Rulemaking in CG Docket No. 21-402 (filed Nov. 10, 2022), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/11110142720936/1> [hereinafter NCLC/EPIC Nov. 10, 2022 Comments].

incentives that will assist in limiting scammers' use of texts as a tool to defraud vulnerable consumers, as described in section III, *infra*.

- 3) **Telemarketing texts** (and calls) that are sent to numbers listed on the Do Not Call Registry (DNC Registry) with illusory consent from the called party – consent purportedly obtained by lead generators, data brokers, and bots. Clearly articulating that certain methods that purport to obtain the consumer prior express invitation or permission do not comply with the FCC's current regulations would go a long way toward eliminating these abuses, and we urge the Commission to take this step, as explained in section IV, *infra*.

We urge the Commission to give high priority to taking meaningful action on these issues, before the current level of subscribers' trust in text messages is squandered.

II. Consumers need protections from *unwanted* texts.

The providers of cellular telephone services—the carriers, their trade association CTIA, and their service partners—have collectively created a comprehensive system to protect consumers from unwanted and outright illegal text messages.⁷ These protections are essential, and the Commission should ensure that these protections are supported.

CTIA standards explicitly require that non-consumer senders of mass text messages to consumers (referred to as “A2P” senders) must have the consumer's consent to receive texts and must have the consumer's express written consent to receive marketing messages.⁸ The standards also require that consumers have the ability to revoke consent, and that senders comply with these revocations.⁹ CTIA considers individuals acting as agents of businesses, organizations, or entities that send messages to consumers to be A2P senders, even when the messages are sent using the person-to-person (P2P) platforms.¹⁰

Several commenters challenge providers' authority to implement these protective measures, wrongly arguing that because consent may not be required by the Telephone Consumer Protection Act (TCPA),¹¹ the providers have no authority to require it.¹² We strongly disagree that either the law

⁷ See CTIA, Messaging Principles and Best Practices 12 (July 2019), available at <https://api.ctia.org/wp-content/uploads/2019/07/190719-CTIA-Messaging-Principles-and-Best-Practices-FINAL.pdf>.

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.* at 8.

¹¹ 47 U.S.C. § 227.

¹² See, e.g., *In re Targeting and Eliminating Unlawful Text Messages*, Comments of The Voice on the Net Coalition, CG Docket No. 21-402 (filed Nov. 10, 2022), available at <https://www.fcc.gov/ecfs/search/search->

or public policy considerations require these CTIA protocols to be curtailed. There is nothing illegal about a private industry establishing rules that preserve the value of its services. And no consumer is prevented from receiving *wanted* texts—the primary requirement for these A2P texts is simply that the recipient must have consented to receive them.

If the consumer has not consented, the sender has a myriad of other ways of reaching that consumer. Alternative methods of providing senders’ messages to consumers include (but are not limited to): emails, live voice calls, Facebook advertising, television, internet advertising, billboards, newspapers, blogs, podcasts, twitter, and more. The rules for A2P messages do not prevent these businesses from contacting consumers, but just prevent them from using mass texting campaigns to send them unwanted text messages.

If unconsented-to texts were permitted, texting would soon lose its value for consumers. As the Commission recently noted with respect to ringless voicemail, “unwanted messages, messages the consumer has no control over, crowd potentially wanted messages out of the consumer’s voicemail capacity.”¹³ The same is true for text messages: if consumers do not have control over receipt of

[filings/filing/111007843632](https://www.fcc.gov/ecfs/search/search-filings/filing/111007843632) (arguing that CTIA’s campaign registry rules are not necessary to prevent illegal texts); *In re Targeting and Eliminating Unlawful Text Messages*, Comments of INCOMPAS, CG Docket No. 21-402, at 2, 3 (filed Nov. 10, 2022), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/11112837315346> (stating that its members have “taken issue with certain aspects of wireless carriers’ use of existing methods to block and mitigate unlawful robotexts” and arguing that CTIA’s Campaign Registry requirements “carry significant operational burdens, privacy concerns, and high costs, but with little demonstrable consumer value being added”); *In re Targeting and Eliminating Unlawful Text Messages*, Comments of the Coalition for Open Messaging, CG Docket No. 21-402, at 8 (filed Nov. 10, 2022), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/1110088217531> (stating that “[c]arriers should not be permitted to impose extra-statutory restrictions on organizations that are not subject to opt-in requirements”); *In re Targeting and Eliminating Unlawful Text Messages*, Consumer Relations Consortium’s Comment to Notice of Proposed Rule Making Targeting and Eliminating Unlawful Text Messages, CG Docket 21-402 (filed Nov. 9, 2022), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/111041353951> (asking FCC to harmonize the rules for texts with those applied by the CFPB to debt collection texts); *In re Targeting and Eliminating Unlawful Text Messages*, Comments of The Ad Hoc Telecom Users Committee, CG Docket No. 21-402 (filed Nov. 10, 2022), *available at* <https://www.fcc.gov/ecfs/document/111095611470/1> (advocating that blocking of text messages be permitted only when the text messages are deemed highly likely to be illegal, and stating that any blocking of text messages should proceed only with notification to the texter with a uniform notification method); *In re Targeting and Eliminating Unlawful Text Messages*, Comments of National Opinion Research Center, CG Docket No. 21-402, at 4 (filed Nov. 10, 2022), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/1110291150463> (stating that current texting rules lead to “overbroad” blocking, and arguing that texts that are legal under the TCPA should not be restricted by carriers).

¹³ *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Petition for Declaratory Ruling of All About the Message, LLC, Declaratory Ruling and Order, CG Docket No. 02-278, at ¶ 12 (Rel. Nov. 21, 2022), *available at* <https://docs.fcc.gov/public/attachments/FCC-22-85A1.pdf>.

text messages, the text messaging function on their phones will rapidly become useless, as the messages they want and need will be lost in a sea of unwanted messages.¹⁴

The commenters who state that the protocols may violate constitutional protections¹⁵ are also wrong. The First Amendment is implicated only when the government—as opposed to a private party—restricts the communication.

It is the Commission’s job to ensure that effective measures used to limit those unwanted texts are not hampered, and indeed, are facilitated. Industry actors are independently working to preserve the utility of the text messaging system. We support these efforts and urge the Commission to explicitly support this consent-driven framework.

III. More needs to be done to stop consumer losses from *scam texts*.

We applaud the Commission’s attention in this proceeding to the growing threat of scam texts. But the Commission should do more. **According to the FTC, consumers have reported greater losses from text message scams in the first three quarters of 2022 than in all of 2020 and 2021 combined.**¹⁶ Robokiller projects a 179% increase in the dollars lost from text messages between 2021 and 2022.¹⁷

¹⁴ CTIA has cited to a 2022 Morning Consult poll indicating that more than 80% of consumers are frustrated by unsolicited political messages, up from 68% in 2020. CTIA, Keeping Consumers Spam Free During Election Season (Sept. 22, 2022), available at <https://www.ctia.org/news/keeping-consumers-spam-free-during-election-season> (“Morning Consult also confirmed what we hear every day from consumers—spam is spam whether it’s an unwanted text from a bank, a concert promoter, or a campaign.”). See also *In re Targeting and Eliminating Unlawful Text Messages*, Comments of the Messaging Malware Mobile Anti-Abuse Working Group (M3AAWG) on the Notice of Proposed Rulemaking, CG Docket No. 21-402, at 13 (filed Nov. 8, 2022), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/11081168704757> (“Regulations intended to prevent anti-competitive practices can and will degrade consumer protection by preventing rogue service providers being held accountable for their misbehavior.”).

¹⁵ See, e.g., *In re Targeting and Eliminating Unlawful Text Messages*, Comments of American Association of Political Consultants, CG Docket No. 21-402, at 1 (filed Nov. 10, 2022), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/111124394663> (alleging that allowing carriers the authority to block “perceived unwanted text message communications . . . presents a serious risk that legal political text messages may not be delivered to the intended electorate,” and that this activity raises First Amendment concerns).

¹⁶ FTC Consumer Sentinel Network, Fraud Reports by Contact Method, Reports & Amount Lost by Contact Method (updated Feb. 22, 2022) (Losses & Contact Method tab, with quarters 1 through 4 checked for years 2020 through 2021, as compared with quarters 1 through 3 checked for 2022), available at <https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/FraudFacts> (Q1-3 2022 sum = \$231M, Q1-4 2021 sum = \$131M, Q1-4 2020 sum = \$86M, \$131M+\$86M= \$217M).

¹⁷ Robokiller, The Robokiller Report: 2022 Mid-Year Phone Scam Insights (2022), available at <https://www.robokiller.com/the-robokiller-report>.

Several commenters have identified methods by which telecom providers currently protect consumers from URLs that contain malware or that direct consumers to malicious websites.¹⁸ The Commission should determine how it can incentivize all providers to implement these or similar practices to safeguard consumers from these prominent and pernicious attack vectors.¹⁹

The Commission should also consider adopting measures that will provide strong financial disincentives for providers and/or platforms that transmit scam texts to consumers, by, for example, imposing liability on providers who knew or should have known they were transmitting such scam traffic.

Additionally, we encourage the Commission to develop a robust working relationship with the FTC, as well as other federal agencies, to identify ways the agencies can work together to shut down the vectors that assist or facilitate illegal scam and telemarketing campaigns (including consciously avoiding knowing that the provider is violating the TSR). The Commission might also leverage its MOUs with the FTC to jointly develop meaningful protections against these texts, for example, where the sender is impersonating another business or a government entity,²⁰ or when a mass texting platform knowingly facilitates illegal telemarketing.²¹

¹⁸ See, e.g., *In re* Targeting and Eliminating Unlawful Text Messages, Comments of CTIA, CG Docket No. 21-402, at 8 (filed Nov. 10, 2022), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/11101045415230> (Google's SafeSearch); *In re* Targeting and Eliminating Unlawful Text Messages, Comments of Sinch America Inc., CG Docket No. 21-402, at 5, 15 (filed Nov. 10, 2022), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/1111531902527> (Zero-Trust Validation).

¹⁹ See, e.g., Christina Ianzito, AARP, AARP Report Warns of Spike in Scam Attempts During the Holidays (Nov. 22, 2022), available at <https://www.aarp.org/money/scams-fraud/info-2022/holidays-consumer-survey.html> (quoting Kathy Stokes, AARP's Director of Fraud Prevention, Fraud Watch Network, as saying, "Type the company's website into your browser, rather than click a link in an ad. This way you avoid fake links that could steal login info or load malware [malicious software] onto your device."). See also NCLC/EPIC Nov. 10, 2022 Comments, *supra* note 6, at 11 nn.40, 41; *In re* Targeting and Eliminating Unlawful Text Messages, Comments of the Messaging Malware Mobile Anti-Abuse Working Group (M3AAWG) on the Notice of Proposed Rulemaking, CG Docket No. 21-402, at 12 (filed Nov. 8, 2022), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/11081168704757>; *In re* Targeting and Eliminating Unlawful Text Messages, Comments of WMC Global, Unlawful Text Messaging: Understanding What's Really Happening and Evolving Industry Defenses, CG Docket No. 21-401, at 2, 4, 5 (filed Oct. 21, 2022), available at <https://www.fcc.gov/ecfs/search/search-filings/filing/1021541512756>.

²⁰ See Federal Trade Comm'n, Trade Regulation Rule on Impersonation of Government and Businesses, Notice of Proposed Rulemaking, 87 Fed. Reg. 62,741 (Oct. 17, 2022), available at <https://www.ftc.gov/legal-library/browse/federal-register-notices/16-cfr-part-461-trade-regulation-rule-impersonation-government-businesses-nprm>.

²¹ Press Release, Federal Trade Comm'n, FTC Warns 19 VoIP Service Providers That 'Assisting and Facilitating' Illegal Telemarketing or Robocalling Is Against the Law (Jan. 30, 2020), available at <https://www.ftc.gov/news-events/news/press-releases/2020/01/ftc-warns-19-voip-service-providers-assisting-facilitating-illegal-telemarketing-or-robocalling>.

IV. The Commission should clarify the interpretation of Do Not Call Registry regulations to prohibit the use of non-compliant methods to capture purported consumer consents for *telemarketing texts*.

As explained in our primary comments,²² the prohibition against making telephone solicitation calls to telephone numbers registered on the Do Not Call Registry without the proper “prior express invitation or permission”²³ applies to texts that include solicitations.²⁴ Most mass telemarketing text campaigns are likely illegal because it is so unlikely that the recipients provided the requisite prior express invitation or permission in a way that meets the requirements of the TCPA regulations. Indeed, many lead generators, data brokers, and others justify hundreds of millions of telemarketing calls and texts every month based on consent purportedly obtained through legally flawed methodologies.²⁵ The specific requirements of the Commission’s regulations for consent for these texts are not just technicalities, but are essential components of one of the core protections of the Telephone Consumer Protection Act—to prevent telemarketing messages from being sent without the consumer’s actual consent.

The regulation governing how “prior express invitation or permission” for solicitation texts and calls to DNC Registry lines expressly limits the manner of obtaining this invitation:

Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating [the nationwide DNC Registry rule] if:

...
(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement *between the consumer and seller* which states that the consumer agrees to be contacted by *this seller* . . .²⁶

This regulation has three specific limitations that are routinely ignored by telemarketers:

1. The express invitation or permission can only be provided *by the consumer directly to the seller*. The regulation requires that the agreement can only be between the seller of the product or services and the consumer. This means that no agreement between a consumer and anyone else—such as a lead

²² See NCLC/EPIC Nov. 10, 2022 Comments, *supra* note 6, at section II.

²³ 47 C.F.R. § 64.1200(c)(2)(ii). See *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Report and Order, CG Docket No. 02-278, 18 F.C.C. Rcd. 14014 (F.C.C. July 3, 2003).

²⁴ 47 C.F.R. § 64.1200(e).

²⁵ See NCLC/EPIC Nov. 10, 2022 Comments, *supra* note 6, at section II.

²⁶ 47 C.F.R. § 64.1200(c)(2)(ii) (emphasis added).

generator, a data broker, another seller, or even a telemarketer—would be valid. In another section, the regulations expressly limit the definition of “seller” to mean “the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase . . . of . . . property”²⁷ Telemarketers and lead generators are not included in this definition of seller.

2. The invitation can be provided to only one seller at a time. Unlike the standard practice of many telemarketers and lead generators who seek to obtain permission for multiple sellers or telemarketers to call the subscriber, the language in this regulation expressly limits the agreement to be between the consumer and “this seller.” Each agreement can only be between one consumer and *one seller*.

3. Each agreement between the seller and the consumer must be in writing and signed by the consumer with the intent to enter into that agreement. If the agreement is entered into over the internet, this means that the agreement must be signed with a process that qualifies as an “electronic signature” under the federal E-Sign Act. As described in our primary comments, lead generators purport to provide the required express permission by having consumers “click” on a website that links to a list containing the names of thousands of sellers. That click is then presented as the consumer’s agreement to receive subsequent telemarketing calls about products or services sold by these thousands of sellers. However, for the consumer’s “click” to be legally equivalent to a signature, the “click” must meet every one of the requirements in E-Sign’s definition of “electronic signature.”²⁸

E-Sign defines “electronic signature” as “an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.”²⁹ Clicking on a link that contains a hidden URL with the names of thousands of sellers does not meet the E-Sign definition of an “electronic signature,” because there was no separate agreement with each seller, and the consumer could not have had the intent to sign such a separate agreement with each of the thousands of sellers listed on the webpage connected with the URL.³⁰

²⁷ 47 C.F.R. § 64.1200(f)(10).

²⁸ “The term ‘signature’ shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.” 47 C.F.R. § 64.1200(f)(9)(ii) (emphasis added).

²⁹ 15 U.S.C. § 7006(5).

³⁰ See, e.g. <https://www.fcc.gov/ecfs/document/1005271665623/2>

Once the FCC issues a clarifying interpretation of its regulation to explain this, the current—and extensive—misuse of lead generators and data brokers to justify unwanted telemarketing calls and texts will be significantly curtailed.

Indeed, in the context of helpful actions that this Commission can take to protect the nation’s cell phones from unwanted texts, this is perhaps the simplest and most straightforward action.

V. Conclusion

We appreciate the opportunity to respond to the Commission’s Proposed Rule on eliminating unlawful and annoying robotexts.

Respectfully submitted, this the 9th day of December, 2022, by:

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