

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Rules and Regulations) CG Docket No. 02-278
Implementing the) DA 22-487
Telephone Consumer Protection Act of 1991)

Relating
to the Request for Clarification Regarding
TCPA Application to Robocalls and Automated Text Messages
to Encourage Continuation in Governmental Health Coverage Programs

Comments of

National Consumer Law Center
on behalf of its low-income clients

and

Consumer Action
Consumer Federation of America
Electronic Privacy Information Center
Florida Justice Project
Jacksonville Legal Aid, Inc.
Justice in Aging
National Association of Consumer Advocates
National Consumers League
National Health Law Program
Public Knowledge
U.S. PIRG

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Comments

I. Introduction and Summary

Pursuant to the Public Notice issued by the Consumer and Governmental Affairs Bureau,¹ the **National Consumer Law Center** (NCLC) files these comments on behalf of its low-income clients and **Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, Florida Justice Project, Jacksonville Legal Aid, Inc., Justice in Aging, National Association of Consumer Advocates, National Consumers League, National Health Law Program, Public Knowledge,** and **U.S. PIRG,**² in response to the Federal Communications Commission's (Commission) call for comments on a letter from the Secretary of

¹ See Public Notice, Federal Commc'ns Comm'n, Consumer & Governmental Affairs Bureau Seeks Comment on Request Relating to Enrollment In Medicaid And Other Governmental Health Coverage Programs, CG Docket No. 02-278 (Rel. May 3, 2022), *available at* <https://docs.fcc.gov/public/attachments/DA-22-487A1.pdf> (inviting comments on the request filed by the U.S. Department of Health and Human Services).

² The [National Consumer Law Center](#) (NCLC) is a nonprofit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates, and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. [Consumer Action](#). Through education and advocacy, nonprofit Consumer Action fights for strong consumer rights and policies that promote fairness and financial prosperity for underrepresented consumers nationwide. [Consumer Federation of America](#) advances the consumer interest through research, advocacy, and education. [Electronic Privacy Information Center](#) is a public interest research center in Washington, DC seeking to protect privacy, freedom of expression, and democratic values in the information age. [Florida Health Justice Project](#) engages in comprehensive advocacy to expand health care access and promote health equity for vulnerable Floridians. [Jacksonville Area Legal Aid, Inc.](#) (JALA) is a non-profit law firm dedicated to providing free civil legal assistance to those who could not otherwise afford it. [Justice in Aging](#) uses the power of law to strengthen the social safety net, and remove the barriers low-income seniors face in trying to access the services they need, we work to ensure the future we all envision for our loved ones and ourselves. [National Association of Consumer Advocates](#) is committed to protecting the rights of consumers. [National Consumers League](#) educates consumers and workers through a variety of programs and fights for their interests before government and businesses, building alliances to ensure their voices are heard. [National Health Law Program](#) are attorneys litigating in state and federal courts and policy advocates fighting to advance access to quality health care for low-income and underserved individuals. [Public Knowledge](#) promotes freedom of expression, an open internet, and access to affordable communications tools and creative works. [U.S. PIRG](#) is your advocate for the public interest, speaking out for healthier, safer, more secure lives for all of us.

Health and Human Services (HHS) seeking clarification of the requirements for consent for automated calls made by various governmental entities and their private contractors to encourage renewals and re-enrollment in Medicaid, the Children's Health Insurance Programs (CHIP), the Basic Health Programs (BHP), and the Health Insurance Marketplace programs (Marketplace).³

The HHS letter expresses the concern that the potential for TCPA liability will prevent these important calls from being made. Assuming that the calls are limited to the purposes described in HHS's letter and that the called parties provided the telephone numbers in a context related to the subject of the proposed calls, it appears that they will conform to the Commission's existing interpretations of the TCPA.

The TCPA applies to most of the entities listed in the HHS letter as callers (all contractors and local governments). They are therefore subject to the TCPA's requirement that a caller have the called party's prior express consent before making an autodialed or prerecorded call or text to a cell phone number. However, in other contexts the Commission has ruled that the called party's provision of their telephone number to the caller or an intermediary in relation to the subject of the call constitutes prior express consent for automated texts and prerecorded calls to that telephone number. While we reserve the right to object to that conclusion, we recognize that it would be inconsistent for the Commission not to apply it to the calls described in HHS's letter. We also note that callers can easily avoid making calls to telephone numbers that have been reassigned to someone other than the enrollee by using the fully operational Reassigned Number Database created by the Commission.

³ Letter from Xavier Becerra, Secretary of Health and Human Services, to Jessica Rosenworcel, Chairwoman of the Federal Commc'ns Comm'n (Apr. 28, 2022), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10429695829926> [hereinafter HHS Letter].

Also, it is imperative that both the Commission and HHS take steps to ensure that any policy regarding these calls does not inadvertently facilitate any of the more of the **tens of millions of scam calls selling fake health insurance now made every month**, or allow more unwanted telemarketing calls or texts. In Section V, we make several recommendations to protect consumers from scam calls and telemarketing calls.

II. Under Commission rulings, the TCPA’s restrictions do not apply to calls placed by federal or state governments or their employees, but do apply to local governments and to contractors.

HHS’s letter states that some of the calls will be placed by federal or state governmental bodies or their employees. There is substantial authority, including a U.S. Supreme Court analysis⁴ and the Commission’s own analysis in its 2020 “Broadnet Order,”⁵ that the TCPA is inapplicable to calls made by the federal government or its employees. These decisions note that the TCPA’s restrictions on autodialed and prerecorded calls apply only to “person[s],”⁶ and they interpret that term not to encompass the federal government or its employees. The Commission’s Broadnet Order applies the same analysis and holds that state governments are similarly not covered by the TCPA. Accordingly, the TCPA’s requirements should not be an impediment to the calls described in HHS’s letter when those calls are made by federal or state governmental agencies or their employees.

⁴ *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 136 S. Ct. 663, 672, 193 L. Ed. 2d 571 (2016). Accord *Barr v. Am. Ass’n of Political Consultants, Inc.*, ___ U.S. ___, 140 S. Ct. 2335, 2344 n.1, 207 L. Ed. 2d 784 (2020) (“The robocall restriction applies to ‘persons,’ which does not include the Government itself.”); *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Broadnet Teleservices, L.L.C. Petition for Declaratory Ruling et al., Order on Reconsideration*, CG Docket No. 02-278, at ¶¶ 9, 25 (F.C.C. Dec. 14, 2020), available at https://docs.fcc.gov/public/attachments/FCC-20-182A1_Rcd.pdf [hereinafter *Broadnet Order*]. See also *Cunningham v. Lester*, 990 F.3d 361 (4th Cir. 2021) (finding federal government to be the real party in interest in suit against federal employees in their personal capacities for directing robocall campaign to promote affordable health insurance, so sovereign immunity bars the claim).

⁵ Broadnet Order, *supra* note 4, at ¶¶ 3, 22 (“[W]e clarify that state government callers in the conduct of official business likewise do not fall within the meaning of ‘person’ in section 227(b)(1) . . .”).

⁶ 47 U.S.C. §227(b)(1).

On the other hand, local governments are considered “persons” that are obligated to comply with the requirements of the TCPA.⁷ Moreover, contractors of any level of government are “persons” as defined by the TCPA, so must comply with the TCPA’s consent obligations.⁸ This applies to contractors even if they are agents of the government.⁹ The Commission noted that federal contractors might qualify for derivative immunity when making calls on behalf of the federal government, but it left that question for courts to determine.¹⁰

Nevertheless, as explained in Section III of these comments, it appears that the called parties’ provision of their telephone numbers during enrollment brings the callers within the scope of Commission rulings that treat the provision of a telephone number to the caller or an intermediary in relation to the subject of the call as prior express consent to receive automated calls or texts at that number. While we do not endorse those rulings,¹¹ we recognize that, if they are

⁷ See Broadnet Order, *supra* note 4, at ¶ 29.

⁸ See *id.* at ¶ 14 (“We find that a federal contractor is a ‘person’ under section 227(b)(1). The term ‘person’ as used in the TCPA and defined in the Communications Act expressly includes an ‘individual, partnership, association, joint-stock company, trust, or corporation’ ‘unless the context otherwise requires.’ Every federal contractor, including those acting as agents, falls within one of these categories. And, unlike the federal government itself, there is no longstanding presumption that a federal contractor is not a ‘person.’ Nor do we find any ‘context that otherwise requires’ us to ignore the express language of the Communications Act’s definition of the term ‘person’ in this situation.”). See also *id.* at 22 (“[S]tate contractors, like their federal counterparts, are ‘person[s]’ under that provision.”).

⁹ See *id.* at ¶ 14. It is important to note that the calls described in the HHS letter do not qualify as “calls made by, or on behalf of, healthcare providers” that are exempt from the consent requirements for automated calls to cell phones for two reasons: 1) These calls “are strictly limited” to calls for specific purposes, which do not include enrollment issues (47 C.F.R. §64.1200(a)(9)(iv)(C)); and 2) only calls that are free to the called party are eligible for the exemption allowed these calls (47 U.S.C. § 227(b)(2)(C)).

¹⁰ See Broadnet Order, *supra* note 4, at ¶ 15.

¹¹ We do not agree that the simple provision of a telephone number constitutes the “prior express consent” as required by the TCPA. As explained in comments filed by NCLC in 2017, the Commission’s interpretation of this requirement is hard to justify, and we have urged the Commission to rule that the actions of the called party that are deemed to be “prior express consent” must actually be express, as opposed to implied, and that those actions must also provide explicit consent to receive autodialed and/or artificial voice or prerecorded calls to a specified cell phone number. See, e.g., *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act. of 1991 et al.*, Comments in Support of the Petition for Declaratory Ruling, CG Docket Nos. 02-278 & 05-338 (Mar. 8, 2017), available at https://www.fcc.gov/ecfs/file/download/DOC-56ac3512f8c00000-A.pdf?file_name=Comments%20in%20support%20of%20Petition%20on%20Consent.pdf.

applied to the calls in question, it will mean that government contractors and local governments have the prior express consent that the TCPA requires to make calls to numbers provided by the called parties in a context that relates to the subject matter of the proposed calls.

III. Automated texts and prerecorded calls to cell phones are legal with prior express consent.

The Telephone Consumer Protection Act does not prohibit automated texts and prerecorded calls. Instead, it only requires the prior express consent of the called party before such calls can be made (and even the prior express consent requirement does not apply if the call involves an emergency).¹²

The HHS letter indicates that the calls and texts will be made or sent to “a contact phone number provided by the enrollee”¹³ or “updated contact information from other state agencies or state-administered program.”¹⁴ The Commission has ruled that, so long as the caller is calling a number that was provided by the called party in a context related to the call, the called party is considered to have provided the prior express consent required by the TCPA.¹⁵ Courts have generally accepted the Commission’s position.¹⁶ Courts have also held that providing the telephone

¹² 47 U.S.C. § 227(b)(1)(A).

¹³ HHS Letter, *supra* note 3, at 7.

¹⁴ *Id.*

¹⁵ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, **Declaratory Ruling and Order**, CG Docket No. 02-078, WC Docket No. 07-135, 30 F.C.C. Rcd. 7961, at ¶ 47 n.474 (F.C.C. July 10, 2015), *available* at https://docs.fcc.gov/public/attachments/FCC-15-72A1_Rcd.pdf (“By ‘within the scope of consent given, and absent instructions to the contrary,’ we mean that the call must be closely related to the purpose for which the telephone number was originally provided. For example, if a patient provided his phone number upon admission to a hospital for scheduled surgery, then calls pertaining to that surgery or follow-up procedures for that surgery would be closely related to the purpose for which the telephone number was originally provided.”). *Accord* *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling et al., Declaratory Ruling, CG Docket No. 02-278, 31 F.C.C. Rcd. 9054, at ¶¶ 23–25 (F.C.C. Aug. 4, 2016), *available* at <https://docs.fcc.gov/public/attachments/FCC-16-88A1.pdf> (when a parent has given a school a cell phone number as a contact, the scope of consent includes communications closely related to the school’s educational mission or to official school activities).

¹⁶ *See, e.g.*, Baisden v. Credit Adjustments, Inc, 813 F.3d 338, 343–344 (6th Cir. 2016) (stating that the context

number to an affiliate of the caller is sufficient, so long as the context in which the caller provided the number relates to the automated call.¹⁷

1. The FCC and many courts have held that the called party's provision of a telephone number to the caller is sufficient to provide prior express consent.

The HHS letter describes the calls at issue as calls that “follow up” with people who were already enrolled in one of the programs,¹⁸ to facilitate “renewals” of coverage.¹⁹ While the TCPA requires prior express consent for these automated calls, the Commission and courts have ruled that there need not be an express agreement in which the called party has agreed to receiving automated and prerecorded calls (although this is an interpretation with which we disagree). The Commission and the courts have ruled that so long as the called party provided their telephone number to the caller or an intermediary in relation to the subject of the call, the caller has prior express consent for automated texts and prerecorded calls to that telephone number.²⁰ For example, the Commission

in which a debtor provides consent matters, but holding that patient's provision of cell phone number to hospital, which provided it to anesthesiologist, who then provided it to collection agency, was consent to receive autodialed and prerecorded collection calls, even though consent form only allowed hospital to share “health information”); *Hill v. Homeward Residential, Inc.*, 799 F.3d 544, 551 (6th Cir. 2015) (provision of cell phone number to initial creditor is consent to receive collection calls regarding that debt, “not on any topic whatsoever”); *Khalil v. McGrath Colosimo Ltd.*, 2018 WL 11216391 (N.D. Ill. Aug. 22, 2018) (calls must relate to the same subject matter for which plaintiff disclosed his phone number); *Fober v. Mgmt. & Tech. Consultants, L.L.C.*, 2016 WL 7626431 (C.D. Cal. July 29, 2016) (patient satisfaction survey falls within scope of consent to receive calls regarding “health plan operations” and “quality improvement”), *aff'd*, 886 F.3d 789 (9th Cir. 2018); *Payton v. Kale Realty*, 164 F. Supp. 3d 1050 (N.D. Ill. 2016) (scope of consent depends on context and purpose for which plaintiff gave cell phone number, but providing it in context of potential merger with caller's business is consent to receive text messages two years later touting caller's business as a good place to work).

¹⁷ *Toney v. Quality Res., Inc.*, 75 F. Supp. 3d 727 (N.D. Ill. 2014). *See also Selby v. LVNV Funding, L.L.C.*, 2016 WL 6677928 (S.D. Cal. June 22, 2016) (consent given to original creditor can be transferred to buyer of debt and then to collector hired by debt buyer).

¹⁸ HHS Letter, *supra* note 3, at 1.

¹⁹ *Id.* at 2.

²⁰ *Williams v. Capital One Bank*, 682 Fed. Appx. 467 (7th Cir. 2017) (giving cell phone number orally when applying for credit card is consent to receive debt collection calls); *Lawrence v. Bayview Loan Servicing, L.L.C.*, 152 F. Supp. 3d 1376 (S.D. Fla. 2016) (letter sent to loan servicer that listed cell phone number was consent to receive calls about the debt).

has stated that “the provision of a cell phone number to a creditor, *e.g.*, as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”²¹

The Commission has also stated that consent can be obtained through an intermediary,²² as have at least two U.S. Courts of Appeals.²³ For example, the Ninth Circuit held that a patient’s consent that a medical provider could disclose her information for purposes of quality improvement was consent to receive patient satisfaction survey calls from a third-party contractor.²⁴

HHS’s request is consistent with these prior rulings of the Commission and the courts.

2. Calls related to the original transaction are included in the prior express consent.

The Commission has articulated that so long as the calls reasonably relate to the transaction in which the called party provided the phone number, then prior express consent is considered to be given for follow-up calls:

By ‘within the scope of consent given, and absent instructions to the contrary,’ we mean that the call must be closely related to the purpose for which the telephone number was originally provided. For example, if a patient provided his phone number upon admission to a hospital for scheduled surgery, then calls pertaining to

²¹ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Request of ACA International for Clarification & Declaratory Ruling, Declaratory Ruling, CG Docket No. 02-278, 23 F.C.C. Rcd. 559, at ¶ 9 (F.C.C. Jan. 4, 2008). *Accord In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, 30 F.C.C. Rcd. 7961, at ¶ 52 (F.C.C. July 10, 2015) (reaffirming this position), *appeal resolved*, ACA Int’l v. Fed. Comm’ns Comm’n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 Declaratory Ruling, but leaving this portion undisturbed).

²² *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, 30 F.C.C. Rcd. 7961, at ¶ 49 (F.C.C. July 10, 2015), *appeal resolved*, ACA Int’l v. Fed. Comm’ns Comm’n, 885 F.3d 687 (D.C. Cir. 2018) (setting aside two parts of 2015 Declaratory Ruling, but leaving this portion undisturbed).

²³ *See* *Fober v. Mgmt. & Tech. Consultants, L.L.C.*, 886 F.3d 789 (9th Cir. 2018) (consent may be obtained through an intermediary; patient’s consent that medical provider could disclose her information for purposes of quality improvement was consent to receive patient satisfaction survey calls from third-party contractor); *Baisden v. Credit Adjustments, Inc.*, 813 F.3d 338, 343–346 (6th Cir. 2016) (consent obtained through an intermediary is valid).

²⁴ *Fober v. Mgmt. & Tech. Consultants, L.L.C.*, 886 F.3d 789 (9th Cir. 2018).

that surgery or follow-up procedures for that surgery would be closely related to the purpose for which the telephone number was originally provided.²⁵

Courts have also held that, when there was a series of similar transactions, such as visits to a medical provider, providing a cell number in connection with one is effective for later transactions.²⁶ The later calls need not be for the exact purpose for which the number is provided, as long as they “bear some relation to the product or service for which the number was provided.”²⁷ The Ninth Circuit held that giving a cell phone number in connection with a gym membership was consent to receive text messages about reactivating that membership after the consumer cancelled it.²⁸

3. Callers can easily avoid making calls to telephone numbers that have been reassigned to someone other than the enrollee

A primary source of TCPA litigation risk has been calls inadvertently made to numbers that are no longer assigned to the person who provided consent. Courts have held the caller liable for making automated calls to a cell phone number that has been reassigned to someone other than the person who provided consent to be called.²⁹

²⁵ *In re* Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Declaratory Ruling and Order, CG Docket No. 02-278, 30 F.C.C. Rcd. 7961, at ¶ 47 n.474 (F.C.C. July 10, 2015).

²⁶ *Hudson v. Sharp Healthcare*, 2014 WL 2892290 (S.D. Cal. June 25, 2014) (visit to hospital; rejecting plaintiff’s argument that there was no prior express consent because her cellular telephone number “autopopulated” from prior visit). *See also* *Jackson v. Safeway, Inc.*, 2016 WL 5907917 (N.D. Cal. Oct. 11, 2016) (provision of cell phone number in connection with flu shot is consent to receive reminder call in next flu season).

²⁷ *Hudson v. Sharp Healthcare*, 2014 WL 2892290, at *6 (S.D. Cal. June 25, 2014) (citation omitted). *See also* *Taylor v. Universal Auto Grp. I, Inc.*, 2014 WL 12526280 (W.D. Wash. Oct. 3, 2014) (reminder calls regarding vehicle service were within scope of consent given by providing cell phone number during previous service visits).

²⁸ *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037 (9th Cir. 2017).

²⁹ *See, e.g.*, *N.L. v. Credit One Bank*, 960 F.3d 1164 (9th Cir. 2020); *Breslow v. Wells Fargo Bank*, 755 F.3d 1265 (11th Cir. 2014); *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014); *Soppet v. Enhanced Recovery Co., L.L.C.*, 679 F.3d 637 (7th Cir. 2012); *Thompson v. Branch Banking & Tr. Co.*, 2020 WL 3316092 (S.D. Fla. May 1, 2020).

The Commission has implemented the Reassigned Number Database specifically to address that risk of liability, as well as to limit the number of unwanted robocalls.³⁰

The FCC's Reassigned Numbers Database (RND) is designed to prevent a consumer from getting unwanted calls intended for someone who previously held their phone number. Callers can use the database to determine whether a telephone number may have been reassigned so they can avoid calling consumers who do not want to receive the calls.

Callers that use the database can also reduce their potential Telephone Consumer Protection Act (TCPA) liability by avoiding inadvertent calls to consumers who have not given consent for the call.³¹

The database has been fully operational since November 1, 2021. It provides a means for callers to find out before making a call if the phone number has been reassigned. If the database wrongly indicates that the number has not been reassigned, so long as the caller has used the database correctly, no TCPA liability will apply for reaching the wrong party.³² Thus, as long as HHS's callers make use of this simple, readily available database, they can be confident that they will not be held liable for making calls to reassigned numbers.

IV. The content of these calls should be limited to ensure that this program is not used to facilitate scam or illegal telemarketing calls.

The Commission should ensure that any pronouncement it makes to facilitate the calls described by HHS cannot be used to undermine efforts to combat scam calls and illegal telemarketing calls.

³⁰ See <https://www.fcc.gov/reassigned-numbers-database>.

³¹ *Id.* The Reassigned Numbers Database can be found at www.reassigned.us.

³² *In re* Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Report and Order, CG Docket No. 17-59, 33 F.C.C. Rcd. 12024, at ¶ 55 (F.C.C. Dec. 13, 2018), *available at* <https://docs.fcc.gov/public/attachments/FCC-18-177A1.pdf> ("Once the database becomes operational, callers that wish to avail themselves of the safe harbor must demonstrate that they appropriately checked the most recent update of the database and the database reported 'No' when given either the date they contacted that consumer or the date on which the caller could be confident that the consumer could still be reached at that number.").

According to YouMail's data, in the month of February 2022 alone, there were more than **96 million scam** calls purporting to sell Marketplace health insurance or Medicare supplements.³³

These scam calls spike during open enrollment season for health insurance.³⁴

Pure scam calls are not the only problem. There continue to be complaints about marketplace sellers of health insurance making automated calls without consent in violation of the TCPA.³⁵ The FTC received more than 300,000 consumer complaints regarding "medical & prescriptions" telemarketing calls from January 2020 through March 2022, more than 185,000 of which were robocalls,³⁶ and it has brought multiple actions against telemarketers for illegal robocalls relating to health insurance.³⁷ Even if these calls are not pure scams in the sense that they actually have a product to sell, many likely involve fraudulent misrepresentations to sell low-quality health insurance plans that do not comply with minimum ACA standards.³⁸ If the FCC issues a

³³ YouMail private data supplied to NCLC relating to the top 1,000 scam callers in the month of February, 2022. *See also* NomoRobo, (904) 257-7997 is a Health Insurance Robocall, *available at* <https://www.nomorobo.com/lookup/904-257-7997>. Nomorobo is a robocall-blocking company that is tracking healthcare insurance scam calls and is sharing audio and transcripts of actual fraudulent voicemails for consumer awareness.

³⁴ *See* Federal Comm'n's Comm'n, Health Care Scams Tend to Spike During Open Enrollment (updated Nov. 26, 2021), *available at* <https://www.fcc.gov/health-care-scams-tend-spike-during-open-enrollment>.

³⁵ *See, e.g.*, Bilek v. Federal Ins. Co., 8 F.4th 581 (7th Cir. 2021) (lead generators initiated robocalls that solicited defendant's health insurance); Hossfeld v. Am. Fin. Sec. Life Ins. Co., 544 F. Supp. 3d 1323, 1332 (S.D. Fla. June 16, 2021) (allegation that defendant authorized telemarketers to make automated calls selling health insurance without required consent sufficient to withstand motion to dismiss).

³⁶ *See* Federal Trade Comm'n, National Do Not Call Registry, All DNC Complaints, January 2020 to March 2022 (accessed May 11, 2022), *available at* https://public.tableau.com/shared/CXXQGZD44?display_count=n&origin=viz_share_link. Hover over "Medical and prescriptions" to see the robocall/live caller breakdown.

³⁷ *See, e.g.*, Federal Trade Comm'n v. Simple Health Plans, L.L.C., 379 F. Supp. 3d 1346, 1362–1364 (S.D. Fla. 2019) (defendants falsely led consumers to believe that health indemnity plans were ACA-compliant health insurance; verification process did not change net impression created by telemarketers' misrepresentation), *aff'd*, 801 Fed. Appx. 685 (11th Cir. 2020); Federal Trade Comm'n v. Partners In Health Care Ass'n, Inc., 189 F. Supp. 3d 1356 (S.D. Fla. 2016) (false or misleading representations that a medical discount card was insurance).

³⁸ *See* Federal Trade Comm'n v. Simple Health Plans, L.L.C., 379 F. Supp. 3d 1346, 1362–1363 (S.D. Fla. 2019) (defendants falsely led consumers to believe that health indemnity plans were ACA-compliant health

pronouncement approving HHS's calls, it should craft it carefully and narrowly, applying it only to calls from the government entities and contractors mentioned, made only to enrollees at numbers provided by the enrollees, and only for the purpose of re-enrollment in the existing plan or a replacement program.

Another concern is the possibility that these calls will undermine long-standing pronouncements from the FTC and others that “the government does not call” people and ask for money or personal information:

If you get a call like this [one purporting to be from the Social Security Administration, the IRS, or Medicare that asks for money or personal information], hang up the phone. It's a scammer.

Because government agencies won't call, email, or text you and ask for money or personal information. Only a scammer will do that.³⁹

Even if the proposed calls and texts do not themselves ask for money or personal information, it appears likely that they will prompt enrollees to call a number whereupon they will be asked to provide personal information and possibly make payment arrangements as well. The FCC and HHS should expect that scammers and telemarketers will spoof these calls, and these agencies should take measures to ensure that telephone service providers block these spoofed calls from reaching subscribers. HHS's letter does not identify any steps it plans to take to reduce this risk. Before issuing any pronouncement approving these calls, the Commission should make sure that HHS has developed a careful plan to ensure that the calls do not provide cover for dangerous and illegal calls from scammers and telemarketers. **The failure to ensure that HHS's calls are not used to mask and facilitate more health-care related scam calls will harm the very people that HHS seeks to assist.**

insurance), *aff'd*, 801 Fed. Appx. 685 (11th Cir. 2020).

³⁹ Federal Trade Comm'n, Consumer Advice, How to Avoid a Government Impersonator Scam (May 2021), available at <https://consumer.ftc.gov/articles/how-avoid-government-impersonator-scam> (emphasis added).

V. The calls authorized by HHS should be carefully controlled.

If the Commission issues a pronouncement approving the calls that HHS seeks to make, it should make clear the importance of limiting and controlling the calls. There are several different concerns.

First, the Commission should point out that the calls must strictly avoid telemarketing. If an autodialed or prerecorded call is considered to constitute telemarketing, the caller must have the called party's prior express *written* consent.⁴⁰ "Prior express written consent" is a defined term, requiring specific disclosures and the called party's signature.⁴¹ While many of the enrollees whom HHS wishes to call have probably given their telephone numbers as part of written enrollment agreements, it is unlikely that those agreements meet the very specific requirements for prior express written consent. Thus, if the calls HHS wishes to make stray into telemarketing, they will be illegal, and callers to which the TCPA applies will be potentially subject to TCPA liability.

For a call to constitute telemarketing, it must promote the sale or rental of property, goods, or services.⁴² Calls that include solicitations to sell *new* insurance, unrelated to the insurance program(s) for which the called party originally applied, are clearly promoting the sale of a product.⁴³ As a result, calls to sell new insurance would be telemarketing calls that should not be authorized. (In addition, solicitations to sell new insurance would almost certainly go beyond the scope of the

⁴⁰ 47 C.F.R. § 64.1200(a)(2), (3).

⁴¹ 47 C.F.R. § 64.1200(f)(9).

⁴² 47 C.F.R. § 64.1200(f)(13) (formerly numbered as 64.1200(f)(12) until the regulation was amended by 86 Fed. Reg. 2562 (Jan. 13, 2021)); *Smith v. Blue Shield of Cal. Life & Health Ins. Co.*, 228 F. Supp. 3d 1056 (C.D. Cal. 2017) (calls notifying enrollees of changes to their health insurance plans and directing them to provider's member services department were informational, not telemarketing, even if one of provider's goals was to retain customers).

⁴³ *See e.g.*, *Sieleman v. Freedom Mortg. Corp.*, 2018 WL 3656159, at *7–8 (D.N.J. Aug. 2, 2018) (calls from consumer's mortgage lender offering refinance are telemarketing and can be made only with written consent, even though consumer's provision of a cell phone number on original loan application ten years earlier may be sufficient to allow debt collection calls).

consent that the called party gave by providing a phone number when originally applying for coverage. See section III of these comments.)

On the other hand, several cases have held that calls to certify enrollees in Medicaid are not considered telemarketing.⁴⁴ The courts have also generally held that calls to assist people in continuing existing coverage or overcoming a missed deadline—even for goods or services sold by private entities—are not telemarketing calls.⁴⁵ The Commission should caution HHS that, in order to fit within these rulings, it must strictly limit the proposed calls to avoid any telemarketing.

To address both the need to avoid any telemarketing in these calls and the concerns expressed in the earlier sections of these comments, the Commission should articulate specific rules for these calls. Such rules might include requirements that—

1. Limit the calls to encouraging the extension or reenrollment in the health insurance program in which the called party originally enrolled or applied for, or a similar one, and prohibit callers from selling or soliciting the sale of any other product or service.
2. Require that callers only call telephone numbers that were provided by the persons to be called.
3. Prohibit callers from asking for payment or personal information over the telephone, to ensure that there is a distinct difference between these calls and the 100 million scam healthcare calls made every month.

⁴⁴ *Dennis v. Amerigroup Washington, Inc.*, 2020 WL 618472 (W.D. Wash. Feb. 10, 2020) (prerecorded calls about benefits and recertification requirements, intended for Medicaid recipients, are not telemarketing), *amended on other issues on denial of reconsideration*, 2020 WL 996856 (W.D. Wash. Mar. 2, 2020); *Williams v. Nat'l Healthcare Review*, 2017 WL 4819097 (D. Nev. Oct. 25, 2017) (call from company paid by hospital to contact patients and help them sign up for Medicaid is not telemarketing).

⁴⁵ *Phan v. Agoda Co. Pte. Ltd.*, 798 Fed. Appx. 157 (9th Cir. 2020) (text message confirming a booking is not an advertisement or telemarketing even though it invited recipient to download an app to manage the reservation); *Aderhold v. car2go N.A., L.L.C.*, 668 Fed. Appx. 795 (9th Cir. 2016) (text message that provided validation code so that user could complete online registration process he had initiated was not telemarketing); *Saunders v. Sunrun, Inc.*, 2020 WL 4601636 (N.D. Cal. Aug. 11, 2020) (text messages sent to follow up on plaintiff's call requesting a quote are not telemarketing); *Wick v. Twilio Inc.*, 2016 WL 6460316 (W.D. Wash. Nov. 1, 2016) (text message telling consumer that his registration to receive a free sample was incomplete is not telemarketing); *Newhart v. Quicken Loans, Inc.*, 2016 WL 7118998 (S.D. Fla. Oct. 13, 2016) (calls in response to consumer requests, and calls to complete transactions that consumers had decided to pursue, are not telemarketing).

4. Require that callers only call telephone numbers that the called party provided directly to the caller, or another entity closely associated with the caller, in the context of the health insurance application that is the basis for the call.
5. Require that callers properly use the Reassigned Number Database before making the calls.
6. Require that the caller ID that accompanies each call accurately reflects both the real name of the caller and a telephone number that accepts incoming calls.⁴⁶ Additionally, HHS and the callers should publicize information that ties the telephone numbers used to make these calls with the health insurance program about which the calls are made.

VI. Conclusion

We agree with the importance of these calls, and we recognize that the Commission's existing rulings consider the prior express consent requirement to be satisfied by the called party's provision of a telephone number to the caller or a related party in a context related to the subject matter of the call. We urge the Commission and HHS to facilitate these calls in a way that enables recipients to stay enrolled in their health care plans, yet does not promote or provide cover for scam calls or illegal telemarketing calls.

We appreciate the opportunity to provide comments on this issue.

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⁴⁶ This requirement goes beyond the prohibition against providing a false caller ID in the TCPA at 47 U.S.C. § 227(e). It requires the real name of the caller and the use of a telephone number through which the called party can return the call.