



Consumer Federation of America

January 9, 2025

Marlene Dortch
Secretary
Federal Communications Commission
45 L St NE
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation, CG Docket No. 02-278, CG Docket No. 21-402, CG Docket No. 17-59

Dear Ms. Dortch:

This *ex parte* Notice is submitted on behalf of the low-income clients of the **National Consumer Law Center**, along with **Consumer Action**, **Consumer Federation of America**, **Electronic Privacy Information Center (EPIC)**, the **National Association of State Utility Consumer Advocates (NASUCA)**, **Public Knowledge**, the **National Consumers League (NCL)**, and **U.S. Public Interest Research Group (U.S. PIRG)**. On January 7, 2025, representatives of these national consumer and privacy groups held a meeting with Danielle Thumann, staff to Commissioner Carr. The attendees at this meeting from these national groups included: me on behalf of the low-income clients of the National Consumer Law Center (NCLC), Ruth Susswein of Consumer Action, Erin Witte of Consumer Federation of America, Chris Frascella of the Electronic Privacy Information Center (EPIC), Michel Singer Nelson of the Colorado Attorney General's office, representing the National Association of State Utility Consumer Advocates (NASUCA), Nicholas Garcia of Public Knowledge, and Teresa Murray and Stanton Cope of U.S. PIRG.

During this meeting, we urged Ms. Thumann to encourage Commissioner Carr to continue his support for the clarification to 47 C.F.R. § 64.1200(f)(9) issued by the Commission on December 18, 2023.¹ We explained that the new regulation is widely viewed by all parties to be a highly effective mechanism to cut down on the proliferation of unwanted telemarketing calls. In 2024, there were generally an average of 1.4 **billion** telemarketing calls every month, but these calls escalated in late

¹ *In re* Targeting and Eliminating Unlawful Text Messages; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Advanced Methods to Target and Eliminate Unlawful Robocalls, Second Report and Order, Second Further Notice of Proposed Rulemaking in CG Docket Nos. 02-278 and 21-402, and Waiver Order in CG Docket No. 17-59, CG Docket Nos. 21-402, 02-278, & 17-59, at ¶ 87 (Rel. Dec. 18, 2023), <https://docs.fcc.gov/public/attachments/FCC-23-107A1.pdf> [hereinafter Second FNPRM]; Targeting and Eliminating Unlawful Text Messages; Implementation of the Telephone Consumer Protection Act of 1991, Proposed Rule, CG Docket Nos. 02-278, 21-402, 89 Fed. Reg. 5177, 5180 ¶ 18 (Jan. 26, 2024), <https://www.govinfo.gov/content/pkg/FR-2024-01-26/pdf/2023-28833.pdf>.

2024 to be over 1.8 billion in the month of November (the latest month for which information is available).²

The regulation will close what is referred to as the "lead generator" loophole by requiring that telemarketers must obtain one-to-one consent from consumers for robocalls. Once in effect and enforced, the regulation will have the effect of dramatically reducing the number of telemarketing calls we receive on our telephones. That will help restore the usefulness and the value of the telephone system in the U.S.

Dramatically reducing the number of telemarketing calls will also enable the telephone industry to block many of the illegal scam calls – which plague Americans, and trigger losses of several billions of dollars a year to seniors and other consumers. This dynamic is illustrated by the strong support for this rule by US Telecom³ and a bipartisan group of 28 state attorneys general.⁴

Additionally, we covered the following specific topics relating to the new regulation:

- The misuse of consumers' "consents" by lead generators and others is a major factor contributing to the increasing number of illegal telemarketing calls and texts, in Section I.
- How the regulation will bring substantial benefits to both consumers and small businesses, in Section II.
- The ways in which reducing telemarketing calls will facilitate blocking of scam calls, in Section III.
- The fact that both the FTC and the Centers for Medicare and Medicaid have also required one-to-one consent, in Section IV, and the FTC has successfully mounted substantial enforcement efforts against major lead generators, in Section IV B.
- An explanation of how prohibiting lead generators from sharing telemarketing consent forms will still permit lead generators to provide helpful services to consumers and businesses, in Section V.
- We described the almost 400 express comments filed with the Commission in this docket, that we attach as an Appendix to this *ex parte* letter.

² U.S. Consumers Received Just Over 4.7 Billion Robocalls in November, According to YouMail Robocall Index, PR Newswire (Dec. 5, 2024), <https://www.prnewswire.com/news-releases/us-consumers-received-just-over-4-7-billion-robocalls-in-november-according-to-youmail-robocall-index-302323522.html#:~:text=IRVINE%2C%20Calif.%2C%20Dec.,to%20show%20a%20meaningful%20decline.%22>.

³ See Comments of USTelecom-The Broadband Association, *In re* Targeting and Eliminating Unlawful Text Messages Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 21-402 & 02-278 (May 8, 2023), <https://www.fcc.gov/ecfs/document/10508915228617/1> [hereinafter USTelecom Comment].

⁴ Reply Comments of 28 State Attorneys General, *In re* Targeting and Eliminating Unlawful Text Messages Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 21-402 & 02-278 (June 6, 2023), <https://www.fcc.gov/ecfs/document/10606091571575/1>.

I. The misuse of consumers’ “consents” by lead generators and others is a major factor contributing to the increasing number of illegal telemarketing calls and texts.

Lead generators, a common feature on the internet, refer potential customers to vendors.⁵ The “leads”—the potential customers—are sold directly to sellers of products or services (such as lenders or insurance companies) or to lead aggregators who then sell the leads to sellers.⁶ As courts and the FTC have noted, it is not always apparent from a particular website that it is operated by a lead generator rather than an actual lender or seller of other products or services,⁷ and misrepresentations on lead generators’ sites are common.⁸ Consumers who visit a lead generator’s site are typically invited to enter their contact information into a form or application on the site. The site operator then sells the consumer’s information to interested lenders or sellers, sometimes with some level of data analysis, and through an automated auction. A 2011 survey found that leads are sometimes sold for over \$100;⁹ more recent online data indicates that leads can be sold for as much as \$600 each.¹⁰

R.E.A.C.H., which describes itself as an organization filing on behalf its “direct-to-consumer marketing, lead generation and performance marketing members,” admitted in its comments that lead generators are responsible for a “meaningful percentage” of entirely fabricated consent agreements.¹¹ R.E.A.C.H.’s comments provide particularly telling information about how the lead generator industry works to facilitate telemarketing robocalls. Its comments explain that “once the consumer has submitted the consent form the company seeks to profit by reselling the “lead” multiple—perhaps hundreds—of times over a limitless period of time. Since express written consent does not expire, the website is free to sell the consent forever.”¹²

⁵ See generally Fed. Trade Comm’n, Follow the Lead Workshop—Staff Perspective (Sept. 2016), https://www.ftc.gov/system/files/documents/reports/staff-perspective-follow-lead/staff_perspective_follow_the_lead_workshop.pdf (overview of lead generation industry).

⁶ *Id.* at 2 (“A lead is someone who has indicated—directly or indirectly—interest in buying a product.”).

⁷ See CFPB v. D & D Mktg., 2016 WL 8849698 (C.D. Cal. Nov. 17, 2016).

⁸ *Id.*; Federal Trade Comm’n, Follow the Lead Workshop—Staff Perspective 5. See, e.g., Consumer Fin. Prot. Bureau v. RD Legal Funding, L.L.C., 332 F. Supp. 3d 729, 782–783 (S.D.N.Y. 2018); MacDonald v. CashCall, Inc., 2017 WL 1536427, at *12 (D.N.J. Apr. 28, 2017), *aff’d on other grounds*, 883 F.3d 220 (3d Cir. 2018) (affirming denial of arbitration motion); Consumer Fin. Prot. Bureau v. CashCall, Inc., 2016 WL 4820635, at *10 (C.D. Cal. Aug. 31, 2016).

⁹ Consumer Federation of America, **Survey of Online Payday Loan Websites** 7 (Aug. 2011), <https://consumerfed.org/pdfs/CFAsurveyInternetPaydayLoanWebsites.pdf>.

¹⁰ See Leads Hook, Blog post, *How to Make Money Selling Leads in 2024 (& How Much to Charge)* (July 12, 2023), available at <http://web.archive.org/web/20240623104337/https://www.leadshook.com/blog/how-to-sell-leads/>.

¹¹ Comment of Responsible Enterprises Against Consumer Harassment, CG Dockets Nos. 21-402, 02-278, at 1 (May 9, 2023), <https://www.fcc.gov/ecfs/document/10509951114134/1>.

¹² *Id.* at 3 (emphasis added).

R.E.A.C.H.'s comments also point out that lead generators and aggregators may sell the record of a consumer's consent to receive calls from one seller to "multiple buyers . . . (or) to other aggregators, who hope that they can sell the [consent to be called] to others within its network."¹³ And, as explained by R.E.A.C.H.,¹⁴ after each sale, all the owners of the consent, including the original lead generator and every subsequent purchaser of the consent, "is free to sell it again."¹⁵

The result of all these sales: "Each time the website operator—or an intermediary "aggregator" . . . sells the consumer's data a new set of phone calls will be made to the consumer."¹⁶

II. The regulation will bring substantial benefits to consumers and small businesses.

We pointed out that the substantial **financial gains** from the Commission's order to small businesses, consumers, and the entire telephone system must all be considered. The lead generators and telemarketers complaining about the FCC's December 18, 2023 order are not the only small businesses impacted by this rule. All the other kinds of small businesses—those that do not *make* money from telemarketing robocalls—will see massive benefits from the Commission's order.

After the Commission requested comments on the impact of the rule to small business,¹⁷ almost 400 small business owners and employees filed express comments to the FCC's website in this docket *strongly supporting the order*. All of the comments from small business supporting the rule are attached to this *ex parte* letter as an Appendix.

These small business commenters routinely noted that telemarketing calls are burdensome, bad for business, and costly. For example, below are just a few of the hundreds of comments filed by small businesses *in favor* of the new regulation:

- I work in mortgage. I rely on my cell phone to communicate with clients and the amount of telemarketing calls is horrible. I have to answer each one as it MIGHT be a client. This ties up SO MUCH of my time and is so annoying. **And even more so, when I pull credit for my clients, they can get upward of SIXTY calls from telemarketing.** It's INSANE and crippling for them. We need to get rid of telemarketing AND trigger leads.¹⁸
- I am a small business owner (Real estate). My phone is my lifeline. All of my business is either generated or facilitated on my phone. **In the current climate, I get more spam calls in a day than I get business calls.** The spammers have begun spoofing numbers to use local numbers. As a real estate professional, I have to answer these calls for fear of it being a lead or customer call. In the recent past, I've left calls unanswered. Were they spammers, or

¹³ *Id.* at 6.

¹⁴ *Id.* at 3 (emphasis added).

¹⁵ *Id.* at 6 (emphasis added).

¹⁶ *Id.* at 3 (emphasis added).

¹⁷ Second FNPRM, *supra* Note 1, at ¶ 87.

¹⁸ Comment of Donna Miller, CG Docket No. 02-078 (Mar. 8, 2024), <https://www.fcc.gov/ecfs/search/search-filings/filing/103081094124655> (emphasis added).

was it a legit business call? Did I lose business and therefore money from unanswered calls? I would venture to say, yes. I did, and many others are doing the same. As a sales professional, I understand the need for free-market practices, but this has gotten out of hand. There is no regard for people and their lives. Calls at all times of the morning and night. Please help the small business owners of the nation from this plague.¹⁹

- I own a small locksmith business. We provide an "express service" that primarily helps people locked out of car, home or business. These persons need fast help so they don't wait for a callback if you miss their call. The customer loses, my business loses... and even the obnoxious telemarketer has wasted his time because I never buy anything from them. That they have the legal right to call without my explicit permission makes little sense to me. Neither putting my phone number on the internet, nor giving it to any other company, is an invitation for calls from just anyone. It's almost like a thousand people overheard you telling your number to someone and they figure it's ok for them to call too. It isn't ok at all. Please stop whatever the telemarketers are doing to get my number. I consider all telemarketer calls to be harassment.²⁰
- I am the owner of a small business. We rely on our phone lines to communicate with customers, suppliers and others. When telemarketers call, they tie up the phone lines, preventing us from doing business and from receiving other important calls. For 10 years, our company was proud of our record of having a live person answer every call within 3 rings. Three years ago, we were forced by the telemarketing calls to use an "auto-attendant" phone tree to weed out the robo-calls. These calls cost us time, and time is money for small businesses. They are also incredibly annoying, and **damage the morale and attitudes of our employees.** The problem on our company cell phones is worse. We are unable to put an auto attendant on the cell phones, and as a business, we can't just ignore phone calls from numbers we don't recognize. **The telemarketing calls and robo-calls have made our cell phones nearly useless for business purposes.** The FCC must close the lead generator loophole and stop telemarketers from harassing small business owners and cell phone users.²¹
- I am the chief executive of a small business that collects input from experts and influencers around the world on behalf of our clientele. To do our work, we must be in rapid contact with hundreds of individuals each month by mobile phone. Typically, we do not have their phone numbers in our phones before they call, meaning that we are not able to white-list them in advance. This means we must answer almost every unknown call that we receive. **Because we have to answer all calls, the increasing number of telemarketing calls that we are receiving are [a] severe economic burden on our business.** Each telemarketing call requires one of our small staff to interrupt what they are doing, answer the call, waste time listening long enough to determine that it is telemarketing call, hang us, and refocus on the task they were doing. There is also the possibility that they will miss an important call

¹⁹ Comment of David A. Bramblett, CG Docket No. 02-278 (Mar. 7, 2024), <https://www.fcc.gov/ecfs/search/search-filings/filing/1030748480268>.

²⁰ Comment of Chris Robinson, CG Docket No. 02-278 (Mar. 11, 2024), <https://www.fcc.gov/ecfs/search/search-filings/filing/10308034167226>.

²¹ Comment of Martha White, CG Docket No. 02-078 (Mar. 7, 2024), <https://www.fcc.gov/ecfs/search/search-filings/filing/10306101225033> (emphasis added).

while dealing with the telemarketing call. Lately, we are becoming so burdened by telemarketing calls that some of our employees are resorting to ignoring calls from unknown numbers out of sheer frustration. When such a call comes from a genuine contact, this impairs our productivity at best and risks us losing a source of knowledge. A crucial aspect is the economic asymmetry of telemarketing calls. The telemarketer uses a robocaller that costs them virtually nothing per call. But we have to spend actual human staff time dealing with each telemarketing call. **Robocalls cause [telemarketers] not merely to transfer economic value from small businesses to telemarketers, but actually to inflict costs on small businesses far out of proportion to whatever economic gains they themselves receive.** They are huge net value-destroying mechanism for the national economy and especially for small businesses.²²

Even some of the small businesses that use leads bought from lead generators are likely to benefit from the FCC's order because it may force lead generators to be more circumspect with the sale of their leads. As explained by one small business, lead generators currently "artificially inflate the cost per click figures by selling the lead to multiple buyers. The business will win [with the new requirements] because the current model almost demands immediate follow-up before the customer is saturated. The consumer will win by knowing exactly who and how many people will be contacting them."²³

III. Reducing telemarketing calls will facilitate blocking of scam calls.

A significant reduction in the one billion-plus telemarketing calls made to U.S. telephones each month will have additional benefits. By reducing the number of these unwanted calls, the communications system will be better able to identify and stop the scam calls. Also, eradicating the majority of unwanted calls will start the process of restoring the value of telephone voice service.

The trade association for the telephone providers—USTelecom-The Broadband Association—vigorously supported the Commission's proposal in this proceeding.²⁴ The industry support for the regulation is because the flood of telemarketing calls makes it more difficult for voice service providers to detect which calls are telemarketing—and potentially legal—and which calls are scams.

A dramatic reduction in the number of telemarketing calls will facilitate the efforts of the telephone industry to identify and block the scam calls. This dynamic was illustrated in the 2023 testimony to the U.S. Senate Subcommittee on Communications, Media and Broadband, by Michael Rudolph, Chief Technology Officer of YouMail, Inc.:

One of the difficulties in analyzing communications is determining whether a communication is spam, generally unwanted by most recipients, or is perpetrating a

²² Comment of William Messenger, Theology of Work Project, Inc. (March 11, 2024), <https://www.fcc.gov/ecfs/search/search-filings/filing/10309038626825> (emphasis added).

²³ Comment of Mark Aussieker, CG Docket Nos. 20-402 & 02-278 (Jan. 30, 2024), <https://www.fcc.gov/ecfs/search/search-filings/filing/101302326222135>.

²⁴ See USTelecom Comment *supra* note 3; see also Letter from Margot Saunders, National Consumer Law Center & Josh Bercu, USTelecom-The Broadband Association to Marlene Dortch, Federal Comm'n's Comm'n, Notice of *ex parte* Presentation, CG Docket No. 02-278 (June 14, 2023), <https://www.fcc.gov/ecfs/document/10615228275141/1>.

scam or committing fraud. This is particularly challenging as the content of a communication may be nearly identical when it comes from an enterprise such as a bank, utility, or government agency as it is when it originates from an imposter.²⁵

Indeed, he points out that scam/fraud calls are typically disguised as telemarketing calls to maximize their success.²⁶ Moreover, many of the providers responsible for the scam calls are also responsible for a sizeable proportion of the telemarketing calls.²⁷

IV. The FTC and the Centers for Medicare and Medicaid have also required one-to-one consent.

A. The FTC's Telemarketing Sales Rule has required one-to-one consent for many years.

In addition to the FCC's regulations, the FTC's Telemarketing Sales Rule (TSR)²⁸ governs prerecorded telemarketing calls. The FTC's TSR has required one-to-one consent for prerecorded telemarketing calls for some time.

With respect to prerecorded calls, the TSR declares:

It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in the following conduct:

...

(v) Initiating any outbound telephone call that delivers a prerecorded message, . . . unless:

(A) In any such call to induce the purchase of any good or service, the seller has obtained from the recipient of the call an express agreement, in writing, that:

- (i) The seller obtained only after a clear and conspicuous disclosure that the purpose of the agreement is to authorize the seller to place prerecorded calls to such person;
- (ii) The seller obtained without requiring, directly or indirectly, that the agreement be executed as a condition of purchasing any good or service;
- (iii) Evidences the willingness of the recipient of the call to receive calls that deliver prerecorded messages by or on behalf of a specific seller; and
- (iv) Includes such person's telephone number and signature;

²⁵ Protecting Americans from Robocalls, Hearing before the S. Comm. on Commerce, Science & Transportation, Subcomm. on Communications, Media & Broadband, 118th Congress, 1st Session, at 3 (Oct. 24, 2023) (written testimony of Michael Rudolph, Chief Technology Officer of YouMail, Inc.), <https://www.commerce.senate.gov/services/files/AB431156-739B-46FE-98F3-FAAEB4145F60>.

²⁶ *Id.* at 4.

²⁷ *Id.* at 13-14.

²⁸ 16 C.F.R. § 310.4(b)(1)(v).

The TSR’s requirement that “the seller” obtain the consumer’s consent, and that the consent allows delivery of prerecorded messages “by or on behalf of a specific seller,” make it clear that a third party that is not the seller’s agent cannot obtain the consumer’s consent, and that consent applies only to the specific, named seller so cannot be sold or transferred. The FTC has explicitly reiterated this point in its Business Guidance,²⁹ which explains:

Does a consumer’s written agreement to receive prerecorded message calls from a seller permit others, such as the seller’s affiliates or marketing partners, to place such calls? No. The TSR requires that the written agreement identify the single “specific seller” authorized to deliver prerecorded messages. The authorization does not extend to other sellers, such as affiliates, marketing partners, or others.

May a seller obtain a consumer’s written permission to receive prerecorded messages from a third-party, such as a lead generator? No. The TSR requires the seller to obtain permission directly from the recipient of the call. The seller cannot rely on third-parties to obtain permission.

Are there specific procedures for obtaining a consumer’s written agreement to receive calls that deliver prerecorded messages? There are three essentials:

1. Before the consumer agrees, the seller must **clearly and conspicuously disclose the consequences** of agreeing — namely, that the agreement will result in the seller delivering prerecorded messages to the consumer via telemarketing calls;
2. The seller may **not** require, directly or indirectly, that a consumer agree to receive prerecorded message calls as a precondition for purchasing or receiving any good or service; and
3. The seller must give the consumer an opportunity to designate the telephone number to which the calls may be placed.

Sellers bear the burden of demonstrating that these prerequisites have been met, and that they possess the required written agreements from consumers to receive prerecorded calls for all such calls that they place.

²⁹ Federal Trade Comm’n, Business Guidance, Complying with the Telemarketing Sales Rule, <https://www.ftc.gov/business-guidance/resources/complying-telemarketing-sales-rule#prerecordedmessages>.

B. The FTC has enforced the TSR for violating the one-to-one consent rule in multiple cases.

These requirements in the TSR have been enforced in highly visible cases brought by the FTC along with “more than 100 federal and state law enforcement partners nationwide, including the attorneys general from all 50 states and the District of Columbia.”³⁰

The FTC’s 2023 complaint against Fluent, LLC noted that the defendant was a “consent farm lead generator” that purported “to collect, through a single click of a button or checkbox on their websites, consumers’ broad agreement to receive marketing solicitations, including robocalls and other telemarketing calls, from dozens or even hundreds of third parties.”³¹ The case settled when Fluent agreed to pay a \$2.5 million civil penalty and, among other things, to be banned from engaging in, assisting, or facilitating robocalls.³²

A similar case, with similar results, was filed against Viceroy Media Solutions, LLC, which was accused of operating “lead generation websites, quick-jobs.com and localjobindex.com, that act as consent farms to gather consumers’ personal information along with their supposed consent to receive robocalls.”³³ The FTC noted that “[i]n reality, consumers have not consented to receive robocalls, as the defendants claim when selling their leads to telemarketers.”³⁴

This is the exact behavior that is explicitly banned by the FCC’s one-to-one consent rule and has been explicitly banned by the FTC since the TSR went into effect in 2010.³⁵ The lead generators that have been flagrantly ignoring the requirements of the TSR should not be permitted to roll back the FCC’s order just because they have not yet been targeted by the FTC for their non-compliance.

C. Telemarketing calls for Medicare Supplemental Insurance also must comply with one-to-one consent requirements.

On April 4, 2024, the Centers for Medicare and Medicaid Services (CMS) issued a rule, effective October 1, 2024, requiring one-to-one consent for all telemarketing calls relating to the sale of Medicare Advantage or Part D. CMS explicitly designed the consent process for these calls to be “consistent with Federal Trade Commission (FTC) and Federal Communications Commission

³⁰ Press Release, Federal Trade Comm’n, FTC, Law Enforcers Nationwide Announce Enforcement Sweep to Stem the Tide of Illegal Telemarketing Calls to U.S. Consumers (July 18, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-law-enforcers-nationwide-announce-enforcement-sweep-stem-tide-illegal-telemarketing-calls-us>.

³¹ *Id.*

³² See Joint Motion for Entry of Proposed Stipulated Order, United States v. Fluent, L.L.C., No. 9:23-cv-81045 (July 17, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/1923230fluentjointmotionforentryofproposedstipulatedfinalorder.pdf.

³³ FTC Press Release, *supra* note 30.

³⁴ *Id.*

³⁵ See 75 Fed. Reg. 48,458 (Aug. 10, 2010).

(FCC) regulations.”³⁶ This new regulation, which became effective October 1, 2024, applies to telemarketers of health insurance, specifically Medicare supplemental insurance, likely including apply many of the lead generators and telemarketers complaining about the FCC’s new rule.³⁷

CMS, which refers to lead generators in its rule as “third-party marketing organizations” (“TPMOs”), noted:

Some TPMOs have been selling and reselling personal beneficiary data, which can undermine existing rules that prohibit cold calling people with Medicare and result in other aggressive marketing tactics for Medicare Advantage and Part D plans. Individuals may be unaware that by placing a call or clicking on a generic-looking web link, they are unwittingly agreeing and providing consent for their personal beneficiary data to be collected and sold to other entities for future marketing activities. To curtail this practice, in this final rule, *CMS is codifying the requirement that personal beneficiary data collected by a TPMO for marketing or enrolling the individual into a Medicare Advantage or Part D plan may only be shared with another TPMO when prior express written consent is given by the individual.*³⁸

Specifically, pursuant to the new regulations: the TPMO must obtain this written consent through a transparent, and prominently placed, disclosure from the individual to share the information and be contacted for marketing or enrollment purposes, separately for each TPMO that receives the data; i.e., one-to-one consent, which is generally consistent with Federal Trade Commission (FTC) and Federal Communications Commission (FCC) regulations.³⁹

Stressing that compliance will be easier if common rules apply across the board, CMS explained the reasons it designed its requirements for prior express written consent to be consistent with FCC and FTC regulations for these calls:

By adopting the one-to-one consent requirement, we will prevent TPMOs from having to build a different consent and disclosure structure on their websites and systems because it aligns with the one-to-one consent structure in the FCC rules on consenting to telemarketing calls or texts using an automatic telephone dialing system or an artificial or prerecorded voice. . . . Thus, the shared one-to-one consent structure will make it easier for TPMOs to collect both consents at the same time; a

³⁶ Fact Sheet on Contract Year 2025 Medicare Advantage and Part D Final Rule (CMS-4205-F), <https://www.cms.gov/newsroom/fact-sheets/contract-year-2025-medicare-advantage-and-part-d-final-rule-cms-4205-f> [hereinafter Fact Sheet on Medicare Final Rule].

³⁷ *Medicare Program; Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs*, 89 Fed. Reg. 24862, 30600-04, 30622 (Apr. 23, 2024), <https://www.federalregister.gov/documents/2024/04/23/2024-07105/medicare-program-changes-to-the-medicare-advantage-and-the-medicare-prescription-drug-benefit> [hereinafter “*Medicare Program*, 89 Fed. Reg.”].

³⁸ Fact Sheet on Medicare Final Rule (*emphasis added*).

³⁹ *Id.*

consent to share the beneficiary's personal data with a specific entity and the consent for that entity to robotext, robocall, or call the beneficiary, as applicable.⁴⁰

The FCC's approach serves this same purpose, aligning its requirements with the FTC's (and now with CMS's) so that a single standard governs all prerecorded telemarketing calls.⁴¹

CMS's regulation rebuts the claims of lead generators and telemarketers that consumers value calls that result from lead generators trading consents, referencing "complaints ... from beneficiaries and their advocates and caregivers about receiving harassing and unwanted phone and email solicitations from individuals attempting to enroll them in MA and Part D plans."⁴² Further, it states: "[T]he overwhelming number of marketing calls beneficiaries receive from TPMOs are unwanted, confusing, and inhibit the beneficiary's ability to make an informed choice."⁴³ It concludes that its rule would

limit when a beneficiary's personal data can be shared and ensures that they know who will be contacting them, which we believe will lower the number of complaints, be less overwhelming, and will result in beneficiaries having a more meaningful discussion with fewer agents, and ultimately enrolling in a health plan that best meets their needs.⁴⁴

V. Prohibiting lead generators from sharing telemarketing consent forms will still permit lead generators to provide helpful services to consumers and businesses.

Regardless of the hysteria emanating from the lead generator industry about the rule, it will not prevent lead generation. Lead generators will not be able to obtain a consumer's consent to receive prerecorded or telemarketing calls through a single agreement that applies to multiple potential callers, and they will not be able to sell or transfer a consumer's consent to others besides the identified seller. It will also end the use of consent farms which create fake consents from consumers then bombard them with unwanted calls. However, lead generators will still be able to enable consumers' consent to receive calls. Compliance with the FCC's rules will simply mean that consumers understand and give true, knowing consent to receive calls from particular sellers.

All of the other information that lead generators provide to consumers, including direct referrals to sellers of products and services through weblinks, is unaffected by compliance with the FCC's rules. And nothing prohibits lead generators from providing the offered referrals through email or snail mail (addresses are often required information), or even by simply displaying the information right on the website. Many lead generators currently do not require the entry of a telephone number to

⁴⁰ *Medicare Program*, 89 Fed. Reg. at 30602.

⁴¹ Second FNPRM, *supra* Note 1, at ¶ 30 n.71.

⁴² *Medicare Program*, 89 Fed. Reg. at 30,449.

⁴³ *Id.* at 30,602 (footnotes omitted).

⁴⁴ *Id.*

refer a consumer to a seller,⁴⁵ and others ask for minimal information (like zip code) and then refer the consumer right to a seller's website.⁴⁶

Nothing in the FCC's rule prevents a lead generator from receiving the consumer's information and then generating a list of sellers that want to contact the consumer, and asking the consumer to check a box and provide a signature for any seller the consumer wants to hear from.⁴⁷ It can do this in real time, while the consumer is online, and the agreement can authorize prerecorded messages. Indeed, it is very common for price comparison and shopping websites to operate in this way, giving the consumer a list of options to choose from. As the FCC stated in its order:

[E]ven under our new rule, comparison shopping websites can obtain the requisite consent for sellers to robocall and robotext consumers using easily-implemented methods. For instance, a website may offer a check box list that allows the consumer to choose each seller that they wish to hear from. Alternatively, a comparison shopping website may offer the consumer a clickthrough link to a business so that it may obtain requisite consent from the consumer directly. Our rule does not prohibit websites from obtaining leads and merely codifies reasonable limits on when those leads allow sellers to use robocalls and robotexts to reach consumers.⁴⁸

Many lead generators already engage in a healthy business directing consumers to appropriate sellers of products and services without collecting and trading consents for robocalls.⁴⁹ This industry can continue exactly as it has been, providing value to sellers and consumers alike. Only those websites that have already been violating the TSR will have to change their practices to comply with both the FTC and the FCC's express requirements.

VI. Conclusion.

Reducing telemarketing calls will produce significant benefits not only for individual consumers and small businesses, but also for the entire ecosystem of telephone voice service. In a time when a minority of people answer calls from unknown numbers,⁵⁰ the benefits of reducing the number of telemarketing calls will provide positive ripple effects for the entire system.

⁴⁵ See, e.g., <https://www.google.com/travel/flights>.

⁴⁶ See, e.g., <https://best.ratepro.co/>; <https://www.esurance.com/>; www.nerdwallet.com.

⁴⁷ See Second FNPRM, *supra* note 1.

⁴⁸ *Id.* at ¶ 41 (footnotes omitted).

⁴⁹ See, e.g., Cybernews, Best VPNs (Mar. 2024), <https://us.cybernews.com/lp/best-vpn/> (providing affiliate links for VPN providers); Top10.com, Top 10 Best Website Builders of 2024 (last updated Mar. 2024), <https://www.top10.com/website-builders/comparison> (providing affiliate links for website builders);

⁵⁰ See Businesswire, TNS Survey: 75 percent of Americans Will Never Answer Calls from Unknown Numbers (July 26, 2022), <https://www.businesswire.com/news/home/20220726005226/en/TNSSurvey-75-of-Americans-Will-Never-Answer-Calls-from-Unknown-Numbers>; Octavio Blanco, Consumer Reports, *Mad About Robocalls?* (Apr. 2, 2019), <https://www.consumerreports.org/robocalls/mad-about-robocalls/> (seventy percent of phone subscribers no longer answer the phone for numbers they do not recognize or if the caller's number is anonymous).

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

Thank you very much for your consideration.

Sincerely,

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