

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

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| 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 THE RETAIL INDUSTRY LEADERS ASSOCIATION

Deborah R. White
Kathleen F. McGuigan
**RETAIL INDUSTRY
LEADERS ASSOCIATION**
99 M Street SE, Ste. 700
Washington, D.C. 20003
Phone: (202) 869-0106

Meredith C. Slawe
Michael W. McTigue Jr.
**SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP**
One Manhattan West
New York, NY 10001
Phone: (212) 735-3000

Margaret E. Krawiec
Paul A. Solomon
Andrew C. Hanson
**SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP**
1440 New York Ave. NW
Washington, DC 20005
Phone: (202) 371-7000

Counsel to the Retail Industry Leaders Association

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EXECUTIVE SUMMARY

The Retail Industry Leaders Association (“RILA”) respectfully submits these Comments in response to the Commission’s Further Notice of Proposed Rulemaking on Targeting and Eliminating Unlawful Text Messages (“Text Messages FNPRM”).¹ RILA is a trade association of the world’s largest, most innovative and recognizable retail companies and brands. RILA’s members include retail companies that communicate with consumers using a range of vehicles and endeavor to honor consumers’ expectations regarding such communications.

RILA recognizes the proliferation of unlawful and unwanted scam, spam and spoof texts that are used in phishing, smishing and other similar fraudulent misconduct. Indeed, many of these activities have impacted RILA’s members by misleading consumers to believe that such messages were sent by or on behalf of legitimate retailers rather than the unrelated bad actors that actually sent the messages. RILA supports the FCC’s goal of protecting consumers and commends the Commission for taking action to curb illegal robotexts that harm consumers, as well as legitimate businesses by undermining bona fide customer engagement efforts.

Accordingly, RILA fully supports the Commission’s commitment to preventing unlawful and scam communications. RILA believes that the following proposed actions will target bad actors and provide consumers with meaningful relief: the FCC’s proposal requiring providers to block text messages from numbers on a reasonable Do Not Originate list; creating a single point of contact requirement for erroneous text blocking; requiring providers to block senders when they are alerted to illegal texts; and banning the practice of single consumer consent outside the logical and topical scope of the original consent.

¹ *In re Targeting & Eliminating Unlawful Text Messages & Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, CG Docket Nos. 21-402 and 02-278, Further Notice of Proposed Rulemaking, 88 Fed. Reg. 20800 (April 7, 2023) (the “Text Messages FNPRM”).

However, the Text Messages FNPRM also seeks comment on extending Do-Not-Call restrictions (the “DNC Restrictions”)² to text message solicitations and to codify this change in the Commission’s rules (the “DNC Text Proposal”). Unlike the foregoing measures, the DNC Text Proposal would primarily and negatively impact those who send legitimate text message solicitations, not scam senders and bad actors. Moreover, the DNC Text Proposal clearly falls outside the scope of Section 227(c) of the Telephone Consumer Protection Act (“TCPA”), and is neither necessary nor aligned with the policies underpinning the TCPA. In the event that the Commission moves forward with the proposal, the rule should include clear carve-outs or safe harbors for entities engaged in legitimate text message solicitations, such as RILA’s members.

² See 47 CFR § 64.1200 *et seq.*

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COMMENTS OF THE RETAIL INDUSTRY LEADERS ASSOCIATION

I. INTRODUCTION AND SUMMARY.

The Retail Industry Leaders Association (“RILA”) respectfully submits these Comments in response to the Commission’s Further Notice of Proposed Rulemaking on Targeting and Eliminating Unlawful Text Messages (“Text Messages FNPRM”).³ By way of background, RILA is the trade association of the world’s largest, most innovative and recognizable retail companies and brands. RILA convenes decision-makers, advocates for the retail industry, and promotes operational excellence and innovation. RILA’s aim is to elevate a dynamic retail industry by transforming the environment in which retailers operate. Its more than 200 members include retailers, product manufacturers and services suppliers that collectively employ over 42 million Americans and account for more than \$2.7 trillion in annual sales, and hundreds of thousands of retail stores, manufacturing facilities and distribution centers around the world.

RILA and its members have a significant interest in the outcome of the Commission’s rulemaking, as many of RILA’s members communicate with their customers by phone and text

³ *In re Targeting & Eliminating Unlawful Text Messages & Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, CG Docket Nos. 21-402 and 02-278, Further Notice of Proposed Rulemaking, 88 Fed. Reg. 20,800 (Apr. 7, 2023) (the “Text Messages FNPRM”).

message. Consumers value and affirmatively seek out desirable and lawful communications. Retailers share consumers' frustration with unwanted communications; indeed, RILA's members are not infrequently "spoofed" by bad actors' texts that seek to confuse consumers by trading on a bona fide retailer's good name. Accordingly, RILA and its members support the Commission's attention to the real issue of scam texts and related consumer fraud.

However, the portions of the proposal that would extend the DNC Restrictions to text messages exceed the statutory authority Congress gave the Commission under Section 227(c) of the Telephone Consumer Protection Act ("TCPA").⁴ Furthermore, the proposal is not aligned with the policies underpinning the TCPA and would have unintended negative consequences for consumers and the industry if promulgated as proposed for the reasons stated below.

First, TCPA Section 227(c) applies to **telephone calls**, not text messages. This is clear from the plain text of the statute. Congress passed the TCPA in 1991 in an effort to address certain abusive telemarketing business-to-consumer calling practices, such as a proliferation in marketing conducted via "automated or prerecorded **telephone calls**."⁵ The limitations of the statute to telephone calls is supported by the TCPA's legislative history and the Commission's TCPA regulations.

Second, the DNC Restrictions do not, and should not, reach text message solicitations. The DNC Restrictions as historically and presently applied to telephone numbers for calling purposes are incompatible with regulating text messaging. Moreover, the Commission has other and more effective tools to combat fraudulent and spam text messages, which make the extension of the DNC Registry and Restrictions to text messages unnecessary.

⁴ 47 U.S.C. § 227 *et seq.*

⁵ *See* S. Rep. No. 102-178 (1991); Pub. L. No. 102-243, 105 Stat. 2394, 2394 (1991) (emphasis added).

Finally, extending the DNC Restrictions to text messages would have harmful unintended consequences. For example, we expect it would be confusing to consumers and negatively impact legitimate business-consumer communications. In addition, DNC Restrictions would engender costly litigation that would enrich plaintiffs' attorneys and drain judicial resources without any concomitant consumer benefit.

Therefore, RILA opposes the proposed application of DNC Restrictions to text messages. If the Commission nonetheless decides to extend these rules to text message solicitations, the Commission should also make clear that the TCPA's affirmative defenses (including the written consent and Established Business Relationship ("EBR")⁶ defenses) apply equally to the text messaging context.

II. CONSUMERS WANT AND VALUE TEXT COMMUNICATIONS FROM LEGITIMATE BUSINESSES LIKE RILA MEMBERS.

Retailers are adapting to the ongoing revolutions in commerce by pursuing transformative innovation. The convergence of retail and technology ("(R)Tech") has caused the retail business model to change fundamentally, resulting in a business imperative to delight profoundly empowered consumers. To thrive in this new era, retailers must prioritize the careful delivery of informational and promotional communications that consumers have come to expect and desire. Empowering and honoring consumer choice is a key tenet of RILA's R(Tech) Center for Innovation, which helps retailers navigate and transform during this era of disruptive change, including with respect to communications.⁷

RILA's members regularly use legitimate text message communication channels to communicate with consumers. This makes sense given the statistics on consumer interest in

⁶ See 47 CFR § 64.1200(f)(5).

⁷ Retail Industry Leaders Association, (R) Tech Center for Innovation, <http://rtech.org/>.

communicating via text. Surveys show that nearly 91% of consumers globally have signed up for a text message marketing program or are interested in doing so.⁸ In addition, when compared to other communication methods, most consumers would prefer to engage with businesses via text message. Of mobile device users, 85% would rather engage with a business via text messaging as opposed to voice call or email.⁹ Relatedly, 58% of consumers said that—as between texts, phone calls or emails—text messages are the best way for businesses to reach them.¹⁰

Consumers' preference for receiving text communications from businesses is reflected in the response rate. Text message marketing has an average response rate of 45% and an average open rate of 98%.¹¹ Text message promotions have a click-through rate of 19.3%, which is approximately 15% higher than email marketing.¹² These statistics align with consumer expectations and desires.

Moreover, **consumers are in control** in the text message space since they can easily opt in or opt out of receiving texts. Given how hypercompetitive the retail industry is—with consumers voting with their wallets every moment of every day—brand reputation and sustained consumer relationships are critical for RILA's members. Thus, retailers have commercial incentives to honor consumers' control directives and opt-out requests.

In the Text Messages Report & Order (R&O) and FNPRM, the Commission highlighted the primary harm it is seeking to address: **bad actors** engaging in **scam** text messages and **scam**

⁸ See Attentive, *2023 Global Consumer Survey Report* (2023), <https://www.attentive.com/2023-consumer-trends-report>.

⁹ See Content Marketing Institute, *SMS Text Marketing? You Bet* (Sept. 27, 2018), <https://contentmarketinginstitute.com/articles/text-based-marketing/>.

¹⁰ See BusinessWire, *58% of Consumer Say That Texting is the Best Way for Businesses to Reach Them Quickly* (Feb. 9, 2021), <https://www.businesswire.com/news/home/20210209005462/en/58-of-Consumers-Say-That-Texting-Is-the-Best-Way-for-Businesses-to-Reach-Them-Quickly>.

¹¹ Luisa Zhou, *Ultimate List of SMS Marketing Statistics* (Mar. 7, 2023), <https://www.luisazhou.com/blog/sms-marketing-statistics/#:~:text=65%25%20of%20people%20in%20a,less%20than%20once%20per%20day>.

¹² See *id.*

robotexts.¹³ RILA commends the Commission for taking on this important issue since unwanted and fraudulent text messages can confuse and hoodwink consumers.¹⁴ Several of the Commission’s proposals tackle the issue of spam text messaging directly (i.e., requiring providers to block text messages from numbers on a reasonable Do Not Originate list and banning the practice of single consumer consent outside the logical and topical scope of the original consent). However, the proposed rule also goes far beyond **scam** texting schemes and sweeps in legitimate text message communications. As proposed, the Text Messages FNPRM reduces consumer control and makes assumptions on their behalf. Consumers use the DNC List to prevent unwanted telephone call solicitations. They do not expect that the DNC List will prevent normal and desired communications from legitimate businesses like RILA members.¹⁵

To ensure that consumers continue to maintain control over desired communications with legitimate businesses, RILA urges the Commission to eliminate the provisions of the proposed rule extending the DNC Restrictions to text message solicitations.

III. THE PROPOSAL TO EXPAND THE DNC RESTRICTIONS TO TEXT MESSAGES RAISES SIGNIFICANT LEGAL AND OPERATIONAL ISSUES.

A. The Relevant TCPA Provisions Do Not Apply to Text Messages.

Congress enacted TCPA Section 227(c) to provide private rights of action for (1) certain uses of automated telephone equipment and (2) intrusions on subscriber privacy rights.¹⁶ The plain language of TCPA Section 227(c) expressly authorizes recovery for violative **telephone calls**

¹³ See Text Messages R&O, 2023 WL 2582658, at *1–3; see also FCC, *FCC Adopts Its First Rules Focused on Scam Texting* (Mar. 16, 2023), <https://docs.fcc.gov/public/attachments/DOC-391800A1.pdf>.

¹⁴ Even U.S. government agencies such as the Internal Revenue Service (“IRS”) have been victims of smishing. See GPB, *No, the IRS isn’t calling you. It isn’t texting or emailing you, either* (Apr. 7, 2023), <https://www.gpb.org/news/2023/04/07/no-the-irs-isnt-calling-you-it-isnt-texting-or-emailing-you-either> (reporting that in the last five years “more than 75,000 victims have lost \$28 million to scammers impersonating the IRS over the phone, email, texts and more”).

¹⁵ Nor did Congress “intend for [the restrictions in the TCPA] to be a barrier to the normal, expected or desired communications between businesses and their customers.” H.R. Rep. No. 102-317, at 17 (1991).

¹⁶ See 47 U.S.C. §§ 227(b), (c).

only.¹⁷ This makes sense because the **Telephone** Consumer Protection Act was enacted to address marketing conducted via “automated or prerecorded **telephone calls**.”¹⁸ The legislative history of the TCPA also confirms this conclusion:

The purposes of the bill are to protect the privacy interests of **residential telephone subscribers** by placing restrictions on unsolicited, **automated telephone calls** to the home and to facilitate interstate commerce by restricting certain uses of **facsimile (fax) machines and automatic dialers** The Committee believes that Federal legislation is necessary to protect the public from automated **telephone calls**.¹⁹

Since the TCPA was passed in 1991, Congress amended the law in many respects. Indeed, beginning in 2019, Congress amended provisions other than Section 227(c) to address text messages directly.²⁰ Critically, however, Congress never added text messages to Section 227(c) and even declined to impose civil liability under Section 227(c) for the transmission of text messages.²¹

Under the preeminent canon of statutory interpretation, courts presume that the legislature says in a statute what it means and means in a statute what it says,²² Thus, while some federal circuit courts interpreting the TCPA have determined that text messages fall within the scope of

¹⁷ 47 U.S.C. § 227(c)(5) (stating that any “person who has received more than one **telephone call** within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may” seek “to recover for actual monetary loss . . . or to receive up to \$500 in damages for each such violation” (emphasis added)).

¹⁸ Pub. L. No. 102-243, 105 Stat. 2394, 2394 (1991) (emphasis added).

¹⁹ S. Rep. No. 102-178, at 1, 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1968, 1973 (emphases added).

²⁰ *See* Pub. L. No. 116-105, 133 Stat. 3274 (2019); 47 U.S.C. §§ 227(e)(8)(A)–(D), (i)(1)–(2), j(2).

²¹ *Compare* Pub. L. No. 102-243, 105 Stat. 2394, 2399 (1991), *with* 47 U.S.C. § 227(c)(5).

²² *See Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (“A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.” (citations omitted)); *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (citations omitted)).

Section 227(b) of the TCPA,²³ we are aware of no cases in which a federal appellate court has held that text messages fall within the scope of **Section 227(c)**.

Lacking specific statutory language under Section 227(c), the Commission relies on various general provisions of the TCPA for its proposed expansion of the DNC provisions to text messages. However, no amount of regulatory hand-waving can disguise the fact that Congress quite plainly did not give the FCC the authority that it seeks to invoke.

B. The Commission Should Not Shoehorn Text Messages into the DNC Restrictions.

1. *The DNC Restrictions Do Not and Should Not Reach Text Message Solicitations.*

The DNC Restrictions and DNC Registry provisions apply only to **residential** telephones (which do not receive text messages) and do not apply to cellular phones (which do receive text messages). The TCPA clearly directed the Commission to “initiate a rulemaking proceeding concerning the need to protect **residential telephone subscribers’ privacy rights** to avoid receiving telephone solicitations to which they object. . . . The regulations . . . may require the establishment and operation of a single national database to compile a list of telephone numbers of **residential subscribers** who object to receiving telephone solicitations”²⁴

²³ See *Warciak v. Subway Rests., Inc.*, 949 F.3d 354, 356 (7th Cir. 2020) (stating, without analysis, that “[t]ext messages to a cellular telephone qualify as a ‘call’ within the meaning of the statute”); *Breda v. Cellco P’ship*, 934 F.3d 1, 4 n.1 (1st Cir. 2019) (stating, without analysis, that “[t]he TCPA also applies to other forms of communication, such as text messages”); *Keating v. Peterson’s Nelnet, LLC*, 615 F. App’x 365, 370–71 (6th Cir. 2015) (deferring to administrative interpretation that TCPA applies to text messages); *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1305 (11th Cir. 2015) (deferring to administrative interpretation that TCPA applies to text messages); *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 269 n.2 (3d Cir. 2013) (stating, without analysis, that “[t]he TCPA’s prohibition on automated dialing applies to both voice calls and text messages”); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951–54 (9th Cir. 2009) (deferring to administrative interpretation that TCPA applies to text messages).

²⁴ 47 U.S.C. § 227(c)(1)–(3) (emphasis added). Indeed, the Supreme Court has recognized the commonsense issue of whether a text message should even be considered a telephone call. See Oral Arg. Tr. at 7:12–14, *Facebook, Inc. v. Duguid*, No. 19-511 (Dec. 8, 2020), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-511_1537.pdf (comments of Thomas, J.) (“I am interested in why a text message is considered a call under the TCPA.”).

Moreover, Commission regulations concerning the DNC Registry prohibit the “initiat[ion of] telephone solicitation[s]” to individuals who have placed their phone numbers on the DNC Registry.²⁵ “Telephone solicitation” includes “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.”²⁶ This definition—including its reference to “telephone call[s] or message[s]”—has remained unchanged since the TCPA was first enacted in 1991, before text messages existed, and throughout other amendments Congress made to the TCPA to include text messages.²⁷

Furthermore, the Commission’s DNC Registry regulations only require common carriers that provide “telephone exchange service” to notify subscribers of their right to object to receiving telephone solicitations.²⁸ A “telephone exchange service” refers to wire line telephones and is defined as either a “service within a **telephone** exchange, or within a connected system of **telephone** exchanges within the same exchange area . . .” or a “comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.”²⁹ The regulations do not apply to common carriers that provide other services, like wireless services. Cellular phones, which are the vehicle for text messaging, are **wireless**, not wire line telephones. Thus, the DNC Registry regulations do not apply.

²⁵ 47 C.F.R. § 64.1200(c)(2) (emphasis added); *see also* 47 U.S.C. § 227(c)(3)(F).

²⁶ 47 U.S.C. § 227(a)(4).

²⁷ *Compare* Pub. L. No. 102-243, 105 Stat. 2394, 2395 (1991), *with* 47 U.S.C. § 227(a)(4).

²⁸ *See* 47 U.S.C. § 227(c)(3)(B).

²⁹ *See* 47 U.S.C. § 153(54) (emphasis added). *See also* Law Insider, *Telephone exchange service definition*, <http://www.lawinsider.com/dictionary/telephone-exchange-access-service> (defining a “telephone exchange access service” as a “service to any wire line telephone access line identified by a unique telephone number that provides local wire line access to the telecommunications network to a service subscriber” (emphases added)).

RILA and its members urge the Commission to return to its long-held approach, consistent with its statutory authority, and revise its proposed rule to eliminate extension of the DNC Registry and Restrictions to text messages.

2. *The Absence of a Clean “Do Not Call” List for Wireless Numbers Argues Against Extension of DNC Restrictions to Text Messages.*

Assuming, for the sake of argument, that the Commission has the statutory authority to extend Section 227(c) restrictions to text messages, one critical factor is lacking: a DNC Registry that is technically capable of managing cellular phones. Land line phone numbers are continuously removed from the DNC Registry when a number is disconnected from the original subscriber and reassigned to a different subscriber (*e.g.*, where both the subscriber’s name and address have changed).³⁰ Legitimate companies rely upon the DNC Registry as a vital compliance tool in connection with telephone call solicitation compliance. However, performing the removal process for wireless phone numbers is impossible as the DNC Registry is not capable of managing reassigned cellular phones. This fact is evidenced by the inability of the federal government’s contractor responsible for performing the “list hygiene” process on the DNC Registry—PossibleNOW Services, Inc. (“PossibleNOW”)—to remove wireless phone numbers because there is no available data source to determine when the name and address of the party who placed the number on the DNC Registry changes.³¹

³⁰ See FTC, *Do-Not-Call Improvement Act of 2007 Report to Congress: Regarding the Accuracy of the Do Not Call Registry* (Oct. 2008), <https://www.ftc.gov/sites/default/files/documents/reports/do-not-call-improvement-act-2007-report-congress-regarding-accuracy-do-not-call-registry/p034305dncreport.pdf>; FTC, *Do Not Call Registrations Permanent and Fees Telemarketers Pay to Access Registry Set* (Apr. 10, 2008), <https://www.ftc.gov/news-events/news/press-releases/2008/04/do-not-call-registrations-permanent-fees-telemarketers-pay-access-registry-set>.

³¹ See, *e.g.*, *United States v. Dish Network LLC*, 75 F. Supp. 3d 916, 930–32 (C.D. Ill. 2014) (describing PossibleNOW’s role as the Federal Trade Commission’s subcontractor responsible for maintaining the DNC Registry and PossibleNOW’s inability to remove wireless phone numbers). Our understanding is that PossibleNOW continues to provide these services to the federal government.

Simply put, the DNC Restrictions as historically and presently applied to telephone numbers for calling purposes are incompatible with regulating text messaging. The lack of a clean DNC Registry for wireless numbers would create a compliance nightmare for legitimate companies trying in good faith to develop robust compliance programs. Companies will have no way of knowing whether a wireless number for which they have consent has been reassigned. Also, companies could be prevented from engaging in wanted communications with a customer with a reassigned number that has not been removed from the DNC Registry. The Commission can prevent this chaotic result by eliminating the extension of the DNC Registry and Protections from the final rule.

3. *Consumers and the Commission Have Tools to Tackle Scam, Spam and Fraudulent Text Messages Without Extending DNC Restrictions to Text Messages.*

Beyond the statutory and regulatory inapplicability, it is unnecessary to stretch these regimes beyond their text. Today's technology places consumers in control and gives them a variety of ways to combat unwanted text messages. For example, a text message (similar to a marketing email) can simply be ignored. Cell phones are designed to allow recipients to control how they will be notified of an incoming text message (*e.g.*, banners on a smartphone's home screen, configuring text tones, music, vibrations, etc.), including the ability to silence notifications. In addition, consumers can simply block unwanted text messages by replying "STOP" or using a similar command to an unwanted text message³² or blocking the sender's number on their phones.

³² See *ACA Int'l v. FCC*, 885 F.3d 687, 692 (D.C. Cir. 2018) ("We uphold the Commission's approach to revocation of consent, under which a party may revoke her consent through any reasonable means clearly expressing a desire to receive no further messages from the caller."); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961, 7996 ¶¶ 64–65 (2015); see also Iterable, *Why Should You Include SMS Opt-Out Options?*, <https://iterable.com/resources/articles/cross-channel-marketing/general/why-should-you-include-sms-opt-out-options/> (setting forth best practices for SMS marketing, including the availability of keyword opt-out options, such as: STOP, END, CANCEL, UNSUBSCRIBE, and QUIT).

Similarly, the Commission has other tools to combat fraudulent and scam text messages—some of which are in the Text Messages FNPRM and which make the extension of the DNC Registry and Restrictions to text messages unnecessary. RILA members support the FCC’s mission to target bad actors and meaningfully combat fraudulent and malicious actions without impairing legitimate communication between consumers and businesses.

IV. EXTENDING DNC RESTRICTIONS TO TEXT MESSAGES WOULD CONTRAVENE CONSUMER EXPECTATIONS AND ENCOURAGE MERITLESS LITIGATION.

A. Applying Section 227(c) to Text Messages Would Prevent Retailers From Meeting Consumer Expectations.

Applying the DNC Restrictions of Section 227(c) to text messages will cause confusion for consumers and retailers. As noted above, a retailer could be prevented from communicating with a customer that signs up for text marketing messages if that customer has a reassigned phone number that was placed on the DNC List by the previous holder of that number.

Moreover, as a practical matter, if businesses were compelled to treat “STOP” text messages sent in response to **one** specific marketing text message solicitation as blanket requests not to receive **any** further marketing communications, consumers would unknowingly lose access to other valuable communications from their ongoing business relationships that they never intended to cease. For example, a customer could decide that she is not interested in receiving marketing information about a retailer’s upcoming jewelry sale and respond by sending a “STOP” message. Under the Commission’s proposal, this would have the inadvertent and unintended effect of preventing the customer from getting marketing information about clothing and home goods sales, which she does want.

Consumers that voluntarily sign up for marketing texts from a retailer do not necessarily expect that an opt-out request to a specific marketing campaign would result in ceasing all

communications with the sender regarding texts other than those sent for specific marketing purposes. Businesses would be besieged with complaints from disappointed consumers who did not expect or understand that sending a “STOP” text message in response to a specific marketing text message would have such sweeping implications.

Given the nature of consumer expectations in the text marketing space, extending the scope of Section 227(c) to cover text messages could disappoint and frustrate as well as damage the brand of retailers who are prevented from engaging in communication desired by both parties. The FCC can prevent this adverse result by withdrawing its proposal to cover text messages under Section 227(c).

B. The Commission’s Current Proposal To Extend the DNC Restrictions and Registry to Text Messages Will Have Negative Unintended Consequences.

If finalized as proposed, the DNC Text Proposal will have negative consequences for consumers and expose retail companies engaged in legitimate consumer outreach to costly litigation—all despite the fact that Congress never intended a Section 227(c) remedy for such communications.³³ A look at the TCPA safe harbor provision helps explain why.

Specifically, the TCPA provides a safe harbor for violations of the DNC Restrictions where “the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection.”³⁴ The Commission’s regulations apply the safe harbor if the violation: (1) is the result of error and (2) occurred despite the defendant’s routine business practices and standards.³⁵ Those routine business practices and standards must include the following: (1) written

³³ See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 187 (1988) (affirming dismissal of case because courts may “not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide” (citation omitted)).

³⁴ 47 U.S.C. § 227(c)(5).

³⁵ 47 C.F.R. § 64.1200(c)(2)(i).

procedures to comply with the national DNC rules; (2) training of personnel on those procedures; (3) maintaining an internal do-not-call list; (4) accessing the DNC Registry; and (5) not using the DNC Registry database for any reason other than compliance with the statute.³⁶ In essence, businesses who follow these procedures fall under a safe harbor and there would be no violation for contacting a consumer unless the consumer was on a business's internal do-not-call list and was contacted anyway.

As noted above, there are significant technical issues related to ensuring that the DNC List is clean and up to date. In addition, the Commission's proposal to apply the DNC Restrictions does not help businesses handle the unique issues associated with mobile devices that would undoubtedly arise if adopted as proposed. These include communications with consumers utilizing pre-paid cell phones, the lack of the ability of wireless providers (and other businesses) to identify cell phone users by name, or the impact on "established business relationships" ("EBRs") in the industry.

With respect to EBRs, Commission rules provide that a request to be put on a business's internal do-not-call list terminates an EBR.³⁷ But a request to be put on an internal DNC List is distinct from texting "STOP" in response to a text message solicitation campaign, which typically results in an automatic removal of the opted-out number from receiving further text messages as part of that campaign. Opting out of a single text message campaign is not and should not be the same thing as ending up on a business's internal do-not-call list, especially when the business has an EBR with the consumer. Simply applying the DNC Restrictions to text message solicitations without text-specific guidance and safe harbors would cause confusion over interpretation of a

³⁶ See 47 C.F.R. § 64.1200(c)(2)(i)(A)–(E).

³⁷ 47 C.F.R. § 64.1200(f)(5)(i).

“STOP” command received in response to a marketing text message and resulting litigation from an active plaintiffs’ bar. Questions would abound, such as, whether the consumer wants to stop all texts from the sender regarding any subject, or only for a specific marketing campaign? Or perhaps for all marketing and promotional texts? What about rewards or loyalty program texts? Or is there some other scope of protection from further text messages?

As currently drafted, the proposal would create fertile ground for abusive litigation regarding the DNC Restrictions, the elements of the current safe harbor provision and the EBR exemption. Businesses today already face significant damages for trying to provide consumers with information that bears no resemblance to the types of harms the TCPA was enacted to address or the phishing and smishing that the FCC is attempting to address with the current proposal. Transmission of information that consumers want and need is already being chilled and punished by litigation and the threat of statutory damages.³⁸ What was originally meant to be a shield for consumers has become a sword for the plaintiffs’ attorney bar.³⁹ Rather than seeking to redress the genuine consumer grievances the TCPA was enacted to address, many lawsuits are built solely to extract money from businesses.⁴⁰ And as a former Chairman of the Commission has observed, “[r]ather than focus on the illegal telemarketing calls that consumers really care about,” TCPA

³⁸ See, e.g., *Ex Parte* Letter from Abercrombie & Fitch Co. and Hollister Co., CG Docket No. 02-278, at 4 (FCC May 13, 2015) (noting that “Abercrombie has eliminated the distribution of text messages to particular customers” because “the only way to avoid TCPA liability altogether for calls or texts . . . is to cease communicating”).

³⁹ Indeed, “the TCPA has become the poster child for lawsuit abuse.” *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, 8073 (2015) (“2015 FCC Order”) (Pai, Former Comm’r, dissenting).

⁴⁰ Much litigation under the TCPA is brought by professional plaintiffs and counsel who specialize in manufacturing and magnifying potential liability. *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (observing that TCPA litigation “has blossomed into a national cash cow for plaintiff’s attorneys” (internal quotation marks omitted)).

plaintiffs and law firms “target useful communications between legitimate businesses and their customers.”⁴¹

Therefore, RILA and its members strongly urge the Commission not to adopt the proposal to extend DNC Restrictions to text message solicitations. Nevertheless, if the Commission decides to proceed, it should hold off and first propose a new safe harbor specific to text messages and/or to amend the current safe harbor provisions to account for the technological differences relevant to text messaging. Such a provision should recognize routine business practice standards, which include maintaining and recording a list of telephone numbers that the seller may not contact, as well as maintaining an automatic process for removing consumers who opt out of a text messaging program from receiving further text messages as part of that campaign. Furthermore, the Commission should make clear that opt-out requests **only** apply to a particular text messaging program or chain and that the affirmative defense for EBRs applies equally to text messages. In other words, if the entity has an EBR with the particular consumer, it should be able to send a text message to that customer even if she is on the DNC Registry because a text message opt-out command for one text messaging program does not revoke the EBR.

V. CONCLUSION.

RILA and its members fully support the Commission’s efforts to tackle spam and fraudulent and malicious text messages. Retailers do not, however, support the Commission’s proposal to apply the DNC Restrictions to text message solicitations. Doing so would exceed the scope of the Commission’s authority under the TCPA and run contrary to Congressional intent. In addition, the proposed rule would frustrate consumer expectations by adversely impacting

⁴¹ 2015 FCC Order, 30 FCC Rcd. at 8073 (Pai, Former Comm’r, dissenting); *see also* Justin (Gus) Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC’s TCPA Rules*, 84 Brook. L. Rev. 1, 57-58 (2018).

legitimate and wanted text communications between businesses and consumers. Moreover, extending Section 227(c) to text messages is unnecessary as the Commission has other means within its statutory authority to address unwanted and illegal scam and fraudulent text messages, including through the adoption of the other proposals outlined in the Text Messages FNPRM. Nonetheless, if the Commission does decide to adopt the DNC Text Proposal, it should first propose safe harbors and affirmative defenses for legitimate text messaging to curb abusive litigation against bona fide retailers such as RILA's members.

If you have any questions regarding these comments or need any additional information, please reach out to Kathleen McGuigan, RILA's Executive Vice President & Deputy General Counsel at Kathleen.McGuigan@rila.org.

Respectfully Submitted,

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Deborah R. White
Kathleen F. McGuigan
**RETAIL INDUSTRY LEADERS
ASSOCIATION**
99 M Street SE, Ste. 700
Washington, D.C. 20003
Phone: (202) 869-0106

/s/ Meredith C. Slawe

Meredith C. Slawe
Michael W. McTigue Jr.
**SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP**
One Manhattan West
New York, NY 10001
Phone: (212) 735-3000

Margaret E. Krawiec
Paul A. Solomon
Andrew C. Hanson
**SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP**
1440 New York Ave. NW
Washington, DC 20005
Phone: (202) 371-7000

Counsel to the Retail Industry Leaders Association