

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

Reply Comments of

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

and

Consumer Action
Consumer Federation of America
Electronic Privacy Information Center
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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Reply Comments

I. Introduction and Summary

These Reply Comments are filed by the **National Consumer Law Center** (NCLC) on behalf of its low-income clients, and **Consumer Action, Consumer Federation of America, Electronic Privacy Information Center, Jacksonville Area Legal Aid, Inc., Justice in Aging, National Association of Consumer Advocates, National Consumers League, National Health Law Program, Public Knowledge, and U.S. PIRG.**¹ These Reply Comments are intended to supplement the Comments previously filed by these groups in this docket.²

¹ 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. 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 nonprofit 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. It works 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](#) is an organization of 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](#) advocates for the public interest, speaking out for healthier, safer, more secure lives for all of us.

² *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Comments of National Consumer Law Center et al. Relating to the Request for Clarification Regarding TCPA Application to Robocalls and Automated Text Messages to Encourage Continuation in Governmental Health Coverage Programs, CG Docket No. 02-278 (filed May 17, 2022), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10517963105996>.

The docket was initiated by 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).

This docket was initiated by a letter from the Secretary of Health and Human Services (HHS) seeking clarification of the requirements for consent for automated calls and texts 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

Many of the important calls⁴ referenced in the HHS letter can be made legally, without fear of liability under the Telephone Consumer Protection Act (TCPA).⁵ As explained below and in our earlier Comments, most of the calls are already likely to be legal either because prior express consent has been provided, or (as in the case of prerecorded calls to landlines) is not currently required. For other calls, section II of these Comments suggests that the best course of action for the Federal Communications Commission (Commission or FCC) is to issue a regulatory exemption pursuant to 47 U.S.C. § 227(b)(2)(C), subject to specific parameters and guardrails.

Section III explains that there is no legal basis for a ruling by the Commission that government contractors making these calls are immune from TCPA liability, either directly as agents of the government, or through derivative immunity. Although this resolution was suggested by HHS, and supported by many other commenters, there is no reasonable basis in the law for such a determination. Such an order would trigger legal challenges, completely undermining any attempt to resolve the issue of liability for the callers. Moreover, a Commission order along these lines would be the direct cause of escalating millions of unwanted—and unstoppable—automated calls to U.S.

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].

⁴ In these Comments, we generally use the term “call” to encompass both voice calls and text messages.

⁵ 47 U.S.C. § 227.

telephone subscribers. Such an order would undermine the specific privacy interests that the TCPA was enacted to protect.

Finally, to protect enrollees against the health insurance scams currently flooding U.S. telephone lines, the Commission should proceed with the suggested exemption only if it initiates an aggressive campaign to shut down the telephone service providers that transmit these scam calls and texts. We suggest a number of specific actions that we urge the Commission to take in this regard.

II. The Commission could provide an exemption for the proposed reminder calls to cell phones

1. Most calls to enrollees will be with prior express consent.

As explained in our Comments, the HHS letter describes the calls at issue as calls that “follow up” with people who were already enrolled in one of the programs,⁶ to facilitate “renewals” of coverage.⁷ While the TCPA requires prior express consent for automated calls, the Commission and courts have ruled that there need not be an express agreement in which the called party consents to receive autodialed and prerecorded calls (although this is an interpretation with which we disagree). The Commission and the courts have 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 is prior express consent for automated texts and prerecorded calls to that telephone number about that subject.⁸

So long as the callers—even if they are government contractors—first check the Reassigned Number Database (RND) to ensure that the telephone numbers have not been reassigned since the

⁶ HHS Letter, *supra* note 3, at 1.

⁷ *Id.* at 2.

⁸ *See, e.g.,* 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).

time the enrollee provided it, the calls will fall within the Commission’s existing rulings. If the caller uses the database correctly but it wrongly indicates that the number has not been reassigned, no TCPA liability will apply for reaching the wrong party.⁹ Thus, as long as HHS’s callers make use of this simple, readily available database, they can be confident that, when they call a number provided by the enrollee, they will not be held liable for making calls to reassigned numbers.

2. To deal with calls to enrollees’ cell phone numbers that are obtained from outside sources, the Commission’s best course of action is to use its free-to-end-user exemption authority.

As discussed in the preceding section, the Commission’s existing rulings treat a call to a number provided by the called party as made with prior express consent, as long as the number has not been reassigned and the call relates to the context in which the called party provided the number. But the called party’s provision of a telephone number cannot be construed as prior express consent to call a different number. In order to make calls or send messages to telephone numbers for enrollees that are obtained from other sources, the Commission’s best course of action would be to use its free-to-end-user exemption authority.

The TCPA gives the FCC the ability to create an exemption from the prior express consent requirement for automated texts and prerecorded telephone calls to cell phones. At 47 U.S.C. § 227(b)(2)(C), the Act permits the FCC to allow these calls and texts to cell phones so long as they are “not charged to the called party” and are subject to other conditions imposed by the Commission “in the interest of the privacy rights” protected by the TCPA.

⁹ *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.”).

The Commission has already provided such an exemption for four types of calls. These include calls made by—

1. “a package delivery company to notify a consumer about a package delivery;”¹⁰
2. “an inmate collect call service provider . . . to enable future collect calls;”¹¹
3. “any financial institution” with certain important information relating to the recipient’s bank account;¹² and
4. “healthcare providers” relating to “appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions.”¹³

In addition to limiting the exempted calls to specific types of callers, as required by 47 U.S.C. § 227(b)(2)(I), the Commission has set out restrictions for these exempted messages, including the number of allowed calls, the length of the calls, who may make the calls, and how the caller must be identified. The Commission also has closely limited the subject matter of the calls, prohibited any telemarketing in the calls, and required that the calls include a method for the recipient to opt out of future calls and that the caller honor the opt-out request.¹⁴

We propose that the Commission consider providing a similar exemption for the calls covered by HHS’s letter, with specific limits on the automated texts and prerecorded calls allowed without consent. For example, the Commission could allow these automated calls and texts subject to the following restrictions:

1. Who can make the calls:

- a. The state Medicaid agency, and other public or quasi-public agencies of state government, and state and local governmental entities to which the state has

¹⁰ 47 C.F.R. § 64.1200(a)(9)(i).

¹¹ 47 C.F.R. § 64.1200(a)(9)(ii).

¹² 47 C.F.R. § 64.1200(a)(9)(iii).

¹³ 47 C.F.R. § 64.1200(a)(9)(iv).

¹⁴ 47 C.F.R. § 64.1200(a)(9).

delegated determinations of Medicaid, CHIP or BHP eligibility on behalf of the state could be allowed to make the calls.¹⁵

- b. Contractors for such state or local governmental entities so delegated could also be authorized to make these calls on behalf of the state or local governmental entity, so long as they are required by contract to comply with the requirements set out by both the Commission and HHS for these calls.

2. Allowed recipients of the calls:

- a. All callers should be required to check all of the numbers to be called through the Reassigned Number Database (RND) before the calls are made.
- b. If the RND indicates that the number provided by the enrollee to the agency is still used by the enrollee, then only that number should be called.
- c. If the RND indicates that the number provided by the enrollee is no longer assigned to the enrollee, then the caller would be permitted to use other reasonable methods to ascertain the current telephone number of the enrollee and call that number.

3. Subject of the calls:

- a. The purpose of the calls is to describe the value and importance of maintaining Medicaid, CHIP, or BHP coverage, or if the enrollee, or a member of the enrollee's household is not eligible for any of these programs, the importance of obtaining Marketplace insurance, or other state-based exchange insurance.
- b. The calls and texts should be required to include the name and contact information of the governmental entity on whose behalf the call is made, which must include a telephone number for the governmental entity that is answered by a live person during normal business hours.
- c. The subject of the calls should be strictly limited to providing information to the called party about how to *retain or re-enroll* in one of the named programs—Medicaid, CHIP or BHP—or to provide a referral to the government agency or quasi-government agency that administers the Marketplace insurance program.
- d. The content of the calls should be limited *to providing specific information* about (i) the deadline to retain or re-enroll in these programs, (ii) how the enrollee should update their information as required, and (iii) otherwise explaining what the enrollee should do to maintain health insurance.
- e. Because of the danger presented by the tens of millions of scam calls made each month, it is essential that these calls be different. *No private or confidential information should have to be provided directly through these telephone calls or texts. Instead,*

¹⁵ As proposed by the HHS Letter, *supra* note 3, at 6.

the calls and texts should only provide information about the steps the recipients should take to provide this information to the appropriate agency in a way that cannot be copied by scammers (e.g., by promoting a single website or telephone number that is promoted in television and radio advertisements as the one safe and secure place to provide this information).

- f. Other than explaining the value of obtaining Marketplace insurance, no advertisements or solicitations relating to the sale of private insurance or any other telemarketing, cross-marketing, solicitation, debt collection, or advertising content should be permitted.¹⁶
- g. No other information should be included in these messages.

4. Limits on the calls:

- a. Every call or text must be sent only by a means that ensures that the recipient will not be charged for the call or text.
- b. The prerecorded portion of every call should be limited to no more than one minute in length, and every text should be limited to a reasonable number of characters so as to not overwhelm the recipient.
- c. Every call or text should include a clear message to the recipient that they have the right to stop future calls or texts, along with instructions on how to opt-out, and callers should be required to honor those opt-out requests immediately.
- d. No more than one call or text per day should be permitted, and no more than a total of seven calls or texts relating to this subject should be permitted over a period of fourteen days.
- e. Calls and texts should only be made or sent between the hours of 8:00 am and 9:00 pm.
- f. Calls should be placed only through voice or text providers that—
 - i. provide the correct caller ID on for the calls, reflecting the name and the telephone number for the government agency on whose behalf the calls are made;
 - ii. register the telephone numbers used for the campaigns on a well-known “white list,” such as FreeCallerRegistry.com; and
 - iii. do not transmit any call unless the provider can apply “A” level STIR/SHAKEN attestation to the call.

¹⁶ These restrictions are like those applied to exempt calls and texts made by package delivery companies, inmate calling services, financial institutions, and healthcare providers under 47 C.F.R. § 64.1200(a)(9)(i)(C), (ii)(B), (iii)(D), and (iv)(D).

It is very important for the Commission to limit this exemption to calls to persons whose numbers have been reassigned, as indicated by the Reassigned Number Database. Calling the number provided by the enrollee is much more likely to be successful than relying on information from the unregulated marketplace of data brokers. As the goal of the program is to ensure that all enrollees are provided with the important information, the best way to ensure that result is to call the telephone numbers they provided when enrolling in the program. Only those enrollees whose numbers have been reported by the RND to have been assigned since they were provided should be called using information from data brokers.

Moreover, Congress intended that the exemption from the requirement for prior express consent for calls to cell phones only be used when balanced by conditions prescribed by the Commission “in the interest of the privacy rights this section is intended to protect.”¹⁷ The Commission should protect subscribers who have been assigned the numbers previously owned by the insurance enrollees from receiving calls that are clearly not meant for them. Protecting those subscribers is an essential condition for the proposed exemption.

III. The Commission has no authority to declare contractors immune from TCPA liability

If the goal of this proceeding is to establish clear protections for callers who are considered persons under the TCPA and therefore subject to its requirements, a declaration from the Commission that it considers these callers immune from liability will not provide that protection. The Commission does not have the authority to declare contractors and local governments immune from the TCPA. Any attempt by the Commission to hold otherwise would likely trigger petitions for reconsideration and/or appeals to the appropriate court. The matter would not be resolved for some time. And, in the meantime, the local governments and contractors making the calls would still be

¹⁷ 47 U.S.C. § 277(b)(2)(C).

subject to an unknown fate regarding their eventual liability for sending automated messages without consent.

The U.S. Supreme Court said that government contractors do not absolute immunity, and it found no authority for the notion that “private persons performing Government work acquire the Government's embrative immunity.”¹⁸ In fact, in circumstances that would be virtually identical to those in which contractors would make the calls at issue in this proceeding, the Supreme Court expressly said:

When a contractor violates both federal law and the Government's explicit instructions, as here alleged, no “derivative immunity” shields the contractor from suit by persons adversely affected by the violation.¹⁹

In that case, the contractor failed to follow the government’s instructions to call only people who provided consent and, as a result, the Court held that the contractor was not entitled to any immunity. Assuming that every government contract requires the contractor to comply with the law, no government contractor who called a person without the consent of that person would ever be entitled to derivative immunity from the TCPA.

Additionally, in the 2020 Order on Reconsideration in the Broadnet proceeding,²⁰ the Commission addressed this issue and explicitly held that government contractors, “including those acting as agents,” are persons covered by the TCPA.²¹ The Commission recognized that the application of sovereign immunity is not an interpretation of the TCPA, and so is outside the scope

¹⁸ *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 166, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016), *as revised* (Feb. 9, 2016).

¹⁹ *Id.*

²⁰ *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 (F.C.C. Dec. 14, 2020), *available at* https://docs.fcc.gov/public/attachments/FCC-20-182A1_Rcd.pdf.

²¹ *Id.* at ¶ 14.

of the Commission's authority.²²

If the Commission were to ignore these legal precedents and issue a pronouncement that government contractors were immune from TCPA liability when making automated calls without consent (unless the calls were exempted calls), the Commission would be severely undermining the primary goals of the TCPA. In the past several years, there have been numerous complaints to the courts and federal agencies regarding how government contractors abused consumers by calling too many times and refusing to stop calling when requested.

Just a few examples of these abusive calling practices by government contractors include:

1. *Allan v. Pennsylvania Higher Educ. Assistance Agency*, 398 F. Supp. 3d 240 (W.D. Mich. 2019), *aff'd*, 968 F.3d 567 (6th Cir. 2020). The student loan borrower and the co-signer alleged that PHEAA violated the TCPA by calling their cell phones 353 times using an ATDS or an artificial or prerecorded voice after they revoked consent.
2. *Cooper v. Navient Solutions, L.L.C.*, 2017 WL 1424346 (M.D. Fla. Apr. 21, 2017). The student loan borrower alleged that the defendant began calling her cell phone in 2015, up to four times per day, with respect to her delinquent student loan. In January 2016, she verbally revoked her consent to be contacted by cell phone. The calls ceased in July 2016, after the plaintiff requested, for a third time, that the defendant stop calling her cell phone. The plaintiff contended that the defendant called her approximately 100 times after her first January 2016 revocation.
3. *Johnson v. Navient Solutions, Inc.*, Case No. 1:15-cv-0716 (S.D. Ind. filed May 4, 2015). The complaint alleged that the plaintiff received multiple prerecorded calls directed to an individual by the name of Marie Bottoms. On each occasion, he was able to speak with a person at Navient whom he told he was not Bottoms. Yet he received 55 calls after he informed the defendant that it was calling the wrong number. With respect to the class, the defendant "placed 9,688,533 autodialed calls to 276,874 unique cellular telephone numbers, from May 4, 2011 through May 4, 2015, after its own records included a wrong number designation for each of them." Plaintiff's Motion for Summary Judgment (filed Sept. 2, 2016).

In 2017, NCLC filed a letter with the Commission to initiate an enforcement action against Navient Solutions for its continuous violations of the TCPA against student loan debtors.²³ In that

²² *Id.* at ¶ 15 ("[I]t is more appropriate for the courts to determine whether the contractor satisfies the applicable test for derivative immunity.")

²³ National Consumer Law Center et al., Re: Request that the FCC initiate enforcement action against

request—which was ignored—we noted that Navient had deliberately engaged in a campaign of harassing and abusing consumers through the use of repeated, unconsented-to robocalls, calling consumers’ cell phones hundreds, and—in some cases—thousands of times after being asked to stop. Many of these calls occurred multiple times a day, often numerous times a week. These calls were frequently made to consumers while they were at work, even after they explicitly explained to Navient that they could not accept personal calls at work. Indeed, Navient’s internal policies permitted up to eight calls per day in the servicing of student loan debt.²⁴ Between 2014 and February 2017, there were 18,389 complaints reported to the CFPB just about Navient’s practices, of which 599 are specifically classified as relating to “Communication Tactics.”²⁵ During the same period, there were 1,878 complaints reported to the Better Business Bureau (BBB) about Navient, of which 1,306 are classified as relating to “Billing/Collection Issues.”²⁶

If the Commission were to issue a pronouncement that government contractors are immune from liability under the TCPA, the purpose of the TCPA would be undermined and millions of unconsented-to robocalls would flood the U.S. telephone network.

IV. Essential protections against scam calls

As explained in our primary Comments, according to YouMail, almost one hundred million scam robocalls **relating to health insurance scams** are made every month to U.S. telephone

Navient Solutions, LLC for massive and continuous violations of the Telephone Consumer Protection Act against student loan debtors (June 12, 2017), *available at* <https://www.fcc.gov/ecfs/file/download/Enforcement-Request%20Filed.pdf?folder=106121158414766>.

²⁴ See, e.g., McCaskill v. Navient Solutions, Inc., 178 F. Supp. 3d 1281, 1286 (M.D. Fla. 2016).

²⁵ See Consumer Fin. Prot. Bureau, Dataset of Navient Complaints, *available at* <https://data.consumerfinance.gov/dataset/navient-complaints/xas4-kc2q>.

²⁶ See Better Business Bureau, Navient Reviews & Complaints, *available at* <https://www.bbb.org/delaware/business-reviews/loans/navient-in-wilmington-de92002017/reviews-and-complaints>.

numbers. These scam calls threaten to drown out the important calls facilitated by the HHS letter. The Commission must establish clear guidelines to enable enrollees to differentiate between the good, helpful calls and the scam calls. The recommendations (in section II.2.4(f)) included with our proposed rules for the exemption to allow these calls will provide some assistance. But, at the same time, the Commission must initiate an aggressive campaign with the Industry Traceback Group (ITG), the state attorneys general, the FTC, and other enforcement agencies to shut down all providers that are transmitting scam calls—particularly those relating to health insurance—through their networks.

We strongly recommend that the Commission suspend from the Robocall Mitigation Database any originating, gateway, or initial intermediate provider who has been found to have transmitted the illegal calls relating health insurance after any type of notice, including one traceback request, or one enforcement request from a state or federal agency. We also recommend that the Commission take these actions promptly upon notice from either the ITG or any enforcement agency that a provider has met any of these triggers. Without that type of aggressive effort by the FCC, it is unlikely that many of the calls initiated by HHS's efforts will reach their intended targets, as those calls are likely to be swamped by the scam robocalls seeking to harm the enrollees.

V. Conclusion

We agree with the importance of these calls. If the Commission determines that they should be allowed, it should do so in a way that enables recipients to stay enrolled in their health care plans yet does not undermine the TCPA's privacy protections or promote or provide cover for scam calls.

Additionally, to avoid these problems in the future, we recommend that HHS require that all future applications or renewals for these government health programs include a very specific provision stating that the applicant consents to receive prerecorded calls and automated texts to the

telephone number provided, as well as any future cell phone number they may have, for calls related to enrolling in, or maintaining enrollment in, the program.

We appreciate the opportunity to provide comments on this issue.

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