

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991
U.S. Department of Health and Human Services
Petition for Declaratory Ruling
CG Docket No. 02-278

DECLARATORY RULING

Adopted: January 23, 2023

Released: January 23, 2023

By the Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this declaratory ruling, we apply Commission precedent to ensure that millions of Americans can receive the information they need to maintain enrollment in Medicaid and other governmental health care programs to avoid losing health care coverage. Specifically, we grant in significant part the request of the U.S. Department of Health and Human Services (HHS) to confirm that federal and state governmental agencies working in conjunction with local governments, governmental contractors, and managed care entities acting under contract with state governments may, under certain circumstances, make autodialed and prerecorded or artificial voice calls or send autodialed text messages to raise awareness of the eligibility and enrollment requirements for these governmental health care programs without violating the Telephone Consumer Protection Act (TCPA).1 We also outline other ways HHS and its partners can reach consumers without running afoul of the restrictions of the TCPA.

2. The federal health care policies implemented in response to the COVID-19 pandemic changed the eligibility requirements for Medicaid and other governmental health care programs. Those changes have resulted in a substantial increase in participation in these programs.2 When the government's continuous enrollment requirement, which ensures that individuals enrolled in Medicaid throughout the pandemic are not at risk of losing coverage, comes to an end, millions of Americans will need to complete renewals necessary to redetermine their eligibility to remain in the program, a process complicated by staff shortages at state agencies that administer the Medicaid program.3 In this declaratory ruling, we help eligible consumers avoid coverage losses by confirming that federal and state governmental agencies and their contractual partners can communicate via automated calls and text

1 See Letter from Xavier Becerra, Secretary, U.S. Department of Health and Human Services, to Jessica Rosenworcel, Chairwoman, FCC (April 28, 2022) (filed in CG Docket No. 02-278) (noting that millions of Americans will lose their Medicaid coverage when the public health emergency ends unless they take steps to renew eligibility) (HHS Letter). We treat the letter as a petition for declaratory ruling. See 47 CFR § 1.2.

2 HHS Letter at 2 (noting that these programs provide health coverage to 86 million Americans and that enrollment has increased 20% since the start of the public health emergency).

3 See Amy Goldstein, Millions of vulnerable Americans likely to fall off Medicaid once the federal public health emergency ends, Washington Post (March 14, 2022) (indicating that as many as 16 million low-income Americans risk losing Medicaid coverage), www.washingtonpost.com/health/2022/03/14/medicaid-loss-of-coverage/.

messages or prerecorded voice message calls with program enrollees about the steps necessary to retain enrollment in these health care programs.

II. BACKGROUND

A. TCPA

3. The TCPA generally requires “any person” making certain calls to obtain the recipient’s prior express consent before making the call absent an emergency purpose.⁴ In relevant part, the TCPA’s restrictions apply to “robocalls” made: (1) using an automatic telephone dialing system or artificial or prerecorded voice to a wireless phone;⁵ and (2) using an artificial or prerecorded voice to a residential telephone line.⁶ The prohibition on using an autodialer to call a wireless number also applies to text messages sent using an autodialer.⁷ If a robocall includes or introduces an advertisement or constitutes telemarketing, consent generally must be in writing, after the caller makes certain disclosures (i.e., “prior express written consent”).⁸ And the Commission has made clear that a consumer simply providing their telephone number constitutes their “prior express consent” to be contacted at that number regarding information closely related to the purpose for which they provided the number, absent instructions to the contrary.⁹

4. Separately, the Commission has clarified that federal and state governments making calls in the conduct of official business do not fall within the meaning of “person” in section 227(b)(1).¹⁰ As a

⁴ See 47 U.S.C. § 227(b)(1).

⁵ See 47 U.S.C. § 227(b)(1)(A); 47 CFR § 64.1200(a)(1)-(2). See *Facebook, Inc. v. Duguid*, 141 S.Ct. 1163, 1168-73 (2021) (holding that to qualify as an “automatic telephone dialing system” under the TCPA, a device must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator).

⁶ 47 U.S.C. § 227(b)(1)(B); 47 CFR § 64.1200(a)(3). The Commission has exempted from this prohibition artificial and prerecorded voice calls to residential telephone lines that are not made for a commercial purpose and calls made for a commercial purpose that do not contain an unsolicited advertisement or constitute telemarketing. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8773-74, paras. 40-41 (1992) (*1992 TCPA Order*) (noting that artificial or prerecorded voice messages that do not seek to sell a product or service do not tread heavily upon the consumer interests implicated by the TCPA).

⁷ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (*2003 TCPA Order*); see also *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (noting that text messaging is a form of communication used primarily between telephones and is therefore consistent with the definition of a “call”).

⁸ See 47 CFR § 64.1200(a)(2)-(3), (b), (f)(9) (defining “prior express written consent”).

⁹ See *1992 TCPA Order*, 7 FCC Rcd at 8769, para. 31. In the *ACA Declaratory Ruling*, for example, the Commission clarified that a party who provides his or her wireless number to a creditor as part of a credit application “reasonably evidences prior express consent by the cell phone subscriber to be contacted at the number regarding the debt.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, 23 FCC Rcd 559, 564, para. 9 (2008) (*ACA Declaratory Ruling*); *Rules and Regulations Implementing the Consumer Protection Act of 1991, Blackboard, Inc. Petition for Expediated Declaratory Rulemaking*, CG Docket 02-278, Declaratory Ruling, 31 FCC Rcd 9054, 9064, para. 23 (2016) (confirming that the provision of a telephone number by a parent or student to a school provides prior express consent to receive communications from the school closely related to the educational mission of the school or to official school activities absent instructions to the contrary from the party who provides the phone number) (*Blackboard Declaratory Ruling*).

¹⁰ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC Petition for Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd 7394, 7399-41, paras. 12-15 (2016) (interpreting the TCPA to exclude calls made by the federal government, in line with the longstanding interpretive presumption that the word “person” does not include the federal government absent a clear

(continued....)

result, federal and state governmental callers and texters are not subject to the TCPA's prohibitions on using automated equipment without the prior express consent of the called party. On the other hand, contractors making calls on behalf of such governments, along with local governmental entities and their contractors, are "persons" subject to the TCPA, except in those cases where the federal or state government is so involved in placing the call as to be deemed to have initiated it.¹¹

B. HHS Letter

5. On April 28, 2022, HHS filed a letter requesting clarification that automated calls and texts or prerecorded telephone calls made to encourage individuals to renew enrollment with their state Medicaid program, Children's Health Insurance Program (CHIP), Basic Health Program (BHP), or Health Insurance Marketplace (Marketplace) are permissible under the TCPA.¹² HHS notes that the continuous enrollment requirement in Medicaid imposed by the public health emergency "extends through the end of the month in which the public health emergency ends, and state agencies may begin to terminate coverage for ineligible individuals at that time."¹³ HHS indicates that millions of vulnerable Americans risk losing Medicaid coverage when the public health emergency relating to the COVID-19 pandemic ends.¹⁴ HHS contends that these coverage losses can be avoided if state governmental agencies and their partners are able to communicate via automated calls and text messages or prerecorded voice messages with enrollees about the steps required to retain their enrollment in these health coverage programs.¹⁵

6. HHS notes that many state agencies and their partners, including local governments, contractors, and managed care entities under contract with state agencies, are considering the use of robocalls and robotexts to remind enrollees to respond to requests from Medicaid agencies to renew their enrollment during three phases of this process.¹⁶ During the first phase, all Medicaid enrollees, along with CHIP and BHP enrollees whose most recent renewal has been delayed due to the public health emergency, may receive text messages or prerecorded calls reminding them to contact their program to

"affirmative showing of statutory intent to the contrary") (2016 *Broadnet Declaratory Ruling*); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, *Broadnet Teleservices LLC Petition for Declaratory Ruling*, *National Consumer Law Center Petition for Reconsideration and Stay*, *Professional Services Council Petition for Reconsideration*, CG Docket No. 02-278, Order on Reconsideration, 35 FCC Rcd 15052, 15059-61, paras. 22-26 (2020) (clarifying that state government callers in the conduct of official business do not fall within the meaning of "person" in section 227(b)(1)) (2020 *Broadnet Order*).

¹¹ See, e.g., 2020 *Broadnet Order*, 35 FCC Rcd at 15059, paras. 18-21 (concluding that governmental callers rather than a contractor were the "maker of the call" because the governmental entity made all decisions regarding whether to make a call, the timing of the call, the call recipients, and the content of the call). The Commission noted that determining whether a governmental entity or its contractor is the maker of the call is a highly fact-specific, case-by-case inquiry. See *id.* at 15059, paras. 19-20.

¹² See HHS Letter at 1.

¹³ *Id.* at 5. The Families First Coronavirus Response Act, Pub. L. No. 116-127, made increasing federal matching funds available for state Medicaid programs that meet specific requirements, including that they maintain the enrollment of most Medicaid enrollees through the end of the month in which the public health emergency ends. On December 29, 2022, the President signed the Consolidated Appropriations Act that decoupled the Medicaid continuous enrollment provision from the public health emergency and terminates this provision on March 31, 2023. As a result, states can resume Medicaid disenrollments beginning April 1, 2023. States are required to maintain updated contact information, and make attempts to contact enrollees prior to disenrollment in Medicaid. See Consolidated Appropriations Act, 2023, Pub. L. No. 117-328 (2022).

¹⁴ HHS Letter at 2 (citing an Urban Institute projection that 15.8 million people are at risk of losing Medicaid coverage).

¹⁵ *Id.* at 3, 6 (noting that local governments play a critical role and often conduct determinations of Medicaid and CHIP eligibility and "managed care facilities" under contract with a state serve as important messengers on behalf of the state).

¹⁶ *Id.* at 3.

ensure their contact information is up to date.¹⁷ In the second phase, when renewals are being processed for Medicaid enrollees, along with regular annual renewals for CHIP and BHP enrollees, some individuals will need to provide additional information, such as updated income information to complete the redetermination of eligibility.¹⁸ These individuals may receive text messages or prerecorded calls reminding them to respond to their program.¹⁹ If they do not respond, these individuals may receive another reminder.²⁰

7. Lastly, in the event a determination is made that an individual is no longer eligible for the program for which they have enrolled, during the final phase, the individual may receive text messages or prerecorded calls explaining the actions that they can take to enroll in another health coverage program.²¹ HHS indicates that no more than six to eight individual calls or messages will be made to any individual enrollee;²² once an enrollee has responded with the requested information, or has enrolled in another health care coverage program, the individual should not receive any additional calls or text messages.²³

8. HHS offers two reasons supporting its request. First, HHS contends that a consumer providing their telephone number when applying for a governmental health care program constitutes prior express consent to be contacted at that telephone number regarding eligibility for and ongoing enrollment in the program.²⁴ Second, HHS urges that, because federal and state agencies are so involved in placing these calls by determining the content, timing, and recipient of the call or text message, the federal or state government is the maker of the call under the TCPA even if a third party is involved.²⁵

9. On May 3, 2022, the Commission released a Public Notice seeking comments on the issues raised in the HHS Letter.²⁶ A wide variety of commenters including non-profit organizations, governmental entities, health insurance providers, and consumer groups expressed support for HHS' requested clarification.²⁷ In general, these commenters reiterate that millions of the most vulnerable Americans risk losing important health care benefits when the public health emergency comes to an end.²⁸ These commenters indicate that the use of autodialed calls and text messages are highly effective in reaching the most vulnerable groups such as low-income, elderly, and non-English speaking individuals with the information that they require to maintain these health care benefits.²⁹ Although in agreement

¹⁷ *Id.* at 4.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 4-5.

²² *Id.* at 5.

²³ *Id.*

²⁴ *Id.* at 8.

²⁵ *Id.* at 8-9 (noting that the Commission has clarified that federal and state governmental callers are not considered "persons" that are subject to the TCPA).

²⁶ *See Consumer and Governmental Affairs Bureau Seeks Comment on Request Relating to Enrollment in Medicaid and Other Governmental Health Coverage Programs*, CG Docket No. 02-278, Public Notice (DA 22-487) (May 3, 2022).

²⁷ *See, e.g.*, Blue Cross Comments at 1; California DHCS Comments at 2-4; CareFirst Comments at 1; Colorado HCPF Comments at 1-2; MassHealth Comments at 1; NCLC et al. Comments at 2; TennCare Comments at 1; Wisconsin DHS Comments at 1.

²⁸ *See, e.g.*, CBPP Comments at 1; LeadingAge Comments at 2; MACPAC Comments at 2; NYS Comments at 2.

²⁹ *See, e.g.*, AAPCHO Comments at 1 (noting the importance of autodialed calls and text messages to reach Asian Americans); Community Catalyst Comments at 2 (importance of text messages in reaching low-income individuals); LeadingAge Comments at 1 (importance in contacting older individuals).

with HHS that the provision of a telephone number upon application for a governmental health care program constitutes prior express consent under existing Commission precedent, NCLC suggests that the better grounds for relief when such telephone numbers have been reassigned to other users is a free-to-end-user exemption rather than deeming the federal or state government the maker of the call.³⁰ Two commenters express concerns that granting HHS' request will result in an increased number of unwanted robocalls absent limitations to avoid abuse.³¹

III. DISCUSSION

10. A critical component of the nation's efforts to address the COVID-19 pandemic is the ability of governmental agencies to communicate effectively with the public.³² As states resume routine renewals and other eligibility actions relating to governmental health care programs, their ability to communicate with Medicaid, CHIP, and BHP enrollees will be critical to successful retention of health care coverage for eligible enrollees.

11. In this declaratory ruling, we confirm that enrollees' provision of a telephone number on an application for coverage in Medicaid or other government health care programs constitutes prior express consent to be contacted at that number regarding enrollment eligibility and the other reasons HHS describes in its petition because the purpose of those calls and texts is closely related to the purpose for which the enrollees provided their numbers. And we reiterate that, when the enrollee is no longer at that number or did not provide a number in the first place, federal and state governmental agencies may nevertheless use autodialers to call or send the text to reach those enrollees, despite a lack of prior express consent.³³ We also emphasize that callers and texters have other options to contact enrollees without running afoul of the TCPA.³⁴ Our clarification will enable government and partner callers to communicate time-sensitive, important information to millions of vulnerable American about maintaining their eligibility for critical health care benefits.

12. As we have with past clarifications, we remind unscrupulous callers and texters that they should not view this as a retreat from our aggressive work to combat illegal calls and texts. As the COVID-19 pandemic continues to impact the United States, phone scammers have seized the opportunity

³⁰ See NCLC Reply Comments at 4-8. In addition to ensuring that calls and texts are not charged to the recipient, NCLC suggests a number of other conditions including, among others, requiring that all callers check the Reassigned Numbers Database (RND), limiting prerecorded call messages to less than one minute, providing opt-out information, limiting the number of calls and messages to one per day and a total of seven over a fourteen-day period, restricting calls and messages to certain hours, and requiring callers to make calls or send text messages via only those voice and text providers that can provide Caller ID reflecting the name and telephone number for the government agency on whose behalf the call is made and STIR/SHAKEN attestations. *Id.* at 5-7. NCLC also requests that the Commission take action to protect consumers from insurance scam calls that could be confused with legitimate calls from state governments and their contractors. *See id.* at 11-12. As noted below, we will continue to use our enforcement authority to aggressively combat such scams.

³¹ See Bailey Glasser Comments at 1; Shields Comments at 2-3.

³² See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling, 35 FCC Rcd 2840 (2020) (confirming that health care providers, state and local health officials, and other government officials may lawfully communicate health and safety information about COVID-19 to protect individuals without violating the TCPA, pursuant to the "emergency purposes" exception).

³³ As explained in the *2020 Broadnet Order*, because the TCPA does not apply to the federal or state government calls, it cannot apply to federal or state government employees acting in their official capacities. *See 2020 Broadnet Order*, 35 FCC Rcd at 15057, 15059, n.38 & para. 22.

³⁴ As discussed in greater detail below, we strongly encourage callers relying upon prior express consent to call or text enrollees to utilize the RND to determine whether the telephone number provided has been reassigned to another individual.

to prey upon consumers.³⁵ For example, we have received reports of scam and hoax text messages and automated calls relating to health care coverage.³⁶ We will be vigilant in monitoring complaints about these calls and will not hesitate to enforce our rules when appropriate.

A. Prior Express Consent

13. Consistent with Commission precedent, we confirm that a consumer who provides their telephone number in an application form used to determine eligibility or seek benefits from Medicaid, CHIP, BHP, and Marketplace health care coverage has given their prior express consent to be called or texted at that number by local governments, governmental contractors, and managed care entities when acting under contract and pursuant to the authorization and direction of a federal or state agency with equipment covered by the TCPA regarding eligibility for and ongoing enrollment in those programs.³⁷ That is because these calls and texts contain information closely related to the purpose for which the consumer provided their telephone number.³⁸ To bolster this view, as HHS indicates, these consumers sign an acknowledgment that “they may be contacted if more information is needed” when they apply for benefits.³⁹

14. We thus agree with HHS and commenters that by providing their telephone numbers on their benefits applications and acknowledging they may be contacted for more information, these consumers have given prior express consent to be called at that number under the TCPA regarding their enrollment eligibility.⁴⁰

15. Consumers who have applied for benefits in governmental health care programs expect and likely welcome calls and texts that inform them of requirements that may affect the provision of health care benefits for which they have applied, including the potential loss of coverage. The reason consumers apply to such health care programs is to obtain the associated benefits; any reasonable consumer would view a call or text designed to prevent termination of benefits as closely related to the purpose for which they provided their telephone number. We thus have no problem concluding that these calls and texts are closely related to the purpose for which enrollees gave their numbers when they applied for benefits. We note, however, that any entity making calls in reliance upon the prior express consent created by the provision of a telephone number on an application for governmental health care benefits should be prepared to demonstrate that they are acting pursuant to the direction and authorization of a governmental agency to make calls or send text messages to enrollees.

³⁵ See Federal Communications Commission, *COVID-19 Consumer Warnings and Safety Tips* <https://www.fcc.gov/covid-scams> (last visited Sept. 1, 2022).

³⁶ *Id.*

³⁷ The Commission has made clear in several contexts that “persons who knowingly release their telephone numbers” for a particular purpose “have in effect given their invitation or permission to be called at the number which they have given” for that purpose, absent instructions to the contrary. See, e.g., *1992 TCPA Order*, 7 FCC Rcd at 8769, para. 31. In the *ACA Declaratory Ruling*, for example, the Commission clarified that a party who provides his or her wireless number to a creditor as part of a credit application “reasonably evidences prior express consent by the cell phone subscriber to be contacted at the number regarding the debt.” *ACA Declaratory Ruling*, 23 FCC Rcd at 564, para. 9 (also confirming that the provision of a wireless telephone number to a creditor extended prior express consent to a third-party debt collector calling on behalf of the creditor to collect the debt related to that transaction).

³⁸ See, e.g., *Blackboard Declaratory Ruling*, 31 FCC Rcd at 9064, para. 23 (confirming that the provision of a telephone number by a parent or student to a school provides prior express consent to receive communications from the school closely related to the educational mission of the school or to official school activities absent instructions to the contrary from the party who provides the phone number).

³⁹ See HHS Letter at 8.

⁴⁰ See, e.g., ACH Comments at 2; Amerihealth Comments at 1; Centene Comments at 1; NCLC et al. Comments at 6-7; NYDH Comments at 2; TennCare Comments at 1.

16. We caution, as NCLC urges, that consumers in this context have not consented to calls or texts that contain advertising or constitute telemarketing.⁴¹ Consent to make an autodialed or prerecorded call or send an automated text that contains advertising or constitutes telemarketing, must be in writing and after certain disclosures.⁴² The mere provision of a telephone number does not satisfy these conditions. Additionally, consumers may revoke prior express consent using any reasonable method— orally or in writing.⁴³ Callers relying upon prior express consent to make autodialed or prerecorded calls, therefore, must be prepared to honor revocation requests made by any reasonable means from recipients who no longer wish to receive calls and texts relating to governmental health care programs.⁴⁴ We also note that the burden is on the caller to prove that it obtained the necessary prior express consent if any question arises as to whether prior express consent was provided by a call recipient.⁴⁵ If so, callers will need to demonstrate that the telephone number called was provided on an application for governmental health care benefits.

17. Finally, we emphasize that even calls made to telephone numbers that have been provided by the called party may be subject to TCPA liability if the number has been reassigned from the person who provided consent.⁴⁶ As NCLC notes, the Reassigned Numbers Database (RND) is a critical tool callers should use to avoid calling a person whose telephone number has been reassigned to another individual.⁴⁷ Callers that make use of the RND can ensure that they are making the most efficient use of their limited resources by avoiding calls to unintended recipients while ensuring compliance with the TCPA.⁴⁸ We therefore strongly encourage all callers relying upon prior express consent to utilize the RND before making such calls.

B. Federal and State Governmental Callers

18. Consistent with Commission precedent, we confirm that federal or state governmental agencies that take the physical steps to make autodialed, prerecorded voice, or artificial voice calls, or send text messages using an autodialer for the purposes HHS describes are not “persons” subject to the

⁴¹ NCLC et al. Comments at 12.

⁴² See 47 CFR § 64.1200(a)(2), (b). The term “prior express written consent” is defined in 47 CFR § 64.1200(f)(9) (a consumer’s written consent to receive telemarketing robocalls must be signed and be sufficient to show that the consumer: (1) received “clear and conspicuous disclosure” of the consequences of providing the requested consent, *i.e.*, that the consumer will receive future calls that deliver prerecorded messages by or on behalf of a specific seller; and (2) having received this information, agrees in writing to receive such calls at a telephone number the consumer designates).

⁴³ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 30 FCC Rcd 7961 at 7996, para. 64 (2015) (*2015 TCPA Order*).

⁴⁴ *Id.* at 7993, para. 55. HHS indicates that each message will identify the agency that is sending the message or on whose behalf a message is sent and will provide the called party with information on how to opt out of or stop receiving future messages. See HHS Letter at 5.

⁴⁵ See *2015 TCPA Order*, 30 FCC Rcd at 7989-90, para. 47; *ACA Declaratory Ruling*, 23 FCC Rcd at 565, para. 10.

⁴⁶ See 47 U.S.C. § 227(b); 47 CFR § 64.1200(a); *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Second Report and Order, 33 FCC Rcd 12024, 12024-25, para. 1 (2018) (*Reassigned Numbers Order*).

⁴⁷ NCLC et al. Comments at 8-9. The RND is designed to prevent a consumer from getting unwanted calls intended for someone who previously held their phone number. Callers and texters can use the RND to determine whether a telephone number may have been reassigned following a specific date so they can avoid potential liability for calling consumers who have not consented to these calls. See 47 CFR § 64.1200(m). The Reassigned Numbers Database can be found at www.reassigned.us.

⁴⁸ Callers may be eligible for a safe harbor if they can prove that they checked the most recent update of the RND and the database erroneously reported that the number had not been reassigned after the caller obtained consent. 47 CFR § 64.1200(m); *Reassigned Numbers Order*, 33 FCC Rcd at 12043-44, paras. 53-58.

TCPA and their calls and texts do not, therefore, require prior express consent. Thus, federal or state governmental callers do need not to obtain the prior express consent of the called party via the provision of a telephone number to make such calls or send such texts.

19. In the *2016 Broadnet Declaratory Ruling* and the *2020 Broadnet Order*, the Commission made clear that federal and state government callers are not “persons” subject to the TCPA’s restrictions if their calls are made in the conduct of official business.⁴⁹ The Commission previously found that a caller may be found to have made or initiated a call in one of two ways: first, by “tak[ing] the steps necessary to physically place a telephone call”; and second, by being “so involved in the placing of a specific telephone call as to be directly liable for initiating it.”⁵⁰ Applying that precedent, we clarify that, when HHS or any federal or state agency “tak[es] the steps necessary to physically place” the calls or texts to enrollees in the governmental health care programs that HHS identifies in its Petition, the federal or state agency is the “maker” of such call and, therefore, such call is not subject to the TCPA. Informational calls made by federal or state government employees regarding enrollment and eligibility for governmental health care programs are “the conduct of official business” and nothing in the record indicates an affirmative showing to the contrary.

20. We are unable on this record, however, to confirm that such federal or state agencies, when they are not “taking the steps to physically place” the call or send the text, are nevertheless “so involved” in the calls at issue to be deemed the maker or initiator of the communication when a third party is involved in a calling campaign. The Commission has said that could occur when the federal or state government caller makes the decisions regarding whether to make a call, the timing of the call, the call recipients, and the content of the call, among other factors.⁵¹ This is a highly fact-specific, case-by-case inquiry.⁵² No such specific facts are before us. As HHS notes, there will be a wide variety of different calling campaigns involving third-party contractors that will vary from state to state.⁵³ As a result, we decline to opine generally on this issue, and instead simply reiterate Commission precedent to guide callers in assessing their individual circumstances in each state and locality but cannot make a specific ruling on the “so involved” basis for finding a federal or state agency the maker of the call in any future calling campaigns.⁵⁴ We note, however, that in the future we might be able to issue case-by-case guidance if HHS or another petitioner were to present us with more specific facts regarding a specific calling campaign and the respective roles of the government and any contractors in those situations.

⁴⁹ See *2016 Broadnet Declaratory Ruling*, 31 FCC Rcd at 7399-41, paras. 12-15; *2020 Broadnet Order*, 35 FCC Rcd at 15059-61, paras. 22-26; see also NCLC et al. Comments at 3 (acknowledging Commission rulings that the TCPA is inapplicable to calls made by the federal government or its employees). State and federal contractors, however, are “persons” under the TCPA and thus subject to TCPA restrictions. *2020 Broadnet Order*, 35 FCC Rcd at 15059, para. 22.

⁵⁰ *DISH Declaratory Ruling*, 28 FCC Rcd at 6583, paras. 26-27. The multi-factor analysis for determining liability of third parties under the TCPA is set forth in the *DISH Declaratory Ruling*, the *2015 TCPA Order*, and the *Dialing Services Forfeiture Order*. See *DISH Declaratory Ruling*, 28 FCC Rcd at 6583-84, paras. 26-27; *2015 TCPA Order*, 30 FCC Rcd at 7980-84, paras. 30-37; *Dialing Services, LLC*, Forfeiture Order, 32 FCC Rcd 6192, 6195-99, paras. 9-18 (2017).

⁵¹ *2020 Broadnet Order*, 35 FCC Rcd. at 15059, paras. 18-21 (these additional factors include the extent to which a person willfully enables fraudulent spoofing, and whether a calling platform knowingly allows clients to use the platform for unlawful purposes).

⁵² *Id.*

⁵³ See, e.g., Letter from Daniel Tsai, Deputy Administrator and Director, Department of Health and Human Services to Marlene H. Dortch, Secretary, FCC at 2 (July 13, 2022) (filed in CG Docket No. 02-278) (noting that every state governmental health care program is unique) (*HHS July 13 ex parte*).

⁵⁴ See, e.g., *2020 Broadnet Order*, 35 FCC Rcd at 15059, paras. 18-21; *2015 TCPA Order*, 30 FCC Rcd at 7978-84, paras. 25-37.

21. Lastly, we note that the Commission has acknowledged that federal and state contractors making calls on behalf of governmental entities may also qualify in some instances for forms of derivative immunity. The Commission has stated that courts are best positioned to apply the body of existing immunity law to governmental contractors and make such determinations on a case-by-case basis.⁵⁵ We, therefore, direct governmental contractors to this body of law to make determinations as to whether they may qualify for derivative immunity in this context.

C. Other Options for Contacting Enrollees

22. We believe that the options we describe here—obtaining prior express consent and/or having a federal or state agency physically place a call—should ensure HHS and its partners can reach enrollees in a timely manner. However, to the extent that there are limited situations in which callers do not have prior express consent to call or text a wireless telephone number, we confirm that there are a number of other options that callers have to communicate with those consumers without violating the TCPA.

23. *Calls to Residential Telephone Lines.* We confirm that calls made using an artificial or prerecorded voice message to a residential telephone line⁵⁶ to raise awareness of the eligibility for and enrollment in Medicaid, CHIP, BHP, and Marketplace, as HHS has described them, are exempt from the prior express consent requirement as “calls made for a commercial purpose but [which do] not include or introduce an advertisement or constitute telemarketing”⁵⁷ because these calls appear to simply inform enrollees about the state of their benefits and how to ensure they do not lose such benefits. Nothing in HHS’s request suggests that these communications will advertise a particular insurance product or any other product or service, and thus they do not appear to be advertising or telemarketing. As a result, this exemption is available for calls from local governments, governmental contractors, and managed care entities acting under contract and pursuant to the authorization and direction of a governmental agency in regard to determinations of eligibility for or enrollment in these governmental health coverage programs.⁵⁸ Of course, if such calls do contain telemarketing or advertising, and are made by “persons” under the TCPA who lack derivative immunity as noted above, they would require prior express written consent. And, in all cases, these calls must satisfy the Commission’s identification requirements if they use artificial or prerecorded voice messages.⁵⁹

⁵⁵ 2020 Broadnet Order, 35 FCC Rcd at 15057, 15062, paras. 15, 28.

⁵⁶ The TCPA does not define “residential telephone line.” We note that a number assigned to a wireless service is not a “residential telephone line” under section 64.1200 of our rules. Compare 47 CFR § 64.1200(a)(1)-(2) with 47 CFR § 64.1200(a)(3).

⁵⁷ See 47 CFR § 64.1200(a)(3)(ii)-(iii). We note that the Commission recently amended its rules to limit the number of exempted calls that can be made to a residential line to three artificial or prerecorded voice calls within any consecutive 30-day period for three categories of exemptions. This amendment has not, however, gone into effect. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 35 FCC Rcd 15188 at 15194, 15197, 15198, paras. 15, 28, 33 (2020).

⁵⁸ See 47 CFR § 64.1200(a)(3)(iii). The term “advertisement” is defined to mean “any material advertising the commercial availability or quality of any property, goods, or services.” 47 CFR § 64.1200(f)(1). The term “telemarketing” is defined as “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.” 47 CFR § 64.1200(f)(13). HHS indicates that Medicaid and CHIP managed care entities may not include marketing or marketplace activities as defined by Medicaid-related managed care regulations in their automated calls and text messages or prerecorded voice calls. See HHS Letter at 7 (citing 42 CFR § 438.104).

⁵⁹ See 47 CFR § 64.1200(b). All artificial or prerecorded message calls must, “[a]t the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call.” In addition, “[d]uring or after the message,” such a call must “state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual.” *Id.*

(continued....)

24. *Communications Not Subject to the TCPA.* HHS and its partners have alternative options of communicating with enrollees that are not otherwise subject to the TCPA, and therefore may avoid TCPA restrictions altogether. For instance, callers can use live operators rather than prerecorded voice messages and/or non-autodialed text messages.⁶⁰ Further, they can use email or direct mail to contact enrollees.⁶¹ Although these methods may be somewhat less efficient than autodialed calls and texts or prerecorded messages, they nevertheless may offer a reasonable means to communicate important information to consumers without infringing upon the privacy rights protected under the TCPA.

25. *Free-to-End User Exemption Requests.* We decline to adopt a free-to-end-user exemption in this case as suggested by NCLC.⁶² We agree with HHS that the imposition of potentially burdensome conditions inherent in any free-to-end-user request may unduly hinder the effectiveness of critical outreach efforts by diverting the already limited resources of state and local governmental agencies to compliance with these conditions.⁶³ Should conditions change, HHS and its partners are, of course, free to request a free-to-end-user exemption from the Commission.⁶⁴

26. We believe that the guidance we provide today will assist HHS and its partners in complying with the TCPA while making these critical calls. HHS and its partners may also configure their calling and texting efforts to further ensure compliance with the guidance set forth herein. For instance, callers can now verify the prior express consent they have received by checking the RND to identify numbers that have been disconnected and possibly reassigned to other individuals and can use that information to assess whether alternative means of communication should be utilized. We strongly encourage robocallers and robotexters to make use of this tool to avoid potential TCPA liability and to explore the options we identify here as well as any other options that may assist health agencies in making these critical calls.

IV. ORDERING CLAUSES

27. For the reasons stated above, IT IS ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, and sections 1.2 and 64.1200 of the Commission's rules, 47 CFR §§ 1.2, 64.1200, and the authority delegated in sections 0.141 and 0.361 of the Commission's rules, 47 CFR §§ 0.141, 0.361, that this Declaratory Ruling is ADOPTED.

28. IT IS FURTHER ORDERED that the request filed by the U.S. Department of Health and Human Services on April 28, 2022, IS GRANTED IN PART and DENIED IN PART to the extent discussed herein.

§ 64.1200(b)(1), (2). There are additional requirements for artificial or prerecorded voice calls that include telemarketing but those requirements are not applicable in this context.

⁶⁰ We caution, however, that a text message sent using a peer-to-peer platform requires consumer consent unless it "is not capable of dialing such numbers without a person actively and affirmatively manually dialing each one." See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, P2P Alliance Petition for Clarification*, CG Docket No. 02-278, Declaratory Ruling, 35 FCC Rcd 6526 at 6528, para. 8 (2020).

⁶¹ We decline to address whether HHS and its partners must comply with any legal requirements outside of the TCPA if they opt to send notices via e-mail or direct mail.

⁶² See NCLC et al. Reply Comments at 4-8. See also 47 U.S.C. § 227(b)(2)(C) (permitting the Commission to exempt, by rule or order, "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party," subject to any conditions set by the Commission).

⁶³ See, e.g., CMMS/HHS Reply Comments at 2; *HHS July 13 ex parte* at 2 (noting the resource challenges involved in compliance with additional safeguards including potential cost restrictions).

⁶⁴ Section 227(b)(2)(C) authorizes the Commission to adopt, by rule or order, exemptions from the prohibition on calls to "a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interests of the privacy rights this section is intended to protect." 47 U.S.C. § 227(b)(2)(C).

29. IT IS FURTHER ORDERED that, pursuant to section 1.4 of the Commission's rules, 47 CFR § 1.4, this Declaratory Ruling shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Alejandro Roark
Chief
Consumer and Governmental Affairs Bureau

Appendix

List of Commenters

Commenters	Abbreviation
Advocates for Community Health	ACH
AHIP	AHIP
American Academy of Pediatrics et al.	AAP
Amerihealth Caritas	Amerihealth
Anthem, Inc.	Anthem
Arizona Health Care Cost Containment System	Arizona HCCCS
Association of Asian Pacific Community Health Organizations	AAPCHO
Association for Community Affiliated Plans	ACAP
Bailey Glasser, LLP	Bailey Glasser
Blue Cross Blue Shield Association	Blue Cross
State of California Department of Health Care Services	California DHCS
CareFirst Blue Cross Blue Shield	CareFirst
Centene Corp.	Centene
Center for Accountability, Modernization, and Innovation	CAMI*
Center on Budget and Policy Priorities	CBPP
Centers for Medicare and Medicaid Services	CMMS/HHS
Colorado Access	Colorado Access
Colorado Dept. of Health Care Policy and Financing	Colorado HCPF
Community Catalyst	Community Catalyst
Cognosante, LLC	Cognosante
Connected Health Initiative	CHI
Connecticut Department of Social Services	Connecticut DSS
Drips Holdings, LLC	Drips Holdings
Enrollment Coalition	Enrollment Coalition
Gainwell Technologies	Gainwell
Healthcare and Family Services	HFS
Healthcare Information and Management Systems Society	HIMSS
Healthcare Leadership Council	Health Leadership
Icario, Inc.	Icario
Illinois Department of Healthcare and Family Services	Illinois HFS
Illinois Primary Health Care Association	Illinois PHCA
Indiana Primary Health Care Association	Indiana PHCA
Kaiser Permanente	Kaiser
LeadingAge (Meridith Chillemi)	LeadingAge
Massachusetts Office of Health and Human Services	MassHealth
Medicaid and CHIP Payment and Access Commission	MACPAC
Medicaid Health Plans of America	MHPA
Medicaid Matters New York	MMNY
National Association of Community Health Centers	NACHC
National Association of Medicaid Directors	NAMD
National Consumer Law Center et al.	NCLC*
Nevada Department of Health and Human Services	Nevada DHHS
New Jersey Primary Care Association	New Jersey PCA
NY State of Health, NYS Department of Health	NYDH
Ohio Association of Community Health Centers	OACHC

Oregon Health Authority	Oregon HA
SameSky Health, Inc.	SameSky
Joe Shields	Shields
Tennessee Department of Finance & Administration	TennCare
Tennessee Primary Care Association	Tennessee PCA
UnitedHealth Group	UnitedHealth
United States of Care	USC
Commonwealth of Virginia – Department of Medical Assistance Services	Virginia DMAS
State of Wisconsin – Dept. of Health Services	Wisconsin DHS

* filing both comment and reply comment (bold - reply comments only).