



Consumer Federation of America



Public Knowledge

October 4, 2022

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278 Report No. 3170—relating to the limits on **Exempt Calls** to clarify that that prerecorded scam calls and automated scam texts are not exempt from TCPA consent requirements; and in the Matter of **Assurance IQ, LLC's Petition**, DA 20-540

Dear Ms. Dortch:

This *ex parte* Notice is submitted to describe a meeting between Federal Communications Commission staff and consumer and privacy advocates on September 30, 2022. Members of the staff from the Consumer and Governmental Affairs Bureau of the FCC in attendance were Alejandro Roark, Zac Champ, Aaron Garza, Karen Schroeder, Mark Stone, and Kristi Thornton, along with Carmen Scurato, legal advisor to Chairwoman Rosenworcel. The consumer and privacy advocates attending were Erin Witte with **Consumer Federation of America**, Nick Garcia with **Public Knowledge**, Christine Hines with the **National Association of Consumer Advocates**, Eden Iscil with **National Consumers League**, Teresa Murray with **U.S. PIRG**, Chris Frascella with **Electronic Privacy Information Center**, and myself—Margot Saunders—with the **National Consumer Law Center**, on behalf of its low-income clients.<sup>1</sup>

We discussed three topics:

1. **Exemptions Proceeding.** In connection with finalizing the regulations to apply limits on calls and texts permitted to be exempt from the requirements of the Telephone Consumer Protection Act (TCPA), we urged that:
  - The FCC complete review of pending issues and finalize the exemptions rules originally proposed in late 2020, amended as necessary.

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<sup>1</sup> In addition, Ruth Susswein of **Consumer Action** is supportive of the points made in this *ex parte*.

- In the process of finalizing the exemption regulations, the FCC clarify that there are no exemptions for prerecorded calls or automated texts that are scams. We propose that the Commission define scam calls to be those made with deception, to defraud, to cause harm, or to wrongfully obtain anything of value from the recipient.
2. **Changes in Labels for Scam and Telemarketing Calls.** To address the confusion regarding which robocalls should be considered illegal when the Commission is considering rules for blocking and labeling calls, as well as in relation to providers' obligations to protect subscribers from illegal calls, we described the current fluidity between calls labeled as scam calls and calls labeled as telemarketing calls, the apparent decrease in "scam" calls, and the increase in telemarketing calls.
  3. **Clarifying that Consent Can Be Provided to Only One Caller at a Time.** We recommended that the FCC respond to the pending proceeding initiated by Assurance IQ, LLC, in which a telemarketer requested the FCC to allow callers to rely on a "reasonable basis to believe they have valid express consent" to make the call. We urged the FCC to take this opportunity to clarify that the current TCPA regulations permit consent to be provided to only one caller.

## 1. Complete the Regulations for Calls Permitted Pursuant to an Exemption and Exclude Scam Calls from Exempt Calls.

### A. The Exemptions Rulemaking Should Be Completed.

As required by the TRACED Act,<sup>2</sup> the FCC issued an order in late 2020<sup>3</sup> that a) places limits on the number of calls that certain commercial callers making non-telemarketing prerecorded calls to a residence can make without consent; b) requires that every prerecorded call made pursuant to one of the exemptions include an automated, interactive opt-out mechanism for the called party to make a do-not-call request; c) requires the caller to honor the called party's request to stop calling once an opt-out request has been made;<sup>4</sup> and d) codifies existing exemptions for calls to cell phones by incorporating them into the FCC's regulations<sup>5</sup>

Although the order setting these limits and requirements on exempt calls was issued in 2020, the FCC has delayed "indefinitely" the implementation of all the limits on exempt prerecorded calls

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<sup>2</sup> Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, § 8, 133 Stat. 3274 (Dec. 30, 2019), *available at* <https://www.govtrack.us/congress/bills/116/s151/text> [hereinafter TRACED Act].

<sup>3</sup> *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Report and Order, CG Docket No. 02-278, FCC 20-186 (Rel. Dec. 30, 2020), *available at* <https://docs.fcc.gov/public/attachments/FCC-20-186A1.pdf> [hereinafter 2020 Order].

<sup>4</sup> *See* 2020 Order, *supra* note 3. *See also* 47 C.F.R. § 64.1200(a)(3)(i)-(iv) (delayed indefinitely).

<sup>5</sup> *See* 2020 Order, *supra* note 3. *See also* 47 C.F.R. § 64.1200(a)(9) (effective Mar. 29, 2021).

made to residential lines (as governed by 47 U.S.C. § 227(b)(1)(B)).<sup>6</sup> This was likely initially due to several unresolved Petitions for Reconsideration.<sup>7</sup> However, in section 8 of the TRACED Act, Congress explicitly required that “not later than 1 year after such date of enactment,” the FCC must “prescribe such regulations, or amend such existing regulations . . . .”<sup>8</sup> It is therefore incumbent upon the FCC to finish this regulatory process and issue the final rules on exemptions (with appropriate corrections).

In the process of finalizing the rules for calls that are exempt from consent requirements under § 227(b), we urge the FCC to specifically exclude from the “classes of parties that may make [exempt] calls” those callers who make calls that can be defined as **scam calls**.

### **B. Scam Calls and Texts Should Be Explicitly Excluded from the Allowed Exemptions.**

There is no reason that scam calls or texts should be considered legal in any way, and in particular, they should not be exempted from the requirements for consent in the TCPA. The Commission should clarify that no exemptions are permitted for either 1) scam prerecorded calls made to residential lines regulated by 42 U.S.C. § 227(b)(1)(B), or 2) prerecorded or autodialed calls (which include texts) made to cell phones covered by § 227(b)(1A).

The current open proceeding is undertaken pursuant to Section 8 of the TRACED Act, which requires the Commission to—

ensure that any exemption under subparagraph (B) or (C) [of § 227(b)(2)] contains requirements for calls made in reliance on the exemption with respect to – (i) **the classes of parties that may make such calls**; . . . [and] (iii) the number of such calls that a calling party may make to a particular called party.<sup>9</sup>

In its 2020 Order, the Commission regulated both the types of callers that can make exempted calls and the number of exempted calls.<sup>10</sup> We are proposing that the Commission should also explicitly

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<sup>6</sup> See Federal Commc’ns Comm’n, Limits on Exempted Calls Under the Telephone Consumer Protection Act of 1991, Final Rule, CG Docket No. 02-278, 86 Fed. Reg. 11,443 (Feb. 25, 2021), *available at* <https://www.govinfo.gov/content/pkg/FR-2021-02-25/pdf/2021-01190.pdf>.

<sup>7</sup> See, e.g., Petition for Partial Reconsideration of ACA International et al., CG Docket No. 02-278 (filed Mar. 29, 2021); Enterprise Communications Advocacy Coalition Petition for Reconsideration, CG Docket No. 02-278 (filed Mar. 17, 2021). See also Public Notice, Consumer & Governmental Affairs Bureau, Federal Commc’ns Comm’n, Petitions for Reconsideration of Action in Proceedings, CG Docket No. 02-278 (Rel. Mar. 31, 2021), *available at* <https://docs.fcc.gov/public/attachments/DOC-371233A1.pdf> (inviting oppositions to the Petitions to be filed within fifteen days of the date on which the Public Notice is published in the Federal Register). The Notice was published in the Federal Register on April 12, 2021. Federal Commc’ns Comm’n, Petition for Reconsideration of Action in Proceedings, CG Docket No. 02-278, 86 Fed. Reg. 18,934 (Apr. 12, 2021), *available at* <https://www.govinfo.gov/content/pkg/FR-2021-04-12/pdf/2021-07360.pdf>.

<sup>8</sup> TRACED Act, *supra* note 2, at § 8(b).

<sup>9</sup> *Id.* at § 8(a) (emphasis added).

<sup>10</sup> See 2020 Order, *supra* note 3, at ¶ 2.

exclude all parties making “scam” calls. (In this definition, it should be reiterated that “calls” include texts.)

Scam calls should be defined as: “calls made with deception, to defraud, to cause harm, or to wrongfully obtain anything of value from the recipients.”

This is an opportune time for the Commission to articulate that prerecorded scam calls and automated texts do not fall within any exemption from the consent requirement for these calls and texts in 42 U.S.C. § 227(b). These calls are among the most invasive and dangerous, and we are confident that the Commission never intended to permit scam calls to be free from the restrictions on prerecorded and automated calls. However, at present, we are not aware of any explicit reference to their coverage under § 227(b) in any of the Commission’s orders.

### **C. Scam Calls Present a Continuing Menace to American Subscribers.**

As the Commission is aware, the latest fraud reports on the Federal Trade Commission (FTC) website confirm the growing danger of scam calls to American consumers, as well as the fact that the telephone is a primary method for scammers to contact their victims.<sup>11</sup> The specifics on these scams are alarming:

- In 2021, there were more than 2.8 million separate reports of fraud made to government agencies.<sup>12</sup>
- Over one third of those reports—1,024,558—were the direct result of contacts made through either a telephone call or a text.<sup>13</sup>
- The recipients of those scam calls and texts had \$830 million stolen from them in 2021.<sup>14</sup> The median amount of money lost through these telephone scams during the first three quarters of 2021 was \$1,250.<sup>15</sup>
- In 2021, complaints about unconsented-to robocalls were the leading source of complaints to both the FCC<sup>16</sup> and the FTC. Approximately 3.4 million complaints about robocalls were

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<sup>11</sup> FTC Consumer Sentinel Network, Fraud Reports by Contact Method, Year: 2022 YTD), *available at* <https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/LossesContactMethods> (last viewed Oct. 3, 2022). The figures for the first two quarters of 2022 appear to be slightly lower, with 1.1 million fraud reports. *Id.*

<sup>12</sup> *Id.* (Losses & Contact Methods tab, with “Contact Method” and 2021 checked).

<sup>13</sup> *Id.* (Combining the number of reports for Phone Call and Text).

<sup>14</sup> *Id.* (Combining the number of reports for Phone Call and Text).

<sup>15</sup> *Id.* (with quarters 1 through 3 of 2021 checked)

<sup>16</sup> Federal Commc’ns Comm’n, Stop Unwanted Robocalls and Texts, *available at* <https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts> (“Unwanted calls – including illegal and spoofed robocalls - are the FCC’s top consumer complaint and our top consumer protection priority.”).

made to the FTC in fiscal year 2021, up from 2.8 million in 2020,<sup>17</sup> and an additional 175,000 complaints were made to the FCC about unwanted and illegal robocalls in fiscal year 2021.<sup>18</sup>

- *Impostor* scam calls (calls pretending to be from government, business, or family and friends) topped the list of commonly reported call topics in fiscal year 2020 and the first three quarters of 2021.<sup>19</sup>

Impostor scams have increased significantly during the pandemic. Among the most costly and heartbreaking cases are those calls that purport to come from a family member in peril, or extortion calls, although not all of these are prerecorded calls.<sup>20</sup> However, during tax season, prerecorded calls from phony IRS agents often demand money and threaten arrest or even deportation if the victims do not comply.<sup>21</sup> [Here](#) is a recording of an IRS impostor call using a prerecorded voice.<sup>22</sup>

Many impostor scams are initiated with either a prerecorded call or a text. Typically, the scammer pretends to be calling from a trusted entity, such as a government agency, for example, the Social Security Administration (SSA). The scammer in a prerecorded SSA call may claim that the victim's Social Security Number (SSN) has been suspended due to suspicious activity or involvement in a crime, and the victim is encouraged to call back to clear up the matter. During the callback, the scammer will ask for the victim's SSN in order to reactivate it, or the scammer may ask the recipient for a fee to reactivate the SSN or to get a new SSN. [Here](#) is a recording of a prerecorded SSA scam call.<sup>23</sup>

Other scams are initiated by a prerecorded call or text in which the scammer pretends to be a tech support person from a well-known business entity, such as Apple. The message states that there is a problem or virus on the recipient's computer and that the victim should call back for assistance in addressing the problem. In the return call, the scammer asks for remote access via the recipient's

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<sup>17</sup> Federal Trade Comm'n, National Do Not Call Registry Data Book for Fiscal Year 2021, at 6 (Nov. 2021), available at [https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2021/dnc\\_data\\_book\\_2021.pdf](https://www.ftc.gov/system/files/documents/reports/national-do-not-call-registry-data-book-fiscal-year-2021/dnc_data_book_2021.pdf).

<sup>18</sup> See Federal Trade Comm'n, Biennial Report to Congress Under the Do Not Call Registry Fee Extension Act of 2007, at 3 (Dec. 2021), available at <https://www.ftc.gov/system/files/documents/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007/p034305dncreport.pdf> ("The FCC also receives complaints about unwanted calls and received approximately 155,000 unwanted call complaints in FY 2020, and approximately 175,000 in FY 2021.").

<sup>19</sup> *Id.* at 7.

<sup>20</sup> See, e.g., Press Release, Office of the Vermont Attorney General, Top 10 Scams of 2020 Released by Attorney General's Office (Mar. 1, 2021), available at <https://ago.vermont.gov/blog/2021/03/01/top-10-scams-of-2020-released-by-attorney-generals-office/>.

<sup>21</sup> See Caralynn Lippo, Business Insider, *The 8 most sophisticated phone scams right now the average person falls for* (Apr. 1, 2019), available at <https://www.businessinsider.com/phone-scams-robocall-spoofing-2019-4#irs-scams-take-advantage-of-peoples-stress-during-tax-season-2>.

<sup>22</sup> Courier Video, Fake IRS Scam Recording, YouTube (Jul. 2, 2017), available at <https://www.youtube.com/watch?v=ANm4uBimRXX>.

<sup>23</sup> Office of the Michigan Attorney General, Social Security Robocall Scams, available at [https://www.michigan.gov/documents/ag/SocialSecurityBenefits\\_scam\\_call\\_666103\\_7.mp3](https://www.michigan.gov/documents/ag/SocialSecurityBenefits_scam_call_666103_7.mp3).

password and login information. The scammer may also ask for money to resolve the fictitious “problem.”

In another variant, a scam is initiated through a prerecorded call or text that pretends to be from an Amazon representative. The victim is asked to contact the caller, at which time the scammer attempts to “coerce people into making immediate payments or turning over sensitive personal information.”<sup>24</sup> These Amazon scams can take different forms.<sup>25</sup> In one type of call, the text or call from the scammer tells the recipient that hackers have gained access to her account, and that the only way to protect the account is to buy a gift card and tell the scammer the gift card number and PIN on the back. An October 2021 FTC website Data Spotlight reported a “rampant rise of Amazon impersonation scams that have already bilked consumers out of millions of dollars.” Between July 2020 and June 2021, reports about Amazon impersonators increased more than fivefold. Approximately 96,000 people reported being targeted, and nearly 6,000 said they lost money. The FTC’s Data Spotlight indicates that, since July 2020, about one in three people who have reported a business impostor scam says that the scammer pretended to be from Amazon.<sup>26</sup>

The FTC recently launched a rulemaking to tackle a “sharp spike in impersonation fraud” spurred by scammers seeking to “capitalize on confusion and concerns around shifts in the economy stemming from the pandemic.”<sup>27</sup> In its Notice of Proposed Rulemaking, the FTC states:

Impersonation fraud in general—including business, government, friend and family, romance, and tech support impersonation—has increased during the pandemic, with reported total losses of \$2 billion between October 2020 and September 2021 (**up 85% year over year**). Since the pandemic began, COVID-specific scam reports have included 12,491 complaints of government impersonation and 8,794 complaints of business impersonation.<sup>28</sup>

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<sup>24</sup> Federal Trade Comm’n, Business Blog, FTC Data Spotlight on Scammers Impersonating Amazon; How Businesses Can Reduce Injury to Consumers (Oct. 20, 2021), available at <https://www.ftc.gov/news-events/blogs/business-blog/2021/10/ftc-data-spotlight-scammers-impersonating-amazon-how>.

<sup>25</sup> See, e.g., Kathryn Masterson, AARP, *Americans Bombarded with Robocalls from Amazon Impostors* (May 14, 2021), available at <https://www.aarp.org/money/scams-fraud/info-2021/amazon-impostor-calls.html> (describing three Amazon impostor scams in video).

<sup>26</sup> See FTC Data Spotlight, *supra* note 24.

<sup>27</sup> Press Release, Federal Trade Comm’n, FTC Launches Rulemaking to Combat Sharp Spike in Impersonation Fraud (Dec. 16, 2021), available at <https://www.ftc.gov/news-events/press-releases/2021/12/ftc-launches-rulemaking-combat-sharp-spike-impersonation-fraud>. See also Mike Snider, *Robocalls and scam calls persist during pandemic, so Americans have stopped answering the phone*, USA Today, Feb. 12, 2021, available at <https://www.usatoday.com/story/tech/2021/02/12/robocalls-scammers-fraud-phone-calls-increase-fcc-ftc-efforts/6706727002/>.

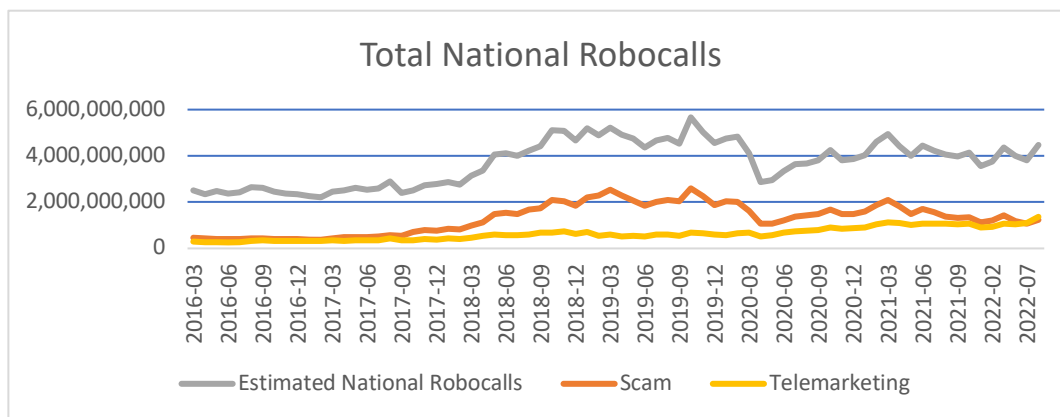
<sup>28</sup> Federal Trade Comm’n, Notice of Proposed Rulemaking, Trade Regulation Rule on Impersonation of Government and Business, 86 Fed. Reg. 72,901, 72,902 (Dec. 23, 2021) (emphasis added).

## 2. The Classification for Calls are Changing, Triggering Clearer Rules Defining Illegal Telemarketing Rules.

The discussions in the Commission’s dockets relating to call blocking and labeling,<sup>29</sup> obligations imposed on providers to stop illegal calls,<sup>30</sup> related dockets,<sup>31</sup> and the recent proposal to address illegal text messages<sup>32</sup> all are premised on the need to protect telephone subscribers from illegal calls and texts. In these discussions, the issue of what is an illegal call has largely been ignored. We and others have focused on scam calls—calls in which the content unmistakably indicates that the caller is trying to defraud or steal something from the called party.<sup>33</sup> However, it is clear that, with over a billion telemarketing calls made every month, it is essential for that focus to encompass illegal telemarketing calls as well.

We have recently become aware that one of the primary sources of information about robocalls—YouMail—is engaged in a process of reclassification of many of its calls.<sup>34</sup> As a result, many calls that YouMail had previously labeled as “scam” calls in its description of the problem of robocalls will now be classified as telemarketing calls.

As a result, the number of scam calls appears to be decreasing in the last few months, and the number of telemarketing calls appears to be increasing.<sup>35</sup>



<sup>29</sup> WC Docket No. 17-97, CG Docket No. 17-59.

<sup>30</sup> WC Docket. No. 17-97, CG Docket No. 17-59.

<sup>31</sup> See, e.g., Numbering Policies, WC Docket Nos. 13-97, 07-243, and 20-67.

<sup>32</sup> CG Docket No. 21-402.

<sup>33</sup> See, e.g., National Consumer Law Center & Electronic Privacy Information Center, Scam Robocalls: Telecom Providers Profit (June 2022), available at [https://www.nclc.org/wp-content/uploads/2022/09/Rpt\\_Scam\\_Robocalls.pdf](https://www.nclc.org/wp-content/uploads/2022/09/Rpt_Scam_Robocalls.pdf).

<sup>34</sup> This was explained in a call between YouMail’s Chief Technology Officer and Margot Saunders and Chris Frascella in August 2022.

<sup>35</sup> Chart derived from data provided by YouMail.

We know from information provided by YouMail that calls it previously categorized as scam calls are now included as telemarketing calls.<sup>36</sup>

That there is a serious problem with illegal telemarketing calls is illustrated by a recent case brought by the Ohio Attorney General against the callers and providers responsible for the ubiquitous auto warranty calls,<sup>37</sup> followed by the FCC's eight cease-and-desist letters against the service providers that carried the calls.<sup>38</sup> The calls violated a host of telemarketing provisions (including spoofing originating telephone numbers, failing to disclose the identity of the caller, and failing to place called parties on their internal Do Not Call list), but the leading claim was that the calls were made without consent of the called parties.<sup>39</sup> It was estimated that these callers and providers were responsible for upwards of eight billion calls.<sup>40</sup>

To protect the privacy of telephone subscribers and rebuild subscribers' trust in the integrity of the U.S. telecommunications system, it is essential that the FCC enforce the protections in the TCPA. As described in Section 3, *infra*, the first step is to clarify that the current regulations place strict limits on the way that that express consent is provided.

### **3. The Issues Raised in the Assurance Proceeding Must be Addressed.**

Assurance IQ, LLC filed its petition in May 2020,<sup>41</sup> seeking, *inter alia*, a declaratory ruling that “[w]here it is determined that a calling party has sufficient information to establish a ‘reasonable

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<sup>36</sup> As one example, a call from “[Evelyn](#),” a “social security disability consultant,” was among a confidential dataset YouMail shared with NCLC and EPIC in February 2022 containing the 1,000 most prevalent scam robocall campaigns. That campaign sent more than 1.6 million calls, according to the thirty-day report provided by YouMail. In September 2022, a nearly identical voice message as the “Evelyn” call reported by YouMail was captured by a [honey pot phone number set up by David Frankel](#), indicating that this campaign is still very much active more than six months later, and is still harassing (and possibly defrauding) phone subscribers who did not consent to receive their calls.

<sup>37</sup> Complaint, State of Ohio *ex rel.* Attorney General Dave Yost v. Jones et al, No. 22-cv-02700 (S.D. Ohio July 7, 2022), *available at* <https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Time-Stamped-Complaint-22-CV-2700-State-of-Ohio-v.aspx> [hereinafter Ohio Complaint]. *See also* Press Release, Office of the Ohio Attorney General, Yost Files Suit Alleging Massive Robocall Scheme – FCC Joins Fights in Related Action (July 7, 2022), *available at* <https://www.ohioattorneygeneral.gov/Media/News-Releases/July-2022/Yost-Files-Suit-Alleging-Massive-Robocall-Scheme-F>.

<sup>38</sup> Federal Commc’ns Comm’n, FCC Takes Actions Against Auto Warranty Scam Robocall Campaign (July 7, 2022), *available at* <https://www.fcc.gov/document/fcc-takes-actions-against-auto-warranty-scam-robocall-campaign>.

<sup>39</sup> *Id.*

<sup>40</sup> Press Release, FCC Authorizes Phone Companies to Cut Off Likely Auto Warranty Scam Robocall Campaign (July 7, 2022), *available at* <https://docs.fcc.gov/public/attachments/DOC-385038A1.pdf> (“The FCC and its partners believe upwards of eight billion robocalls have been generated by Roy Cox, Jr., Aaron Michael Jones, their Sumco Panama companies, and international associates.”).

<sup>41</sup> Petition for Expedited Declaratory Ruling Regarding the Application of U.S.C. § 227(b)(1) of the Telephone Consumer Protection Act by Assurance IQ, LLC, CG Docket No. 02-278 (filed May 12, 2020), *available at*



basis to believe that they have valid consent to make the call? the caller may rely on that consent for TCPA purposes until the caller is informed otherwise.”<sup>42</sup> Moreover, multiple courts have already rejected this position.<sup>43</sup> **Although Assurance LLC has requested that its petition be dismissed,<sup>44</sup> the issues raised in the proceeding are still central to controlling illegal telemarketing calls under the TCPA, and the record in the proceeding supports meaningful action.**

The consumer and privacy groups filing this *ex parte* vehemently opposed the Assurance petition<sup>45</sup> when it was filed, noting, among other points, that before consumers shop for insurance from Assurance they must enter their name, email address, and telephone number to receive their quote and click a button. But as we pointed out in these comments filed in 2020:

What this consent form does not make clear is that by clicking the button, not only has the user agreed to receive marketing calls from “insurance companies or their agents,” plus “the owner of this website and its agents, representatives and affiliates,” but also from 174 *partner companies*. . . . The consent form gives the consumer no reason to suspect that clicking the button will bring on such an onslaught.<sup>46</sup>

The button clicked by the unsuspecting consumer contained a weblink to the list of 174 other potential callers, most with no connection to Assurance, and many with no connection to insurance.<sup>47</sup> Examples and more explanation of this phenomenon were provided in a subsequent *ex parte*.<sup>48</sup>

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<https://www.fcc.gov/ecfs/file/download/ASSURANCE%20IQ,%20LLC%20FCC%20PETITION.pdf?folder=10512089842790>

<sup>42</sup> *Id.* at ii.

<sup>43</sup> *Berman v. Freedom Fin. Network*, 400 F. Supp. 3d 964, 979 (N.D. Cal. 2019) (good faith is not a defense); *Denova v. Ocwen Loan Servicing, L.L.C.*, 2018 WL 1832901, at \*5–6 (M.D. Fla. Jan. 25, 2018) (these are not defenses to claim of violation of § 227(b)); *O’Shea v. Am. Solar Sol., Inc.*, 2016 WL 11620998 (S.D. Cal. Nov. 7, 2016).

<sup>44</sup> Letter from Paul C. Besozzi, Squire Patton Boggs, to Marlene Dortch, Federal Commc’ns Comm’n (May 10, 2022), *available at* <https://www.fcc.gov/ecfs/document/105101851403763/1>.

<sup>45</sup> *In re Assurance IQ, LLC’s Petition for Expedited Declaratory Ruling*, Comments of National Consumer Law Center et al., CG Docket No. 02-278 (filed June 22, 2020), *available at* <https://www.fcc.gov/ecfs/document/10622280311488/1>.

<sup>46</sup> *See id.* at 2 (emphasis in original). *See also id.* at Appendix 1 (includes a list of the 174 companies).

<sup>47</sup> A few examples of the subjects of the unrelated marketing calls the consumer unwittingly becomes subject to receiving by clicking on the big blue button “View My Quote” are provided on Assurance’s website. Debt.com appears to offer “debt relief” from credit card debt, student loan debt, tax debt, and more.

<sup>48</sup> Letter from Margot Saunders, National Consumer Law Center, to Marlene Dortch, Federal Commc’ns Comm’n, Re: Notice of Ex Parte Presentation, CG Docket No. 02-278, Petition of Assurance IQ, LLC (Aug. 12, 2020), *available at* <https://www.fcc.gov/ecfs/document/1081384309645/1>.

The plaintiff in the case<sup>49</sup> that prompted Assurance’s petition to the FCC denied ever having gone on any website or consented in any way to receiving calls from Assurance.<sup>50</sup> Instead, as he described to the FCC, he asserted that it was likely that Assurance—like many telemarketers—had paid third-party lead generators a premium for “consent data” entered on somebody else’s website. In his comments to the FCC, Mr. Shelton pointed out that even Assurance did not allege that he had provided his consent to be called, and Assurance admitted that the consent had been provided through a “fraudulent internet lead scenario.”<sup>51</sup> In addition to Mr. Shelton’s comments, the record in this proceeding is replete with evidence of the significant problems created by fraudulent lead generators and of the red flags only a willfully blind seller would ignore.<sup>52</sup>

As litigation in this area demonstrates, telemarketers routinely use lead generators. Yet some lead generators manufacture consent data out of whole cloth. The consumer contact information provided is obtained through various other means, and then the data is manipulated to appear as if it had been entered on a consent form by the consumer when, in fact, it never was.<sup>53</sup> As we described in our comments, others trick consumers into purportedly giving consent to a broad list of entities that the consumer never contemplated.

The problem with lead generators manufacturing fake consents and then selling them to telemarketers was highlighted in an FTC public workshop entitled “Follow the Lead” in October

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<sup>49</sup> Complaint, Shelton et al. v. Lumico Life Insurance Company and Assurance IQ, Inc., Civ. Action File No. 7:19-cv-6494 (S.D.N.Y. filed July 12, 2019), *available at* <https://www.classaction.org/media/shelton-v-lumico-life-insurance-company-et-al.pdf>.

<sup>50</sup> *See id.* at ¶¶ 3, 47, 54.

<sup>51</sup> *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Comments of James Shelton in Opposition to Petition for Expedited Declaratory Ruling filed by Assurance IQ, LLC, CG Docket No. 02-278, at 1 (filed June 22, 2020), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/10622624728686> (referring to Assurance’s Petition for Expedited Declaratory Ruling Regarding the Application of U.S.C. § 227(b)(1) of the Telephone Consumer Protection Act, CG Docket No. 02-278, at 9 (filed May 12, 2020)).

<sup>52</sup> *See, e.g.*, Letter from Timothy J. Sostrin, Keogh Law, to Marlene Dortch, Federal Commc’ns Comm’n, Notice of Written Ex Parte Presentation, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (Aug. 12, 2020), *available at* <https://www.fcc.gov/ecfs/document/1081372806755/1>; *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Reply Comments of James Shelton in Opposition to Petition for Expedited Declaratory Ruling filed by Assurance IQ, LLC, CG Docket No. 02-278 (filed July 6, 2020), *available at* <https://www.fcc.gov/ecfs/search/search-filings/filing/107071574027591>; *In re* Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Reply Comments of Joe Shields on the Assurance IQ LL Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed July 6, 2020), *available at* <https://www.fcc.gov/ecfs/document/1070659982358/1>; *In re* Assurance IQ, LLC’s Petition for Expedited Declaratory Ruling, Comments of ZipDX LLC, CG Docket No. 02-278 (filed May 28, 2020), *available at* <https://www.fcc.gov/ecfs/document/105290315115325/1>.

<sup>53</sup> *See, e.g.*, McCurley v. Royal Seas Cruises, Inc., 2022 WL 1012471 (9th Cir. Apr. 5, 2022); McCurley v. Royal Seas Cruises, Inc., Case No. 17-cv-00986, Doc. 87, at 60 (S.D. Cal. 2018). *See also* Pesach Lattin, *Performance Marketing Insider*, *Bot Form Fills are Destroying Lead Generation Industry. What Can Be Done?* (Mar. 19, 2019), *available at* <https://performinsiders.com>; Alexandra Bruell, *Fraudulent Web Traffic Continues to Plague Advertisers, Other Businesses*, *The Wall St. J.*, Mar. 8, 2018, *available at* [www.wsj.com](http://www.wsj.com); Josh Sternberg, Digiday, *Confessions of a Lead-Gen Specialist* (June 4, 2012), *available at* <https://digiday.com>.

2015.<sup>54</sup> The FTC noted in its Staff Perspective following the workshop that “the pathway through which leads are collected, processed, and sold is often very complex and opaque.”<sup>55</sup> Various parties create marketing websites with consent forms and then sell the data to intermediary “aggregators” who compile the lead data from multiple website publishers, and then sell the data to other aggregators, who then sell it to other aggregators, and so on, before it finally ends up in the hands of the telemarketer that might seek to rely on it.<sup>56</sup>

Despite sellers’ and telemarketers’ knowledge of the inherent unreliability of consent provided through multiple weblinks and data brokers, it remains a common defense offered by sellers. For example, in a recent case decided by the Ninth Circuit,<sup>57</sup> the defendant, Royal Seas Cruises, contracted with a telemarketing company, Prospects DM, to robocall new customer leads on their behalf. Prospects DM then contracted with a slew of web publishers to collect leads for Royal Seas Cruises such as diabeteshealth.info, which has nothing to do with cruises or travel. No one in the lead supply chain validated the contact information or their consent to be robocalled. As a result, the named plaintiffs in the case against Royal Seas were robocalled by Prospects DM and passed on to Royal Seas Cruises to hear an unsolicited pitch for a vacation package.

The plaintiffs sued Royal Seas Cruises on behalf of the tens of thousands of people who allegedly never consented to be robocalled by Royal Seas Cruises or Prospects DM. A district court granted summary judgment to the defendant, finding that Royal Seas Cruises could not be held liable because it did not have specific knowledge about the bad leads and it included a provision in its contract with Prospects DM requiring the company to comply with the TCPA.

The Ninth Circuit reversed the judgment of the lower court, finding that:

Royal Seas also knew that of the 560 customers whom Prospects warm-transferred and who made purchases from Royal Seas, 13 percent had phone numbers that did not match the customer consent data that Prospects had provided to Royal Seas, and 31 percent did not have a matching phone number and last name.

The amount of mismatched data in the record cannot all be explained by data-entry errors or family members with different last names. The number for one of the named plaintiffs, John McCurley, for example, was associated with the name “Jose Fernandez.” There is evidence that Royal Seas’s employees knew of the discrepancies because when they spoke with the transferred customers, because they addressed the customers by the first name that Prospects provided.

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<sup>54</sup> See Federal Trade Comm’n, “Follow The Lead” Workshop Staff Perspective (Sept. 2016), *available at* [https://www.ftc.gov/system/files/documents/reports/staff-perspective-follow-lead/staff\\_perspective\\_follow\\_the\\_lead\\_workshop.pdf](https://www.ftc.gov/system/files/documents/reports/staff-perspective-follow-lead/staff_perspective_follow_the_lead_workshop.pdf).

<sup>55</sup> *Id.* at 5.

<sup>56</sup> *Id.* at 4.

<sup>57</sup> *McCurley v. Royal Seas Cruises, Inc.*, 2022 WL 1012471(9th Cir. Apr. 5, 2022).

These facts, in combination with the evidence of widespread TCPA violations in the cruise industry, would support a finding that Royal Seas knew facts that should have led it to investigate Prospects' work for TCPA violations.<sup>58</sup>

The factual situations described in the Assurance and Royal Seas cases are not outliers. Telemarketers typically rely on consent supposedly provided through data brokers, bots, or weblinks on websites. At our meeting with the FCC staff on September 30, we provided one illustration related to car insurance quotes.

If a consumer shops for auto insurance online, they are likely to land on a website like this one from [Free Insurance Quotes](#).<sup>59</sup> (A pdf copy of this page is attached to this letter as Appendix 1.) After the consumer inputs their contact information and the telephone number, they are invited to click on a large button that says GET MY AUTO QUOTES.

But, below the GET MY AUTO QUOTES button, the following appears—in a tiny font:

By clicking the button above, I consent to receive emails, calls and/or text messages, for marketing purposes, regarding insurance quotes, or other products and services on behalf of [Free-insurance-quotes.us partners](#), using my provided telephone number even if it's on a federal, state or corporate do-not-call list. I acknowledge calls may be pre-recorded messages using artificial voice and/or placed using an automated telephone dialing system. I understand consent is not required to purchase and that I may revoke my consent at any time. Applicable text messaging rates may apply. I agree to the [Privacy Policy](#) and [Terms of Service](#) provided.

The weblink attached to the words “[Free-insurance-quotes.us. partners](#)” includes a list of 8,422 different sellers of products or services, the majority of which are not related to insurance. (The list of these sellers is provided at Appendix 2.)

Another example of telemarketers relying on weblinks to support the required prior express consent required for telemarketing calls to residential lines was illustrated in the case brought by the Ohio Attorney General against callers making the ubiquitous auto warranty calls. The complaint noted that:

when a VoIP Provider of Sumco Panama had to respond to an ITG traceback request, Sumco Panama needed to “buy some time” before responding in order to add “auto services” language to the list of opt-in websites in the terms and conditions

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<sup>58</sup> *Id.* at \*3 (emphasis added).

<sup>59</sup> [https://auto.free-insurance-quotes.us/?ueid=glsr\\_mdgtl\\_auto&segment=GSEARCH2&c2number=844-955-4151&campaignid=11847578621&adgroupid=114841171323&targetid=kwd-97641804&device=c&network=g&matchtype=e&loc\\_physical\\_ms=9057478&utm\\_source=google&utm\\_medium=cpc&utm\\_content=522572512681&utm\\_term=assurance%20insurance&gclid=CjwKCAjw4c-ZBhAEEiwAZ105RVoSoPvJ1xck2IrJ4tMoYK3XIY92tp6eg5pRpBOebR0qeVTPEgODvhoCLQIQAvD\\_BwE#formPage\\_16](https://auto.free-insurance-quotes.us/?ueid=glsr_mdgtl_auto&segment=GSEARCH2&c2number=844-955-4151&campaignid=11847578621&adgroupid=114841171323&targetid=kwd-97641804&device=c&network=g&matchtype=e&loc_physical_ms=9057478&utm_source=google&utm_medium=cpc&utm_content=522572512681&utm_term=assurance%20insurance&gclid=CjwKCAjw4c-ZBhAEEiwAZ105RVoSoPvJ1xck2IrJ4tMoYK3XIY92tp6eg5pRpBOebR0qeVTPEgODvhoCLQIQAvD_BwE#formPage_16).

after many VSC robocalls were made based on the alleged “opt in” from these websites.”<sup>60</sup>

And, the websites from which Call Originator Defendants claimed to have received consent to telemarket the auto warranty calls included a list of sites marketing goods and services completely unrelated to auto warranties.<sup>61</sup>

We urge the FCC to reject the request made in the Assurance petition and articulate that there is no good faith defense to making calls without the requisite consent.

### **B. The Regulations Permit Consent to Only One Seller at a Time.**

The regulations governing prerecorded calls to residential lines permitted pursuant to an exemption to the TCPA (15 U.S.C. §227(b)(2)) allow prerecorded telemarketing calls only if the subscriber has signed a written agreement that clearly authorizes only one seller to make the calls:

A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice;<sup>62</sup>

Similarly, the regulations that allow telephone solicitation calls to lines registered on the National Do Not Call Registry require that the subscriber must have provided prior express invitation or permission to just one seller:

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller . . .<sup>63</sup>

It is simply inconceivable that the Commission intended to allow the disguised, sneaky, and outright false methods purported to obtain prior express written consent and prior express invitation for these calls used by sellers such as Assurance, Royal Seas, and the sellers of auto warranties prosecuted by the Ohio Attorney General. Yet sellers continue to rely on these types of false consent as justification for making the billion plus telemarketing calls placed to American telephone lines every month. Many millions of these monthly telemarketing calls would be unequivocally illegal if the FCC resolves any question regarding how consent (or invitation) must be provided by the consumer to one seller at a time.

Assurance’s request for a ruling that sellers may rely on consents provided by brokers, leads, and others raised the issue of the appropriate criteria for a caller to ensure that a telemarketing call is legal. In response, the FCC should clarify that the only defense to a claim for a telemarketing call

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<sup>60</sup> Ohio Complaint, *supra* note 37, at ¶ 69 (italics in original; underlined content emphasis added).

<sup>61</sup> *See id.* at ¶ 70.

<sup>62</sup> 47 C.F.R. § 64.1200(f)(9)(i) (emphasis added).

<sup>63</sup> 47 C.F.R. § 64.1200(c)(2)(ii) (emphasis added).

requires that the seller show that the called party provided prior express consent (or a prior express invitation or permission) to *that seller*.

This disclosure is made pursuant to 47 C.F.R. § 1.1206.

Thank you very much for your consideration.

Sincerely,

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