May 8, 2023

By electronic submission to:
Comment Intake— Targeting and Eliminating Unlawful Text Messages
CG Docket Nos. 02–278, 21–402/ FCC 23– 21; FR ID 134449 c/o Legal Division Docket Manager
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Proposed Rule: Targeting and Eliminating Unlawful Text Messages
CG Docket Nos. 02–278, 21–402/ FCC 23– 21; FR ID 134449

Dear Sirs and Madams:

The Online Lenders Alliance (OLA) welcomes the opportunity to comment on the Federal Communication Commission's (FCC) Proposed Rule ***"Targeting and Eliminating Unlawful Text Messages."***

About OLA

OLA represents the growing industry of innovative companies developing and deploying new financial technology, including proprietary underwriting methods, sophisticated data analytics and non-traditional delivery channels, to offer online consumer loans and related products and services. OLA's members include online lenders, vendors and service providers to lenders, consumer reporting agencies, payment processors and online marketing firms.

Fintech companies are at the vanguard of innovative online tools that reach new customers, prevent and mitigate fraud, manage credit risk, and service loans. As technology evolves and the public's comfort with online financial transactions grows, protecting consumers is more important than ever. OLA is leading the way to improve consumer protections, with a set of consumer protection standards to ensure that borrowers are fully informed, fairly treated, and using lending products responsibly. OLA members voluntarily agree to comply with OLA Best Practices, a set of rigorous standards above and beyond the current legal and regulatory requirements, that help OLA members, their business partners, and the industry at large stay current on the changing legal and regulatory landscape. OLA Best Practices cover all facets of the industry, including advertising and marketing, privacy, payments, and mobile devices. Most importantly, OLA Best Practices help consumers make educated financial decisions by ensuring that the industry fully discloses all loan terms in a transparent, easy-to-understand manner.[1]

Much of the innovation undertaken by OLA members gives consumers greater control over their financial future, especially with access to capital. Whether purchasing a home, starting a business, financing an education, or even paying for auto repairs, the ability to find and secure credit is often a determining factor in a consumer's financial wellbeing. Online lenders provide benefits to consumers, particularly those in underserved communities, with fast, safe, and convenient choices that are not available through traditional lending markets.

Overview

Mobile technology has unquestionably transformed our lives, and OLA supports recent FCC efforts to reduce unwanted, nuisance calls and texts. OLA has been an outspoken advocate for reasonable regulation and participated in discussions with the Federal Trade Commission (FTC) leading up to its issuance of its "Follow the Lead"[2] report about lead generation.

While certain parts of the FCC's proposed rule have merit, other parts would significantly change how lead generators obtain consumer consent and share that information with their marketing partners, resulting in fewer consumer choices, greater exposure to cybercrime, decreased competition among market participants, and increased prices of products and services for consumers.

Introduction

Lead generation is a long-established marketing and advertising method that has become increasingly vital in the age of internet commerce. Specifically, consumer-focused industries rely on third-party internet marketers ("lead generators") to reach specific consumer audiences. Lead generators accomplish this through independent marketing and advertising, creating marketplaces of vetted providers for consumers seeking goods and services.

Some of today's most prominent lead generators include Uber, Google, Lending Tree, Quote Wizard, A Place for Mom, Twitter, Expedia, and Priceline. Through the work of the lead generation industry, legitimate service providers are able to connect with consumers interested in purchasing their products and services, while simultaneously suppressing illegitimate scammers and other unscrupulous actors the consumer otherwise may encounter in their search.

Whether it is Expedia gathering all available flights for a given time and place, or Lending Tree providing competitive finance rates for competing lenders, lead generation has become integral to the way consumers find and select products and services. Similarly, it has changed the way businesses find and engage with consumers.

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[1] Online Lenders Alliance Best Practices https://onlinelendersalliance.org/best-practices/

[2] https://www.ftc.gov/reports/follow-lead-workshop-staff-perspective

In today's technology-enabled marketing ecosystem, successful companies are laser-focused on consumer choice and product availability. That is certainly true in the financial sector. In fact, one of the first successful internet-based lead generation verticals was developed by financial fintech companies to serve as a conduit for subprime and near-prime consumers who were unable to access credit through traditional means.

Also referred to as "performance marketing," lead generation is a faster and more cost-effective way for lenders to maximize their limited marketing resources. In turn, this benefits the consumer by limiting the exposure of their most sensitive data, saving hours (or even days) of frustrating searches and increasing the likelihood of finding the financial solution they seek.

How Lead Generators Help Consumers

Despite the best efforts of government and industry, scam websites exist. When consumers happen upon such a site, they stand to lose hundreds or thousands of dollars. Most consumers are too proud to go on-the-record about being the victim of a scam, but some are willing to explain.[3] Lead generators provide a safe and efficient service for consumers seeking credit by accessing multiple lenders at the same time with only one submission of their information. By submitting only one request and allowing the automated system to securely present that information to multiple lenders, the consumer is not repeatedly divulging personally identifiable information across multiple sites. This approach saves consumers time, while also safeguarding their private information.

Another distinguishing aspect of lead generation in fintech space is its transparency. When consumers create Facebook profiles or conduct Google searches, they may never think about how the information they provide can be collected, processed, and used by multiple entities to market products or services to them.

Fintech lead generators use clear forms, appropriate disclosures, and adhere to policies that facilitate consumer understanding of precisely how the information they are providing will be used. OLA member lead generators inform the consumer that their information will be used only in furtherance of their loan request, which is in line with the spirit of this Commission's proposed rule that consent be obtained for marketing partners within the "scope of the original consent."

Critically, small-dollar lead generators often connect underserved consumers with credit providers willing to quickly help solve the needs of the credit challenged. Furthermore, lead generators in the short-term consumer finance market provide their services to consumers free of charge. Reputable lead generators, complying with the standards outlined and enforced by the OLAs Best Practices, enable consumers to seek capital in a transparent and secure environment

[3] https://www.wmar2news.com/matterformallory/it-put-me-in-a-deeper-hole-consumers-in-need-of-a-loan-are-losing-money-to-advanced-fee-scams. This consumer fell victim to a scam website. Ethical lead generators work only with legitimate lenders and could have prevented this scam if the victim had found an OLA member's lead generation site instead. Having compliant lead generation sites rank higher than scam sites is the best consumer protection tool against scams like this.

from vetted providers that are legally permitted to lend in their respective jurisdictions, creating a more efficient and safer consumer experience.

Rule Changes Will Impact How Lead Generator Obtain Consent, Harming Consumers

OLA believes that lead generators must be transparent and properly inform consumers regarding what will transpire once they fill out a form online when seeking goods and services, including which parties might contact that consumer. OLA's Best Practices explicitly bars member companies from providing a lead for a purpose other than what the consumer has explicitly provided consent. OLA agrees with the commission that there should be no place for bad actors that mislead consumers, or unscrupulously share consumer data with parties inconsistent with the consumer's original request for services. However, there are concerns that the rule's proposals would significantly diminish the number of potential leads and will have several unintended negative consequences for both consumers and industry. This is especially true under the rule's contemplation of single consumer consent.

One outcome of the FCC proposal will be to prevent consumers from working with lead generators and the vetted lenders they know and trust. Lead generators must collect consent for multiple parties, because the lead generator is unable to predict, which lender may be interested in offering the consumer a financial product or service before the vetted marketplace participants evaluate the consumer's information. Restricting a consumer's ability to interact with reputable lead generators and their marketplaces of vetted lenders will significantly reduce access to credit for those most in need of assistance, and in many cases drive up the cost of that same credit, as lenders who previously relied on lead generators incur increased costs for customer acquisition. It also increases the likelihood of exposure to fraudsters and scams.

In a newly released report, the FTC found that consumers lost nearly $8.8 billion to fraud in 2022, an almost 30% increase from the previous year and more than double the amount lost in 2021.[4] Limiting the number of marketing partners with whom a lead generator can share a consumer's information will force consumers to submit their personal information on multiple websites, posing a much greater risk of consumer data being compromised, including hitting scam websites that steal money and data. Simply put, lead generators reduce fraud by allowing a consumer to access a vetted marketplace of service providers through a single, secured submission of their data.

A majority of the citizenry never has to consider the importance of the general right to contract, which includes one's ability to act with some guaranty as to future obligations and rights. Not until one is faced with the prospect of not having that right does its value becomes more readily apparent. With this rule, the FCC is effectively denying consumers their fundamental right to give or withhold their consent to be contacted for products they may be interested in. The general right to contract is intimately connected to several other fundamental rights including among others the right to contract for marriage and private education. (*See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374

[4] https://www.ftc.gov/news-events/news/press-releases/2023/02/new-ftc-data-show-consumers-reported-losing-nearly-88-billion-scams-2022

(1978). Any regulation abrogating the general right to contract will necessarily infringe on these previously recognized fundamental rights.

Proposed Rule Would Conflict With Other Agency Guidance On The Use Of Hyperlinks

For years, lead generators in the subprime lending space have secured the consumer's consent to be called by vetted lenders in their network. Typically, this consent is collected via a checkbox or "agreed" button, designating the consumer's desire to receive marketing calls or texts. This is necessary because the lead generator cannot and does not know which lender may be interested in offering the consumer a financial product or service before evaluating the consumer's information. Typically, consents list partners by name through a clickable reference to "marketing partners" in the opt-in. The specific marketing partners are visible only when the consumer clicks the link and views the list of marketing partners the lead generator has provided. Again, OLA supports the Commission's objective that consent be obtained for marketing partners within the "scope of the original consent."

Historically, the FTC has been the lead federal agency focused on addressing the definition of "clear and conspicuous," with decades of guidance and precedents. The Commission addressed the use of hyperlinks in May 2000 ("Dot Com Disclosures – Information About Online Advertising"), and again in 2013 when they published the updated ".com Disclosures,"[5] which contains 87 references to "hyperlinks," including when they should and should not be used. For more than two decades, lead generators have operated pursuant to this guidance.

One of the items addressed by the FTC guidance is whether a disclosure can be placed behind a hyperlink. The FTC has maintained that this is not permissible if the disclosure is an integral term, but some smaller items like consumer consent can be behind a hyperlink if the hyperlink is clearly visible and properly labeled.

This distinction plays an important role in determining whether the names of companies included in the "Marketing Partners" hyperlink (or other similarly named hyperlinks utilized by lead generators) are considered an "integral part of the claim or inseparable from it." The FTC has maintained that consent agreements are not an integral part of the claim, and it would confuse consumers were it to be included in the disclaimer itself.

Further, most, if not all, lead generators utilize the hyperlinks in ways that are consistent with the "key considerations for evaluating the effectiveness of all hyperlinks" as outlined on page 11 of the *.com Disclosures*, stating that the hyperlink should be in close proximity to the claim to which it is relevant, noticeable, clear and easily accessible, and in a style consistent with other hyperlinks utilized on the webpage. There is also precedent for the use of hyperlinks endorsed by

[5] https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf

FTC staff in specific financial services contexts.[6] The changes outlined in the FCC's proposed rule would be inconsistent with theses previous guidance.

The rule, as proposed, could drastically change the way consumers obtain their information when purchasing goods and services online. While no consumer wants to be inundated with unwanted texts, calls and emails, altering the process for how lead generators obtain consent and list marketing partners represents a huge shift that may not address the underlying problem while making the shopping experience increasingly convoluted, unsafe, and less effective for consumers.

OLA appreciates the opportunity to provide input on this initiative. If you have question or need additional information, please feel free to contact me at mday@OLADC.org.

Respectfully submitted,

Michael Day
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Online Lenders Alliance

[6] hudsoncookadvisoryop_0.pdf (ftc.gov)