

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

In the Matter of )
Rules and Regulations Implementing the ) CG Docket No. 02-278
Telephone Consumer Protection Act of )
1991 )
ACA International, the Edison Electric )
Institute, the Cargo Airline Association, and )
the American Association of Healthcare )
Administrative Management Petition for )
Partial Reconsideration )
Enterprise Communications Advocacy )
Coalition Petition for Reconsideration )

ORDER ON RECONSIDERATION AND DECLARATORY RULING

Adopted: December 22, 2022

Released: December 27, 2022

By the Commission:

I. INTRODUCTION

1. The Telephone Consumer Protection Act of 1991 (TCPA) restricts certain calls to residential and wireless telephone numbers absent the prior express consent of the called party or a statutory exemption, but authorizes the Commission to exempt certain calls from these restrictions.

2. In 2020, the Commission adopted measures to implement section 8 of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act) by limiting the number of exempted calls that can be made to residential lines; requiring that callers making exempt calls allow consumers to opt out of future exempt calls; and codifying in its rules the existing exemptions for certain types of calls to wireless numbers, including calls by package delivery companies, financial institutions, prison inmate calling services, and healthcare providers.

3. We now address two requests to revisit those actions as part of our ongoing work of combating unwanted robocalls while permitting legitimate callers to deliver information consumers have consented to receive. Specifically, we grant petitioners' request to allow exempted callers the option of

1 Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 (TCPA).

2 Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105, 133 Stat. 3274, § 8 (2019) (TRACED Act).

3 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 35 FCC Rcd 15188 (2020) (TCPA Exemptions Order).

4 See ACA International et al., Petition for Partial Reconsideration, CG Docket No. 02-278 (filed Mar. 29, 2021) (ACA Petition); Enterprise Communications Advocacy Coalition (ECAC), Petition for Reconsideration, CG Docket No. 02-278 (filed Mar. 17, 2021) (ECAC Petition).

obtaining either oral or written consent if they wish to make more calls than the numerical limits; however, we deny their requests to reconsider the numerical limits on exempted calls as well as the expanded opt-out requirements. Additionally, we grant ACA's request that an earlier Commission ruling on "prior express consent" for calls made by utility companies to wireless phones applies equally to residential landlines. Our decisions here preserve consumer privacy as intended by Congress while allowing callers to engage in important communications with the public.

## II. BACKGROUND

### A. Telephone Consumer Protection Act

4. The TCPA prohibits initiating "any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party" unless a statutory exemption applies or the call is "exempted by rule or order by the Commission under [section 227(b)(2)(B)]."<sup>5</sup> The TCPA also prohibits, without the prior express consent of the called party, any call using an automatic telephone dialing system or an artificial or prerecorded voice to any telephone number "assigned to a . . . cellular telephone service, . . . or any other radio common carrier service, or any service for which the called party is charged for the call" unless a statutory exemption applies or the call is exempted "by rule or order" of the Commission.<sup>6</sup>

5. Section 227(b)(2)(B) authorizes the Commission to adopt, by rule or order, exemptions from the ban on calls to residential lines for those "not made for a commercial purpose" and for "such classes or categories of calls made for commercial purposes" that do not adversely affect the privacy rights of the called party and do not transmit an unsolicited advertisement.<sup>7</sup> And 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."<sup>8</sup>

6. The Commission adopted exemptions pursuant to these statutory provisions, beginning in 1992, for calls to residential numbers that are not made for a commercial purpose, calls made for a commercial purpose that do not contain an unsolicited advertisement, and calls from tax-exempt nonprofit organizations,<sup>9</sup> and in 2012 for healthcare-related calls subject to the Health Insurance Portability and

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<sup>5</sup> See 47 U.S.C. § 227(b)(1)(B). The TCPA exempts from this prohibition calls for emergency purposes. *See id.*; see also 47 CFR § 64.1200(f)(4) (definition of "emergency purposes").

<sup>6</sup> See 47 U.S.C. §§ 227(b)(1)(A)(iii), 227(b)(2)(C). We refer to these calls herein as calls to "wireless numbers."

<sup>7</sup> 47 U.S.C. § 227(b)(2)(B).

<sup>8</sup> *Id.* § 227(b)(2)(C).

<sup>9</sup> 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. 39-41 (1992) (*1992 TCPA Order*) (noting that the problem of unsolicited commercial autodialed and prerecorded message calls represented a more serious concern for telephone subscribers than non-commercial autodialed and prerecorded message calls). The Commission also concluded that a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests and adopted an exemption for artificial voice or prerecorded voice message calls delivered to consumers with whom the company has an established business relationship. *Id.* at 8769-71, paras. 32-35. The Commission subsequently eliminated that exemption and required companies to obtain prior express written consent before delivering artificial-voice or prerecorded-voice *telemarketing* messages to their customers. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1846-48, paras. 39-43 (2012) (*2012 TCPA Order*). The *2012 TCPA Order* also amended the exemption for artificial or prerecorded voice calls to residential lines to include any call "made for a commercial purpose but [that] does not include or introduce an advertisement or constitute telemarketing." See *2012 TCPA Order*, 27 FCC Rcd at 1860, Appx. A.

Accountability Act of 1996 (HIPAA).<sup>10</sup> For wireless numbers, the Commission exempted calls from package delivery companies,<sup>11</sup> financial institutions, inmate phone service providers, and certain healthcare callers, subject to specific conditions.<sup>12</sup>

## B. TCPA Exemptions Order

7. In 2019, Congress enacted section 8 of the TRACED Act to require that the Commission ensure that any exemption granted under sections 227(b)(2)(B) or (C), allowing callers to make artificial voice, prerecorded voice, or autodialed calls without consent, include certain conditions.<sup>13</sup> Specifically, section 8(a) requires that any such exemption contain requirements with respect to: “(i) the classes of parties that may make such calls; (ii) the classes of parties that may be called; and (iii) the number of such calls that a calling party may make to a particular called party.”<sup>14</sup>

8. On December 29, 2020, the Commission issued a Report and Order adopting its proposal from the *TRACED Act NPRM*<sup>15</sup> to codify in its rules the previously granted exemptions for calls to wireless numbers in order to make those exemptions more clear and understandable for both callers and consumers.<sup>16</sup> In addition, the Commission amended its existing TCPA exemptions for calls made to residential telephone lines to ensure each satisfies section 8(a)’s requirement to identify who can call, who can be called, and any call limits.<sup>17</sup> Specifically, the Commission limited the number of exempted calls that can be made to a residential line to three artificial or prerecorded voice calls within any consecutive thirty-day period for three exemptions (the exemptions for non-commercial calls, commercial calls that do not constitute telemarketing, and calls by tax-exempt nonprofit organizations).<sup>18</sup> As for exempted HIPAA-related calls, the Commission amended the rules to limit the number of calls that can be made to a residential line to one artificial or prerecorded voice call per day, up to a maximum of three artificial or prerecorded voice calls per week.<sup>19</sup> The Commission noted that this limitation is identical to the condition imposed on healthcare calls to wireless numbers that are exempted under section 227(b)(2)(C).<sup>20</sup>

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<sup>10</sup> *2012 TCPA Order*, 27 FCC Rcd at 1853-54, paras. 60-61. We refer to these four categories of exempted calls to residential lines herein as “informational” calls. See 47 CFR §§ 64.1200(a)(3)(ii)-(v). We also emphasize that the 2020 amendments to these exemptions are not yet in effect.

<sup>11</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Order, 29 FCC Rcd 3432, 3437-38, para. 18 (2014) (*Cargo Airline*).

<sup>12</sup> See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7989, 8027-28, 8031-32, paras. 45-46, 138-39, 147-48 (2015) (*2015 TCPA Declaratory Ruling*).

<sup>13</sup> TRACED Act § 8(a) (codified at 47 U.S.C. § 227(b)(2)(I)).

<sup>14</sup> *Id.*

<sup>15</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Notice of Proposed Rulemaking, 35 FCC Rcd 11186, 11196-98, Appx. A (2020) (*TRACED Act NPRM*).

<sup>16</sup> See *TCPA Exemptions Order*, 35 FCC Rcd at 15192, para. 10.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* at 15194, 15197, 15198, paras. 15, 28, 33.

<sup>19</sup> See *TCPA Exemptions Order*, 35 FCC Rcd at 15199, para. 38.

<sup>20</sup> See *id.* (citing *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 8031-32, paras. 147-48). We note that the amendments to 47 CFR § 64.1200(a)(3)(ii)-(v), (b)(2), (b)(3), and (d) will not go into effect until the Commission announces the Office of Management and Budget’s approval of these rules in the Federal Register. The Commission has stated that callers will have six months from publication of such notification in the Federal Register to come into compliance with the amended rules. See *TCPA Exemptions Order*, 35 FCC Rcd at 15200, para. 42.

9. The amended rules adopted in the Report and Order also require that residential telephone subscribers be permitted to “opt out” of artificial and prerecorded voice calls made pursuant to these exemptions.<sup>21</sup> Under these rules, a consumer who wants to avoid further artificial or prerecorded voice calls can opt out by dialing a telephone number (required to be provided in the artificial or prerecorded voice message) to register his or her do-not-call request in response to that call.<sup>22</sup> The rules also require that the caller must provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request.<sup>23</sup>

10. Two parties asked the Commission to reconsider the new requirements.<sup>24</sup> Both ACA and ECAC request that the Commission correct amended rules that they contend inadvertently imposed a written consent requirement to exceed the numerical limits placed on exempted calls to residential lines.<sup>25</sup> ACA also seeks reconsideration of the numerical limits and opt-out requirements imposed on exempted non-telemarketing calls to residential lines, arguing that these limitations are arbitrary and unnecessary.<sup>26</sup> ECAC contends that placing differing numerical limitations on certain health care calls compared to other types of calls to residential lines creates impermissible content-based restrictions that violate the First Amendment.<sup>27</sup> In addition, ACA challenges our retention of the existing limitations on package delivery notifications to wireless numbers and requests that the Commission confirm that a 2016 declaratory ruling on calls by utilities to wireless numbers applies equally to similar calls made to residential lines.<sup>28</sup> On April 12, 2021, the Commission published notice of the petitions for reconsideration in the Federal Register.<sup>29</sup> Ninety-seven parties, including 91 individuals, filed comments responding to the petitions, and eight other parties, including one individual, filed replies.<sup>30</sup>

### III. ORDER ON RECONSIDERATION

11. On reconsideration of the *TCPA Exemptions Order*, we revise the Commission’s rule requiring prior express written consent to make informational calls over the numerical limits to permit such callers to obtain the necessary consent either orally or in writing. We decline, however, to revise any of the numerical limitations on the number of exempt non-telemarketing calls to residential lines that we established in the *TCPA Exemptions Order*. We also conclude that the differing numerical limitations for different categories of exempt calls to residential lines are both constitutional and necessary to advance the health and safety of consumers. We also retain the opt-out requirements for exempt informational calls. Finally, we decline to revisit the limitations on package delivery notifications to wireless numbers that have been in place since 2015 and confirm that the Commission’s 2016 declaratory ruling on calls by utilities to wireless numbers applies equally to similar calls made to residential lines.

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<sup>21</sup> See 47 CFR § 64.1200(b)(2)-(3); see also *supra*, n.20.

<sup>22</sup> *Id.* § 64.1200(b)(2).

<sup>23</sup> *Id.* § 64.1200(b)(3).

<sup>24</sup> See ACA Petition; ECAC Petition.

<sup>25</sup> See ACA Petition at 4-9; ECAC Petition at 4-5.

<sup>26</sup> See ACA Petition at 9-17.

<sup>27</sup> See ECAC Petition at 11-13.

<sup>28</sup> See ACA Petition at 15-16 and 18-20.

<sup>29</sup> Federal Communications Commission, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petitions for Reconsideration, 86 Fed. Reg. 18934 (Apr. 12, 2021) (setting April 27, 2021 as the due date for oppositions and May 7, 2021 for replies to oppositions).

<sup>30</sup> See Appx. C. The 92 individuals filed identical comments in support of ACA’s petition.

### A. Consent Requirement for Exempt Calls to Residential Lines

12. We grant petitioners' request that we clarify that callers may obtain consent either orally or in writing to exceed the numerical limits on artificial or prerecorded voice calls to residential telephone lines made under the exemptions contained in section 64.1200(a)(3)(ii)-(v) of our rules.<sup>31</sup> We agree with the petitioners and commenters, including both industry and consumer organizations, that the Commission did not intend to require that such callers obtain consent only in writing.<sup>32</sup> While the text of the *TCPA Exemptions Order* did not specify that consent must be obtained in writing, we agree with petitioners that the amended rule implementing the numerical limitations appears to require prior express written consent to exceed those limitations.<sup>33</sup> As a result, we amend section 64.1200(a)(3) to make clear that consent for informational (i.e., non-telemarketing) calls to residential telephone numbers can be obtained orally or in writing, consistent with longstanding Commission rules and precedent, as discussed below.<sup>34</sup>

13. We agree with petitioners and commenters that there is no reason for the consent requirements for informational calls to residential lines to differ from the consent requirements for informational calls to wireless numbers, which allow for either oral or written consent.<sup>35</sup> In addition, as some commenters note, to extend the written consent requirement to informational calls that include calls from utilities and healthcare providers could impair the ability of these callers to provide important public safety information to consumers,<sup>36</sup> though we note that to the extent such calls are "necessary in any situation affecting the health and safety of consumers," they would fall under the exemption for "calls made for emergency purposes" and thus would not require prior express consent.<sup>37</sup>

14. The Commission's rules prior to adoption of the *TCPA Exemptions Order* did not require prior express written consent for artificial or prerecorded voice message calls made under any of the exemptions for calls to residential lines.<sup>38</sup> The *TCPA Exemptions Order* expressed no intent to amend these rules to require written consent to make informational artificial or prerecorded voice calls to residential lines, and it provided no justification for such a requirement. In fact, the text of the *TCPA Exemptions Order* refers only to "prior express consent": "callers can make more than three non-commercial calls using an artificial or prerecorded voice message within any consecutive thirty-day period by obtaining the *prior express consent* from the called party, including *by using an exempted call*

<sup>31</sup> See ACA Petition at 4-9; ECAC Petition at 4-5. Section 64.1200(a)(3)(ii)-(v) of our amended rules placed numerical limitations on the number of artificial and prerecorded voice informational calls that can be made to a residential telephone number without consent under a recognized exemption (i.e., non-commercial calls; commercial calls that do not include an advertisement or constitute telemarketing; tax-exempt nonprofit organization calls; and HIPAA-related calls). See 47 CFR § 64.1200(a)(3)(ii)-(v). The Commission indicated that a caller must obtain the consent of the called party to exceed the numerical limitations. See *TCPA Exemptions Order*, 35 FCC Rcd at 15195, para. 20.

<sup>32</sup> See, e.g., AICC Comments at 3; Joint Consumer Organizations Comments at 9; PACE Comments at 1-2; Sirius XM Comments at 1-2.

<sup>33</sup> See ACA Petition at 5; ECAC Petition at 4; see also ABA et al. Comments at 6; AICC Comments at 3; Joint Consumer Organizations Comments at 9; Cal Utilities Reply Comments at 4-5.

<sup>34</sup> See Appx. A.

<sup>35</sup> See, e.g., AICC Comments at 3; PACE Comments at 1-2.

<sup>36</sup> See, e.g., ABA et al. Comments at 6; Dominion Energy Comments at 1-2; AFSA Reply Comments at 1-2; NRECA Reply Comments at 3.

<sup>37</sup> 47 CFR §§ 64.1200(a)(3)(i), (f)(9); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 31 FCC Rcd 9054, 9061-63, paras. 17-21 (2016) (*EI Declaratory Ruling*).

<sup>38</sup> See 47 CFR § 64.1200(a)(3) (stating that prior written consent is required "unless the call" is made under one of the five enumerated exemptions).

to obtain consent.”<sup>39</sup> The Commission’s rules distinguish “prior express consent” from “prior express written consent.”<sup>40</sup> Only the latter requires consent to be obtained in writing.<sup>41</sup> To obtain consent by “using an exempted call” strongly suggests that the Commission contemplated that such callers could obtain consent orally while communicating with the called party.

15. In addition, the Commission’s longstanding precedent has expressly limited the written consent requirement only to telemarketing calls.<sup>42</sup> We note, for example, that the Commission did not amend the definition of “prior express written consent” in our rules, which is limited to “advertisements or telemarketing messages” to encompass exempted informational calls to residential lines.<sup>43</sup> As a result, we agree with the petitioners and commenters that there is no indication that the *TCPA Exemptions Order* intended to change the Commission’s longstanding rules and precedent that apply the written consent requirement only to telemarketing calls. As noted above, commenters, including several consumer organizations, unanimously support this conclusion, and none oppose it. We therefore amend section 64.1200(a)(3) of our rules accordingly to implement this clarification.<sup>44</sup>

16. *Effective Date.* The effective date of the amended rule contained herein is six months after publication in the Federal Register. This timeframe allows the amended rule to take effect on the same date as the rules that were adopted in the *TCPA Exemptions Order* that have not yet gone into effect. In the *TCPA Exemptions Order*, the Commission concluded that a six-month implementation period was warranted to allow callers an opportunity to take measures to comply with the numerical limits and opt-out requirements on artificial or prerecorded voice calls made to residential lines.<sup>45</sup> The Commission stated that this six-month period would commence upon publication in the Federal Register of Office of Management and Budget (OMB) approval of those rules.<sup>46</sup> OMB has approved those rules, but the Commission has not yet published the Federal Register notice to commence the six-month implementation period for those rules to become effective.<sup>47</sup>

17. Because the amended rule contained herein is interrelated with the rules from the *TCPA Exemptions Order* that are not yet in effect, we are establishing an effective date of six months after Federal Register publication of this rule such that all the amended rules can take effect on the same date. As a result, our forthcoming Federal Register publication will set the same effective date for both the rules from the *TCPA Exemption Order* that are not yet in effect and for the amended rule contained

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<sup>39</sup> See *TCPA Exemptions Order*, 35 FCC Rcd at 15195, para. 20 (emphasis added).

<sup>40</sup> See, e.g., 47 CFR § 64.1200(a)(2) (distinguishing between telemarketing calls that require “prior express written consent” from other calls that require only “prior express consent” when made to certain categories of telephone numbers including wireless telephone numbers); *2012 TCPA Order*, 27 FCC Rcd at 1838-41, paras. 20-28 (revising the TCPA consent rules to require prior express written consent for autodialed or prerecorded *telemarketing* calls, but maintain the existing prior express consent rules for *non-telemarketing, informational* calls) (emphasis in original).

<sup>41</sup> See 47 CFR § 64.1200(f)(9) (defining “prior express written consent”).

<sup>42</sup> See, e.g., *2012 TCPA Order*, 27 FCC Rcd at 1838-41, paras. 20-28. We do not, however, mean to suggest that the Commission could not require written consent for non-telemarketing calls, where the law and the facts would support such a decision.

<sup>43</sup> See 47 CFR § 64.1200(f)(9).

<sup>44</sup> See Appx. A.

<sup>45</sup> See *TCPA Exemptions Order*, 35 FCC Rcd at 15200, paras. 41-42. The amended rules that required OMB approval are contained in 47 CFR § 64.1200(a)(3)(ii)-(v), (b)(2) and (3), and (d)(1)-(6). The amended rules that did not require OMB approval have gone into effect. Those rules are contained in 47 CFR § 64.1200(a)(9).

<sup>46</sup> *Id.* at para. 42.

<sup>47</sup> See Notice of Office of Management and Budget Action, OMB Control No. 3060-0519 (approved Sept. 15, 2021), available at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=202107-3060-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=202107-3060-001).

herein.

## B. Numerical Limits for Exempt Calls to Residential Lines

18. We deny petitioners' request to reconsider the Commission's numerical limits on exempt informational calls to residential lines. We note that section 8(a) of the TRACED Act provides that the Commission "(I) shall ensure that any exemption under subparagraph (B) or (C) contains requirements with respect to— . . . (iii) the number of such calls that a calling party may make to a particular called party."<sup>48</sup> In response to the Commission's request on the matter, commenters generally opposed any limits on exempt calls,<sup>49</sup> but did not submit any specific cost or benefit data on potential call limits or numerical limits that the Commission had imposed in other contexts,<sup>50</sup> and offered little guidance on appropriate limits for different types of calls to meet the TRACED Act's requirements.<sup>51</sup>

19. As the *TCPA Exemptions Order* emphasized, limiting the number of exempted calls to residential lines will greatly reduce interruptions from intrusive and unwanted calls and reduce the burden on residential telephone users to manage such calls.<sup>52</sup> As Congress noted in enacting the TCPA, artificial and prerecorded voice calls are often a greater invasion of privacy than live calls because the call recipient cannot interact with the caller.<sup>53</sup> And more recently, in passing the TRACED Act, Congress noted that "[u]nwanted or illegal robocalls threaten . . . critical communication[s] when frustrated recipients, fearing unwanted or illegal robocalls, are hesitant to answer their phones."<sup>54</sup>

20. Further, while the adoption of a numerical limit satisfies the requirements of the TRACED Act, it also brings the residential exemptions "in line with" exempted calls to wireless numbers, which contain a numerical limitation on the number of calls that can be made.<sup>55</sup> We agree with the Joint Consumer Organizations that the adopted limits on artificial and prerecorded calls to residential lines will have "particularly profound benefits for consumers."<sup>56</sup> As the Joint Consumer Organizations note, the absence of any limits on prerecorded non-telemarketing calls to residential lines is a primary source of consumer frustration that has led to consumers abandoning their landline telephone service.<sup>57</sup>

21. We continue to believe that—with respect to the exemptions for non-commercial calls,

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<sup>48</sup> See 47 U.S.C. § 227(b)(2)(I) (emphasis added); see also *TCPA Exemptions Order*, 35 FCC Rcd at 15193-94, para. 15. Even if this statutory language can be interpreted to give us discretion to set "the number of such calls" either at a fixed number or as "unlimited," we believe for the reasons set forth in the *TCPA Exemptions Order* that the numerical limitations adopted therein (e.g. three calls per 30 days) are permissible under the statute and supported by the record.

<sup>49</sup> See *TCPA Exemptions Order*, 35 FCC Rcd at 15191, para. 9.

<sup>50</sup> See *id.* at 15195, paras. 19-20

<sup>51</sup> See *id.* at 15194, para. 15.

<sup>52</sup> See *id.* at 15194, para. 15.

<sup>53</sup> See S. Rep. No. 102-178, 102d Cong., 1st Sess. 4 (1991) (noting that prerecorded calls are "more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons" because, among other things, "automated calls cannot interact with the customer except in preprogrammed ways," and such calls "do not allow the caller to feel the frustration of the called party").

<sup>54</sup> See S. Rep. No. 116-41, 116th Cong., 1st Sess. 3 (2019).

<sup>55</sup> See *TCPA Exemptions Order*, 35 FCC Rcd at 15195, para. 17.

<sup>56</sup> Joint Consumer Organizations Comments at 4.

<sup>57</sup> *Id.* at 5. See also Letter from Margot Saunders, Senior Counsel, National Consumer Law Center, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2-3 (filed Sept. 7, 2021) (maintaining that the significant reduction in the use of landlines for personal use is often blamed on the unrelenting nature of unwanted robocalls to landlines) (Joint Consumer Organizations *Ex Parte*).

commercial calls that do not constitute telemarketing, and calls by tax-exempt nonprofit organizations—limiting the number of calls that can be made to a particular residential line to three artificial or prerecorded voice calls within any consecutive thirty-day period strikes the appropriate balance between these callers reaching consumers with valuable information and reducing the number of unexpected and unwanted calls consumers currently receive and thus restoring trust in the residential landline network and advancing health and the safety of life, as discussed further below.<sup>58</sup>

22. We also believe a consistent limit for those three exemptions is appropriate. We therefore disagree with ACA that we should impose different numerical limits for each type of informational call based on the content or purpose of the message.<sup>59</sup> While petitioners characterize this as a “one-size fits all” approach, we find that such a consistent numerical limit for these three exemptions will benefit both callers and consumers.<sup>60</sup>

23. In addition, contrary to ACA’s assertion, there is ample support in the record for the adopted three-calls-per-thirty-day numerical limit. As discussed above, numerous consumer organizations supported this limit, arguing that the three-call-per-thirty-day limit is reasonable.<sup>61</sup> We agree with the Joint Consumer Organizations who argue that, in the context of our federal debt collection rules adopted in 2016, “the Commission engaged in an extensive and thorough analysis of the appropriate number of unconsented-to calls that should be permitted,” and that “[a]fter a full proceeding in which interested parties were invited to provide comments and reply comments, the Commission adopted a limit of three calls per thirty days for these calls.”<sup>62</sup> Nothing in the current record disturbs that analysis and thus gives us cause to change any of the numerical limits. We also note that the numerical limit for HIPAA-related calls to residential lines is identical to the limit that has been in place for more than six years and functioned without any record evidence of unduly restricting the ability of callers to make autodialed or prerecorded voice calls under a similar exemption for wireless telephone numbers.<sup>63</sup> The Commission thus has six years of experience of applying that numerical limit to this same category of calls to wireless numbers, and this experience has demonstrated that this numerical limit strikes an appropriate balance between these callers reaching consumers with valuable healthcare information and restoring trust in the residential landline network, which can help to advance health and the safety of life as discussed further below.<sup>64</sup>

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<sup>58</sup> See *infra* section III.C.

<sup>59</sup> See ACA Petition at 12-14. We note, however, that the Commission adopted a different numerical limit for exempted HIPAA-related calls. See *TCPA Exemptions Order*, 35 FCC Rcd at 15199, para. 38.

<sup>60</sup> As described more fully in Section III.C. below, we recognize that one type of exempt call justifies a different numerical limit—healthcare (or HIPAA) related calls. In light of record evidence that these calls offer important health and safety information to consumers, and are thus categorically different from and likely more important for consumers to receive than other exempted calls, the Commission permitted one exempt artificial or prerecorded voice call per day, up to a maximum of three exempt artificial or prerecorded voice calls per week. See *TCPA Exemptions Order*, 35 FCC Rcd at 15199, para. 38.

<sup>61</sup> See Joint Consumer Organizations Comments (filed jointly by the National Consumer Law Center, Consumer Action, Consumer Federation of America, Consumer Reports, EPIC, National Association of Consumer Advocates, and U.S. PIRG) at 4-8; see also Letter from Margot Saunders, Senior Counsel, National Consumer Law Center, to Marlene Dortch, Secretary, FCC, CG Docket No. 02-278, at 1 (filed Oct. 4, 2022) (advocating that the Commission finalize the rules as adopted).

<sup>62</sup> See Joint Consumer Organizations Comments at 6. We note that, while the Supreme Court invalidated the exemption for federal debt collection calls, the Court’s decision does not invalidate the Commission’s analysis that a limit of three calls per thirty days was reasonable. See *Barr v. Am. Ass’n of Political Consultants, Inc. et al.*, 140 S. Ct. 2335, 2346 (2020) (*AAPC*).

<sup>63</sup> See 47 CFR § 64.1200(a)(9)(iv).

<sup>64</sup> See *infra* section III.C.1.



24. Further, we agree with the Joint Consumer Organizations that the three-calls-per-thirty-day numerical limit is also reasonable in light of the two exceptions that the TCPA already provides for artificial or prerecorded voice calls: all calls relating to emergencies are permitted, and all calls for which prior express consent has been provided are permitted.<sup>65</sup> The limitations the Commission adopted in the *TCPA Exemptions Order* are narrowly tailored to advance the health, safety, and privacy of consumers, while still providing opportunities for callers to contact consumers in an emergency or when they have received prior express consent. If callers need to make the calls because of a health or safety emergency or pursuant to prior express consent, there is no limit on the calls.<sup>66</sup> Thus, we disagree with ACA's position that we did not consider the needs of utilities to make emergency calls, as permitted in the rules and Commission precedent.<sup>67</sup>

25. Moreover, as the Commission emphasized in the *TCPA Exemptions Order*, callers wishing to make more than three non-telemarketing calls using an artificial or prerecorded voice within any consecutive thirty-day period can obtain consumer consent to make more.<sup>68</sup> Callers can use exempted calls to obtain consent if the calls satisfy other applicable conditions. And most significantly, as discussed above, now that we have made clear that callers can obtain consent orally from consumers, informational callers will more easily be able to obtain permission to exceed the numerical limits. We continue to believe that consumers who welcome such calls are likely to readily give such consent,<sup>69</sup> and the record developed on reconsideration does not contradict this assertion. In addition, because the TCPA only restricts calls to a residential telephone number when they use an artificial or prerecorded voice, callers using a live agent to make such calls should not risk violating the TCPA rules.<sup>70</sup>

26. While ACA and several commenters oppose the three-calls-per-thirty-day limit and argue such limit is arbitrary and will impede the ability of informational callers to deliver time-sensitive information to consumers, they neither offer a clear alternative limit to apply to all exempted callers nor suggest appropriate distinct limits for each and every various type of call.<sup>71</sup> In addition, the petitioners

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<sup>65</sup> Joint Consumer Organizations Comments at 6-7.

<sup>66</sup> The Commission has already given examples of such emergencies in numerous rulings, including calls conveying information about: a) pandemic-related health measures; b) school closures due to weather conditions; and c) other calls "made necessary in any situation affecting the health and safety of consumers." See 47 CFR §§ 64.1200(a)(3)(i), (f)(9); see also *EI Declaratory Ruling*, 31 FCC Rcd at 9061-63, paras. 17-21 (clarifying that "school callers may lawfully make autodialed calls and send automated texts to student family wireless phones without consent for emergencies including weather closures, fire, health risks, threats, and unexcused absences" and granting "school callers additional relief for calls and messages that, while not emergencies, nevertheless are closely related to the school's mission, such as notification of an upcoming teacher conference or general school activity, by clarifying our understanding that such calls are (absent evidence to the contrary) made with the prior express consent of the called party when a telephone number has been provided to an educational institution by that called party"). Other school calls to residential lines could also qualify as an exempted call "not made for a commercial purpose."

<sup>67</sup> 47 CFR §§ 64.1200(a)(3)(i), (f)(9); see also *EI Declaratory Ruling*, 31 FCC Rcd at 9061-63, paras. 17-21.

<sup>68</sup> See *TCPA Exemptions Order*, 35 FCC Rcd at 15194, para. 16.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.* at 15194-95, para. 16; see also 47 U.S.C. § 227(b)(1)(B); 47 CFR § 64.1200(a)(3).

<sup>71</sup> See, e.g., Sirius XM Comments at 8 (arguing that the three-calls-per-thirty-day limit is arbitrary under the APA and supporting reopening the record, reassessing each exemption, and crafting frequency limitations consistent with consumer expectations and actual data in the record); Cal Utilities Comments at 7-8 (a one-size-fits-all rule is potentially dangerous for utility customers, as utilities have multiple, pressing reasons—beyond emergencies, and having nothing to do with marketing—to communicate information to customers expeditiously); NRECA Reply Comments at 3; PACE Comments at 2. ACA notes, however, that the Consumer Financial Protection Bureau (CFPB) adopted a numerical limit of seven calls within seven days for debt collection calls, and that the *TCPA Exemptions Order* failed "to mention the CFPB's seven-call limitation or provide a reasoned explanation, cost benefit analysis, or other justification for rejecting a harmonized call frequency limit for consumers." See ACA

(continued....)

offer no new facts or data on the calls they make that have changed since the last opportunity to present such matters to the Commission. “In the absence of additional data from commenters,”<sup>72</sup> and to implement the statutory mandate, we conclude that these numerical limits adequately balance the privacy interests of consumers with the ability of informational callers to communicate with the public, and that there is no reason to revisit these limits at this time.

27. Given that we find the numerical limits to be reasonable, we decline to adopt what ACA describes as “important safeguards” to ensure that consumers receive the calls they expect.<sup>73</sup> ACA argues that, if the Commission retains the existing numerical limits, it should apply them on a “per event” or “per account” basis rather than on a “per telephone number” basis.<sup>74</sup> We believe a per-event or per-account condition is unnecessary in order for callers to deliver important information to consumers. We emphasize that informational callers need only obtain consent orally or in writing from a consumer to be able to make unlimited calls to that telephone number regarding any event—whether it be a utility service upgrade, a security threat on a financial account, or a scheduled medical appointment. Thus, callers can obtain consent from consumers who desire to receive more than three calls per thirty days; consent is an important safeguard to ensure not only that callers can make the calls they need to make, but that consumers are protected from repetitive nuisance calls. Moreover, ACA’s argument in its reply comments for a “per event” or “per account” approach to call limits is new, but we see no reason why it could not have been presented during the rulemaking proceeding. In the absence of any clear reason that it is in the public interest to adopt ACA’s alternative approach to numerical limits, we find this to be an alternative and independent reason not to grant ACA’s late request.<sup>75</sup>

28. Finally, we decline ACA’s request for the Commission to revisit the numerical limit under the wireless exemption for package delivery notifications that has been in place since 2014.<sup>76</sup> As the Commission stated in the *TCPA Exemptions Order*, such request, which was also made in response to the *TRACED Act NPRM*, is outside the scope of section 8 of the TRACED Act.<sup>77</sup> In addition, we deny ACA’s request to allow package delivery companies to send at least two additional follow-up messages, even when no signature is required.<sup>78</sup> We find no reason to conclude that the existing exemption that allows for one notification (whether by voice call or text message) to notify a consumer about a package

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Petition at 16-17. As stated below (*see infra* note 114), we find that the higher number of calls adopted by the CFPB would undercut our efforts to restore confidence in the landline telephone network, as explained above—and nothing in the CFPB’s decision appears contrary to our assessment.

<sup>72</sup> *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1160 (2021).

<sup>73</sup> ACA et al. Reply Comments at 9-10.

<sup>74</sup> *Id.* at 9 (arguing that calls made in response to a specific event reasonably may have different timing and call volume needs than other calls).

<sup>75</sup> *See* 47 CFR § 1.429(b). Section 1.429(b) of the Commission’s rules provides that a petition for reconsideration which relies on facts or arguments which have not previously been presented to the Commission can be granted only in certain limited circumstances—one of which is that consideration of the new argument is required by the public interest. *Id.* ACA also requested that we clarify that a call should only count toward the numerical limits when the caller has succeeded in placing the call with the customer directly or with the customer’s answering machine or voicemail system. *See* ACA Reply Comments at 10. As this issue was similarly not directly before the Commission during the rulemaking proceeding, we decline to address the request at this time.

<sup>76</sup> *See* ACA Petition at 15-16 (arguing that delivery companies often need more than 160 characters in a text message to convey important details of a delivery and that there are instances, apart from the need to collect a recipient’s signature, when a delivery company may need to send additional messages regarding a package to the recipient); *Cargo Airline*, 29 FCC Rcd at 3437-38, para. 18.

<sup>77</sup> *See TCPA Exemptions Order*, 35 FCC Rcd at 15201, para. 44 n.104.

<sup>78</sup> ACA Petition at 15 (citing comments filed by FedEx).

delivery is inadequate to address these situations as described in the record.<sup>79</sup> To the extent that additional notifications may prove helpful in these situations, we note that callers may use their one exempted notification to obtain consent from recipients to make additional notifications or use a live caller to contact the recipient.<sup>80</sup>

**C. Numerical Limits are Consistent with the First Amendment as They Help Restore Trust in the Residential Landline Network and Advance Health and Safety of Life**

29. We also conclude that it is fully consistent with the First Amendment to retain the call limitation established in the *TCPA Exemptions Order* for the residential line exemption for healthcare calls subject to HIPAA and the distinct call limitation applicable to the residential line exemptions for noncommercial calls; commercial calls that do not include an unsolicited advertisement; and calls from tax exempt nonprofit organizations (collectively, the “non-HIPAA exemptions”). In its Petition, ECAC argues that the different numerical limits adopted for the residential line exemption for healthcare calls subject to HIPAA (one call per day up, to three calls per week) and those adopted for the non-HIPAA exemptions (three calls per thirty days) constitute content-based restrictions that fail strict scrutiny and thus violate the First Amendment.<sup>81</sup> NCTA similarly argues that “the three-call limit [on exempted commercial informational calls] imposes overbroad restrictions on fully protected speech and violates the First Amendment.”<sup>82</sup> ECAC and NCTA argue that because the distinction in the call limitations for the different residential line exemptions are content-based, that subjects the Commission’s regulatory regime to strict First Amendment scrutiny, and that the Commission has not satisfied that standard.<sup>83</sup> For the reasons explained below, we reject the claim that the call limitations violate the First Amendment and therefore deny requests for reconsideration premised on that theory.<sup>84</sup>

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<sup>79</sup> Although FedEx indicates that there are “many instances, apart from the need to collect a recipient’s signature, when a delivery company may need to send additional messages to the recipient,” it cites only limited examples that include a notification that: i) a package is at a FedEx facility and ready for pickup; ii) duties or taxes must be paid to complete delivery; or iii) a post-delivery notification that “the package has been delivered.” See FedEx Comments at 6. As noted above, we find no reason to conclude that the existing exemption that allows for one notification relating to a package delivery is inadequate to inform package recipients of these situations.

<sup>80</sup> The TCPA restricts only those informational calls delivered to wireless lines made using an autodialer, or an artificial or prerecorded voice messages. See 47 U.S.C. § 227(b)(1)(A).

<sup>81</sup> ECAC Petition at 11-12; see also NCTA Reply Comments at 5-7. In footnote six of its petition, ECAC also references various numerical limitations for calls to wireless numbers. ECAC Petition at 12 n.6. ECAC’s reply comments, however, describe its petition as focused on “limitations on the number of messages that may be transmitted to a residential telephone number” without mentioning call limitations for calls to wireless numbers. ECAC Reply at 5. Thus, ECAC has not put the Commission in a position to meaningfully engage any such concerns. In any event, as these differing numerical limitations were adopted in 2014 and 2015, the Commission proposed retaining them in the *Traced Act NPRM*, and no commenter presented this argument in response to the proposal, we decline to consider this aspect of ECAC’s First Amendment argument under the circumstances here. See 47 CFR § 1.429(b).

<sup>82</sup> NCTA Reply Comments at 5.

<sup>83</sup> ECAC Petition at 12-13; NCTA Reply Comments at 6.

<sup>84</sup> The ECAC Petition focused solely on the disparity in call limitations, seeking uniformity. See ECAC Petition at 11-13. NCTA raises a broader challenge to the call limitations for any of the residential line exemptions, contending that any limitations are unjustified in light of the First Amendment. See NCTA Reply Comments at 5-8. Although NCTA’s broader First Amendment arguments extend beyond the scope of the reconsideration request in ECAC’s petition, they nonetheless warrant consideration insofar as they are within the purview of ACA’s request that the Commission reconsider the call limitations for the residential line exemptions. See, e.g., ACA Petition at 17 (“On reconsideration, the Commission should reopen the record, reassess each exemption, and craft frequency limitations consistent with consumer expectations, other reasoned agency outcomes, and actual data in the Commission’s record.”).

30. Particularly in light of the Supreme Court’s recent decision in *Barr v. Am. Ass’n of Political Consultants (AAPC)*, we recognize that a court could view the Commission’s approach to the residential line exemptions as implicating content-based regulation of speech subject to strict scrutiny.<sup>85</sup> Strict scrutiny requires the “government [to] prove[] that the[ restrictions] are narrowly tailored to serve compelling state interests.”<sup>86</sup> Evaluating the First Amendment concerns raised on reconsideration, we find that the call limitations for our residential line exemptions satisfy strict First Amendment scrutiny.<sup>87</sup> As discussed below, we conclude that our call limitations are narrowly tailored to advance a distinct governmental interest—that is, restoring trust in the residential landline network and advancing the health and safety of life—and thus satisfy strict First Amendment scrutiny.

31. We conclude that the adopted call limitations for the residential line exemptions are narrowly tailored to advance the compelling governmental interest in health and safety of life.<sup>88</sup> The

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<sup>85</sup> Cf. Joint Consumer Organizations Comments at 11-12 (“We do not necessarily agree that the differing limits are unconstitutional. However, we recognize that the Supreme Court’s analysis in *Barr v. Am. Ass’n of Political Consultants, Inc.*, finding that the congressional exemption for debt collection calls made in the 2015 Budget Amendment was an unconstitutional, content-based restriction on free speech, illustrates the potential risk of setting up different rules for different types of calls”). In 2015 Congress amended the TCPA to create an exception for calls to collect a debt owed to the federal government. The Supreme Court held that the telemarketing restrictions of the TCPA thus were content-based restrictions on speech because, as a result of that amendment, the TCPA differentiated between calls to collect a debt owed to the government and other calls, and that the statute failed strict scrutiny review. See *AAPC*, 140 S. Ct. 2335, 2346-47 (2020) (plurality opinion) (concluding that strict scrutiny applies and the statute fails that standard); *id.* at 2364-65 (Gorsuch, J., concurring in the judgment in part and dissenting in part).

<sup>86</sup> *Reed, Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); see also, e.g., *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (*NIFLA*) (similar).

<sup>87</sup> We believe that the exemption for commercial calls lacking an unsolicited advertisement could be viewed as encompassing exclusively commercial speech, and thus subject to intermediate scrutiny under *Central Hudson*. See, e.g., *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 422-23 (1993); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563-64 (1980); *Jordan v. Jewel Food Stores*, 743 F.3d 509, 517 (7th Cir. 2014). Even to the extent that the more stringent regulation of this category of commercial speech is viewed as content-based, courts commonly continue to treat intermediate scrutiny under *Central Hudson* as remaining applicable in that context. See, e.g., *Aptive Environmental, LLC v. Town of Castle Rock*, 959 F.3d 961, 986 (10th Cir. 2020); *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 138 (3d Cir. 2020); *Vugo v. City of New York*, 931 F.3d 42, 49-50 (2d Cir. 2019); *Retail Digital Network, LLC v. Prieto*, 861 F.3d 839, 846 (9th Cir. 2017) (en banc); *Missouri Broadcasters Ass’n v. Lacy*, 846 F.3d 295, 300 n.5 (8th Cir. 2017). But see, e.g., *Int’l Outdoor v. City of Troy*, 974 F.3d 690, 703 (6th Cir. 2020). Nor does the *AAPC* decision itself—which did not involve the government’s reliance on *Central Hudson*—persuade us that *AAPC* would require a contrary approach. In light of our conclusion that call limitations on the exemption for commercial calls lacking an unsolicited advertisement (like the other non-HIPAA exemptions) satisfies strict First Amendment scrutiny, we thus additionally and separately find that it even more readily satisfies intermediate scrutiny under *Central Hudson*.

<sup>88</sup> Courts have recognized the significance of the government’s interest in the public’s health and safety of life in a variety of other contexts. See, e.g., *United States v. Petras*, 879 F.3d 155, 167 (5th Cir. 2018) (in First Amendment context, discussing precedent finding a “compelling government interest of safety in air travel”); *Grider v. Abramson*, 180 F.3d 739, 749 (6th Cir. 1999) (in First Amendment context, concluding that a “search of each rally attendee mandated by the KKK Rally Detail” “patently constituted a necessary constraint narrowly fashioned to further a compelling governmental interest in public safety and order”); *Ohio Citizen Action v. City of Mentor-on-the-Lake*, 272 F.Supp.2d 671, 684 (N.D. Ohio 2003) (in First Amendment context, stating that “the promotion of public safety is a compelling governmental interest”); *Grove v. City of York*, 2007 WL 46556, \*9 (M.D. Pa. Jan. 10, 2007) (in First Amendment context, stating that “[p]ublic safety, the court agrees, is a compelling government interest”); cf. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (recognizing, in religious exercise context, that “[s]temming the spread of COVID-19 is unquestionably a compelling interest”); *Buchwald v. Univ. of N.M. School of Med.*, 159 F.3d 487, 498 (10th Cir. 1998) (in freedom to travel context, concluding that “distinction [] employed as a proxy for selecting those candidates likely to return to the state of New Mexico and

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landline telephone network—and the communication it enables—is an important tool in ensuring residential consumers receive the information they need to advance their own health and safety of life along with that of others. Yet the evidence reveals that the escalating problem of robocalls has undermined consumers’ trust and willingness to rely on their landline telephone, leading consumers in many cases to simply not answer the phone.<sup>89</sup> That communication breakdown can have significant health and safety of life implications for the many consumers who rely on residential landline service.<sup>90</sup>

32. As a statutory matter, when calibrating the residential line exemptions, it is appropriate for the Commission to consider the health and safety of life implications of the use of the telephone network that our exemption rules would facilitate. Although the TCPA includes a special focus on consumer privacy,<sup>91</sup> it nonetheless recognizes the importance of health and safety of life considerations through the statutory exemption from TCPA restrictions for calls made or initiated for emergency purposes.<sup>92</sup> Congress likewise recognized that “privacy rights, *public safety interests*, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.”<sup>93</sup> Further, the TCPA was enacted as part of the Communications Act, which established the Commission to, among other things, “promot[e] safety of life . . . through the use of wire and radio communications.”<sup>94</sup>

33. Turning to the specific context at issue here, evidence supports the conclusion that the volume of robocalls landline consumers receive undermines their trust in, and willingness to rely on, the

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supply needed medical care to underserved areas of the state” was “not only legitimate, but also compelling”); *Varandani v. Bowen*, 824 F.2d 307, 311 (4th Cir. 1987) (recognizing, in due process context, “the government’s compelling interest in assuring safe health care for the public”); *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 550 (S.D.N.Y. 2006) (in religious exercise context, stating that “[c]ompelling governmental interests are those that protect public health, safety or welfare”).

<sup>89</sup> We acknowledge that prior FCC news releases advised consumers not to answer calls from unknown numbers. See, e.g., *Consumer Alert: Protect Yourself Against ‘Neighbor Spoofing’, Scam Callers Placing Phone Calls That Appear To Be Local*, News Release, at 1 (Mar. 8, 2018) (“Don’t answer calls from unknown numbers.”) available at <https://docs.fcc.gov/public/attachments/DOC-349632A1.pdf>. News releases are unofficial announcements, however, and nothing suggests that at the time of those statements the Commission had weighed—or even considered—the effects of the loss of trust in the telephone network on health and safety of life. Furthermore, such statements predated the measures subsequently taken to combat robocalls and restore trust in the residential landline telephone network. Thus, such statements do not call into question the significance of the governmental interest we focus on here.

<sup>90</sup> As the ACA Petition observes, “[a]ccording to the National Center for Health Statistics, approximately forty percent of American households in the United States still retain a landline, and between two and three percent of Americans *only* have a landline.” ACA Petition at 12 (emphasis in original). The problem we focus on in this analysis is one of residential landline users missing out on communications important to health and safety of life that continue to come to them through that medium of communication because of their reluctance or unwillingness to answer calls due to diminished trust in that telephone service. Consumers who no longer have landline service do not raise those same considerations and are not part of our analysis in this regard. In addition, the focus on residential landline consumers simply reflects the fact that, in pertinent part, the ECAC Petition and the ACA Petition focused on the exemptions from the restrictions on calls to residential lines (rather than to wireless numbers).

<sup>91</sup> See, e.g., 47 U.S.C. § 227(b)(2)(B)(ii)(I) (authorizing the FCC to exempt commercial calls from the residential line prohibition only after determining that they “will not adversely affect the privacy rights that this section is intended to protect”).

<sup>92</sup> 47 U.S.C. § 227(b)(1)(A), (B).

<sup>93</sup> The Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394 (emphasis added).

<sup>94</sup> 47 U.S.C. § 151.

landline telephone network.<sup>95</sup> There is evidence that the number of robocalls has increased dramatically in recent years.<sup>96</sup> The Commission previously has cited “hundreds of comments from consumers [filed in a rulemaking] stating that they no longer answer their phone when it rings,” and has concluded that “[i]t is obvious that the volume of unwanted calls is reducing the value of telephony to anyone who makes or receives calls.”<sup>97</sup> Commenters state that “[t]he unremitting nature of unwanted and unstoppable—even if technically legal—calls made to landlines has led to a wavering trust in voice calls.”<sup>98</sup> Unwanted robocalls, for example, often are either delivered with inaccurate caller ID information or are delivered with caller ID information that is not familiar to a consumer, and thus are highly likely to be viewed by called parties with suspicion.<sup>99</sup> The Joint Consumer Organizations also explain the practical consequences that flow from this state of affairs: “[p]eople have become so inured to the unwanted calls ringing their lines that they do not pick up—even when the calls are important.”<sup>100</sup> There also is evidence that consumers’ increasing reluctance to answer the phone undermines public health and safety of life that depends on the phone network.<sup>101</sup> Exacerbating this concern is the fact that traditional residential voice service can be particularly important for vulnerable populations, such as the elderly.<sup>102</sup> As the Joint Consumer Organizations observe, “[t]he Commission’s new regulations provide a meaningful way to rebuild the fading trust in the usefulness of landlines by arming recipients with effective tools to stop

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<sup>95</sup> See, e.g., Joint Consumer Organizations NPRM Comments at 6-7; Joint Consumer Organizations Recon Comments at 4-8; Committee on Energy & Commerce, Section-by-Section Summary Pallone-Thune TRACED Act, Comm. On Energy & Commerce (Dec. 2019) (E&C Summary), available at <https://republicans-energycommerce.house.gov/wpcontent/uploads/2019/12/Pallone-Thune-TRACED-Act-Section-by-Section.pdf>, cited in Joint Consumer Organizations Recon Comments at 6; Statement of Rep. Pallone, Vol. 165, No. 193 Cong Rec. at H9244 (Daily Ed. Dec. 4, 2019). The FCC also reported in 2019 that YouMail shows the estimated national volume of robocalls increasing from 29,082,325,500 in 2016 to 30,507,422,900 in 2017, and to 47,839,232,200 in 2018. See Report on Robocalls, CG Docket No. 17-59, at 6, para. 13 (CGB Feb. 2019) (2019 Report on Robocalls).

<sup>96</sup> See, e.g., 2019 Report on Robocalls at 6, para. 13 (citing robocall call volume data from various private entities), available at <https://docs.fcc.gov/public/attachments/DOC-356196A1.pdf>; E&C Summary at 1 (citing data estimate that in 2018 there was a 64% increase in robocalls since 2016); Written Testimony of Margot Freeman Saunders, Senior Counsel, National Consumer Law Center, before the Senate Committee On Commerce, Science & Transportation, Subcommittee On Communications, Technology Innovation and the Internet, “Illegal Robocalls: Calling All to Stop the Scourge,” at 5 (Apr. 11, 2019) (Joint Consumer Organizations Senate Testimony) (presenting a chart showing the increase in robocalls from December 2015 through March 2019), available at <https://www.commerce.senate.gov/services/files/6E5E5801-49EF-4581-B294-EB8202C2E94E>.

<sup>97</sup> *Advanced Methods To Target and Eliminate Unlawful Robocalls*, Second Report and Order, 33 FCC Rcd 12024, 12025-26, para. 4 (2018).

<sup>98</sup> Joint Consumer Organizations Comments at 5.

<sup>99</sup> See 2019 Report on Robocalls at 8-10, paras. 20-24.

<sup>100</sup> Joint Consumer Organizations Aug. 17, 2020 *Ex Parte* Letter at 7; cf. Report on Robocalls at 6, para. 15 (“Currently, the only certain way to determine whether a call is wanted or unwanted is to answer it or let it go to voicemail, and hope the caller leaves a message.”).

<sup>101</sup> See, e.g., Joint Consumer Organizations Aug. 17, 2020 *Ex Parte* Letter at 7-8 & nn.27-28 (citing evidence that COVID-19 contact tracers’ efforts are being undermined by residents declining to answer their phones); S. Rep. No. 116-41, at 3 & n.12 (May 21, 2019) (May 2019 Senate Report) (observing that “[u]nwanted or illegal robocalls threaten [] critical communication when frustrated recipients, fearing unwanted or illegal robocalls, are hesitant to answer their phones,” and citing as an example an instance where “a surgeon failed to respond to a phone call from an emergency room believing it to be a robocall, which caused the surgeon to lose valuable time in responding to the injured individual”).

<sup>102</sup> See, e.g., *Connect America Fund*, Report and Order, 34 FCC Rcd 2621, 2624, para. 10 (2019); *Technology Transitions, et al.*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372, 9405-06, paras. 58-59 (2015).

many of the unconsented-to calls they receive.”<sup>103</sup>

34. Importantly, we find that it is the overall volume of unauthorized robocalls that has led residential landline consumers increasingly to simply decline to answer the phone, even if a given call might, in the abstract, be subjectively desirable to a given consumer.<sup>104</sup> It is reasonable to assume that callers generally, and specifically those callers who argue here to be able to make unlimited numbers of robocalls without consumer consent, have incentives to call repeatedly because the cost of repeated calling is trivial to the caller financially, and there exists only an incremental risk a consumer will not pick up their call. Thus, callers individually have little or no incentive to be concerned about the collective problem of unwanted robocalls undermining trust in the network. As a result, it is appropriate for us to take action to address the larger overall volume of robocalls. We expect that curtailing the number of calls to residential lines that can be made by virtue of FCC exemptions under section 227(b)(2)(B) will substantially reduce the total volume of calls consumers receive without their prior authorization, helping restore consumers’ confidence in the calls they do continue to receive.

35. As a general matter, and in the absence of anything other than conclusory assertions to the contrary, we are not persuaded that a less restrictive limitation than three calls per thirty days would be a reasonable choice of call limitation for these residential line exemptions given the compelling governmental interests at stake. Indeed, one could argue that the need to address the volume of unauthorized calls and thereby restore trust in the telephone network could be addressed most effectively by eliminating these exemptions altogether. But we also must weigh First Amendment considerations, and in this proceeding we do not find a basis to restrict these calls further than a limit of three calls per thirty days under the residential line exemption.<sup>105</sup> In particular, against the backdrop of the Commission previously having adopted, after a thorough and reasoned analysis, a three-call-per-thirty day limit for other types of unconsented-to calls, we conclude that, at least on this record, we do not find a sufficient justification for taking a more restrictive approach and either eliminating the exemptions entirely or adopting lower call limitations, given the need for an appropriate fit between the regulatory approach and the relevant governmental interest.<sup>106</sup>

36. Notwithstanding those general findings regarding the call limits for residential line exemptions, we nonetheless find a less restrictive call limitation warranted for the exemption for healthcare calls as defined by HIPAA. The exemption for healthcare calls as defined by HIPAA is unique in that the governmental interest in health and safety of life cuts both ways with respect to such calls. In other words, curtailing unauthorized robocalls as a whole will help restore consumers’ trust and willingness to rely on residential landline service, thereby advancing the governmental interest in health and safety of life—but, at the same time, allowing healthcare calls as defined by HIPAA to reach residential consumers is itself also a benefit to the governmental interest in health and safety of life.

37. On balance, the governmental interest in health and safety of life is best advanced in this unique scenario by allowing a higher number of calls under the exemption for healthcare calls as defined by HIPAA. This call limit matches the limit the Commission adopted for calls to wireless numbers in 2015, and the Commission found “no credible evidence it has unduly restricted healthcare providers’

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<sup>103</sup> Joint Consumer Organizations Comments at 4.

<sup>104</sup> Consequently, arguments about whether some universe of consumers subjectively might desire particular categories of calls, or whether particular categories of calls are subject to differing regulatory overlays apart from the TCPA and our implementing rules, *see, e.g.*, ACA Petition at 12-17, do not undercut our reasoning.

<sup>105</sup> Separate from our analysis of the merits below, the Commission also did not reopen the issue of whether to eliminate the residential line exemptions in this proceeding, and thus such an option is not procedurally before the Commission in the current proceeding.

<sup>106</sup> *See, e.g., Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 31 FCC Rcd 9074 at 9088-92, para. 33-41 (2016) (underlying amendment to the TCPA overturned on constitutional grounds in *AAPC*).

ability to communicate with their patients.”<sup>107</sup> We thus conclude that the risk that more a restrictive call limitation could unduly restrict healthcare providers’ ability to communicate with their patients—a possibility the Commission cannot rule out on this record—counsels against a lower call limitation. At the same time, in light of our experience with the prior limit for calls to wireless numbers, we also do not find a basis to conclude that a higher number of calls is warranted here, given the mixed effects of such calls when considered in conjunction with all the other calls made without prior consent under the residential line exemptions.

38. We also are not persuaded by commenters’ objections to the Commission’s call limitations for the residential call exemptions. Some commenters contend that other calls implicate health and safety of life just like health care messages as defined by HIPAA.<sup>108</sup> These commenters appear concerned that the Commission’s approach unduly restricts that speech by failing to apply the more generous call limitations that apply to healthcare calls as defined by HIPAA. But these claims do not account for the full range of calls that can be made notwithstanding the TCPA’s restriction on calls to residential lines. In particular, in addition to the Commission-created exemption for health care calls as defined by HIPAA, section 227(b)(1)(B) expressly carves out any call made with “the prior express consent of the called party,” and any “call [] initiated for emergency purposes” from the scope of its prohibitions.<sup>109</sup>

39. As discussed above, the TCPA’s restrictions for calls to residential lines do not apply to calls unless they use an artificial or prerecorded voice.<sup>110</sup> If callers need to make calls related to, for example, power outages or utility work, they can either obtain the consumer’s consent to do so before using an artificial or prerecorded voice or use a live caller to make the call.<sup>111</sup> Or, if the call is made for an “emergency purpose” as defined by the Commission’s rules and orders, it is exempted by our rules.<sup>112</sup> None of the examples in the record articulate a scenario for which distinct, more lenient<sup>113</sup> call limitations practically could be crafted, that would apply to circumstances that both: (i) implicate the governmental interest in health and safety of life and (ii) is not already subject to either the FCC’s exemption for health care messages as defined by HIPAA or one of the statutory exceptions.<sup>114</sup> Indiscriminately expanding call limitations based on speculation that they conceivably might benefit such calls would also allow an array of other calls that undermine our goal of restoring greater consumer trust and confidence in the landline

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<sup>107</sup> *TCPA Exemptions Order*, 35 FCC Rcd at 15199, para. 38.

<sup>108</sup> *See, e.g.*, ECAC Petition at 11; ACA Petition at 13-15; NCTA NPRM Comments at 3.

<sup>109</sup> 47 U.S.C. § 227(b)(1)(B).

<sup>110</sup> *Id.*

<sup>111</sup> The same is true for other types of calls ACA describes as related to consumers’ health and safety—time sensitive financial account updates, healthcare (*e.g.*, telemedicine and remote care), and package deliveries. *See* ACA Petition at 13.

<sup>112</sup> *See id.*; *see also* 47 CFR § 64.1200(f)(4) (definition of “emergency purposes”).

<sup>113</sup> When we refer to requests for “more lenient” call limitations, we include not only other possible requested limits that are somewhat higher, but also requests that there actually or effectively be no call limit at all.

<sup>114</sup> Commenters do not grapple with whether and to what extent these calls would or would not already be subject to other exemptions, in which case the need for more lenient call limitations on FCC-created exemptions would be unnecessary. Nor do commenters identify the sort of clear nexus to health and safety of life that we see in healthcare calls as defined by HIPAA. In the case of power outages or utility work cited by ACA, for example, *see* ACA Petition at 13-15, although there could be such a nexus, it might or might not be present in a given situation not already covered by a statutory exemption, and even where present could be very attenuated. The logic of ACA could equally apply to innumerable other areas with any arguable connection to health and safety of life. In the absence of evidence to the contrary, such a theoretical nexus does not persuade us to view them as similarly situated to healthcare calls as defined by HIPAA for purposes of the governmental interest we are seeking to advance in this specific context.



telephone network, to the benefit of health and safety of life. Consequently, the record does not reveal a plausible alternative approach to expanding the universe of calls subject to a higher call limitation under the theory that they are similarly situated to healthcare calls as defined by HIPAA.

40. Nor does the record identify a plausible alternative approach that would give more lenient call limitations for calls that commenters claim are delivered for important interests other than the interest in health and safety of life. ACA, for example, alludes to an example of political speech and cites examples of communications bearing on consumers' financial interests or safety of property.<sup>115</sup> More generally, NCTA cites TCPA legislative history that "Congress did not intend the statute 'to be a barrier to the normal, expected, or desired communications between businesses and consumers.'"<sup>116</sup> These commenters largely do not contend, let alone provide persuasive evidence, that the other interests—such as commercial or financial interests or safety of property<sup>117</sup>—are as compelling as the governmental interest in health and safety of life that we are seeking to advance, which would be undermined by allowing more calls to residential landline consumers without their prior consent.<sup>118</sup> And in all cases, it is essential to keep the aggregate effects in mind—the higher volume of these other types of calls raised by commenters will contribute to the overall lack of trust in the telephone network—a fact undiminished if they at the same time advance some more narrow interest. Furthermore, the First Amendment only requires us to consider plausible alternatives,<sup>119</sup> and the record here does not reveal alternatives that could target just that speech that advances the other identified interests without sweeping in other types of speech that would simply contribute to the call volume that undermines trust in the telephone network without any adequate countervailing benefit.<sup>120</sup>

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<sup>115</sup> ACA Petition at 13-17.

<sup>116</sup> NCTA NPRM Comments at 4 (quoting H.R. Rep. No. 102-317, at 13 (1991)); *see also, e.g.*, NCTA Reply Comments at 5 (discussing prior Commission decisions recognizing that there can be value to consumers from informational calls, including between service providers and their customers); *id.* at 7 (citing examples of service provider calls "concerning network outages, billing issues, or appointment reminders").

<sup>117</sup> Although safety of property is, along with safety of life, among the Commission's responsibilities under section 1 of the Act, this does not imply that they always are identical in terms of the magnitude of that interest. Indeed, courts' references to the importance of public safety can be seen as focused particularly on health and safety of life. *Cf. Mozilla v. FCC*, 940 F.3d 1, 62 (D.C. Cir. 2019) ("whenever public safety is involved, lives are at stake").

<sup>118</sup> To the extent that commenters contend that the adopted call limitations will cause consumers to miss time sensitive information, *see, e.g.*, ACA Petition at 13, we are unpersuaded that such speculative claims should alter our analysis. Beyond the speculative nature of the claim, even when there was no limitation on the number of calls that could be made under the residential line exemptions, such calls nonetheless often were missed because consumers were reluctant to answer calls due to their loss of trust in the telephone network. We appropriately prioritize restoring that trust through our actions here.

<sup>119</sup> *See, e.g., Playboy Enter. Grp.*, 529 U.S. at 816 ("When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.").

<sup>120</sup> Many commenters do not even attempt to clearly define the exemption or category of calls for which a more lenient call limitation would apply, nor define what that alternative limitation would be. And commenters that do cite alternatives do not weigh their effects on the governmental interest in health and safety of life. For example, although ACA cites an example of a higher call limitation adopted by the Consumer Financial Protection Bureau (CFPB) for calls by a debt collector in implementing a different statutory scheme, *see* ACA Petition at 16-17, the higher number of calls would undercut our efforts to restore confidence in the landline telephone network explained above—and nothing in the CFPB's decision appears contrary to our assessment. Likewise, we are not persuaded to broadly import into the residential line context the different call limitations that apply to the FCC-created exemptions for calls to wireless numbers, cited by some commenters. *See, e.g.*, ACA Petition at 15-16. We also reject the argument that we broadly should import call limitations from the wireless number exemptions into our exemptions from the residential line restriction. As discussed above, healthcare calls as defined by HIPAA present unique considerations that warrant distinctive treatment of that residential line exemption, and in that context we

(continued....)

41. We also are not persuaded that our call limitations for the residential call exemptions are unnecessary in light of anti-illegal robocall measures as a result of the TRACED Act and prior Commission policies—namely: opt-out rights specified by rule; the required implementation of STIR/SHAKEN; and call blocking.<sup>121</sup> As discussed below, we conclude that those other measures—while designed to address important aspects of the robocalls problem—do not obviate the need for our approach to call limitations.

42. *Opt-Out.* The consumer opt-out rights in our rules, while helpful for consumers, alone are not adequate to protect consumers who have lost trust in the telephone network and consequently are reluctant to answer the phone in the first place. If consumers do not answer a given call and learn who the caller is (assuming that the caller provides accurate information), they have no ability to opt out of future calls from that caller. Thus, despite the important protections they afford, opt-out mechanisms are unlikely to meaningfully reduce the volume of calls received by those consumers who already have lost trust in the telephone network.

43. *STIR/SHAKEN.* While voice service provider implementation of STIR/SHAKEN will combat robocalls and introduce additional trust into the network, it addresses a different problem than the rules at issue here. STIR/SHAKEN combats the problem of illegal spoofing—that is, the falsification of caller ID information by bad actors to deceive call recipients into believing a call is trustworthy.<sup>122</sup> It accomplishes this goal by allowing terminating providers to verify that the caller ID information attached to a call is legitimate.<sup>123</sup> By adding new information about the call originator and caller ID information displayed, widespread implementation of STIR/SHAKEN promotes call blocking and labeling, enables more effective enforcement, and restores trust in caller ID information.<sup>124</sup>

44. STIR/SHAKEN combats scam spoofed calls,<sup>125</sup> which is a subset of unwanted calls.<sup>126</sup> All forms of unwanted robocalls undercut Americans’ trust in the voice network in their own way.<sup>127</sup> An estimate from YouMail found that scam robocalls were just 47% of all robocalls in 2019.<sup>128</sup> The

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look as part of our analysis to the call limitations that apply to healthcare calls in the wireless context. Other than healthcare calls as defined by HIPAA, the record does not persuade us that any other categories of calls subject to the Commission’s residential line exemptions warrant distinctive treatment. Thus, importing more lenient call limitations from our rules governing calls to wireless lines would undercut the governmental interest in health and safety contrary to our pursuit of that compelling governmental interest here.

<sup>121</sup> See, e.g., ACA Reply Comments at 8.

<sup>122</sup> See *Call Authentication Trust Anchor*, WC Docket No. 17-97, Second Report and Order, 36 FCC Rcd 1859, 1860, para. 1 (2020).

<sup>123</sup> See *Call Authentication Trust Anchor*, WC Docket No. 17-97, Third Further Notice of Proposed Rulemaking, 36 FCC Rcd 8827, 8827 para. 1 (2021).

<sup>124</sup> *Id.* at 8828-29, para. 3.

<sup>125</sup> See, e.g., *2019 Call Blocking Declaratory Ruling*, 34 FCC Rcd at 4892-93, para. 49 & n.99 (observing that “[v]oice service providers have emphasized the value of SHAKEN/STIR in addressing the illegal call problem,” and citing record support in that regard); *Advanced Methods To Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9706, 9707, para. 3 (2018) (“Caller ID spoofing is often the key to making robocall scams work.”).

<sup>126</sup> See, e.g., 2019 Report on Robocalls at 4 (recognizing that some robocalls “are lawful, but are simply unwanted”).

<sup>127</sup> See Joint Consumer Organizations Recon Comments at 4-5 (“it bears emphasizing that the significant reduction in the use of landlines for personal use is often blamed on the unrelenting nature of unwanted robocalls to landlines: both telemarketing calls that are blatantly illegal, as well as the plethora of unwanted prerecorded non-telemarketing calls that, until now, have been exempt from the TCPA’s limits and, therefore, unstoppable”).

<sup>128</sup> *2019 Call Blocking Declaratory Ruling*, 34 FCC Rcd at 4889-90, para. 40 (“YouMail [] estimates that 47% of robocalls are scam calls.”).

remainder totals an estimated 31 billion robocalls—comparable to the number of *all robocalls* in 2016.<sup>129</sup> Other estimates also indicate that a large proportion of robocalls are not scams.<sup>130</sup> Merely reducing the number of scam calls—while highly valuable as a form of consumer protection and significant progress relative to the *status quo* in terms a reduction to the volume of robocalls—is not sufficient in itself to restore trust that an incoming call is likely to be one the recipient wants to answer. Even if STIR/SHAKEN implementation—and the associated call blocking and consumer response—succeeds at eliminating *all* scam robocalls, a significant number of unwanted robocalls would remain. This, in turn, would continue to undermine trust in the telephone network unless it can be further addressed by the Commission in its calibration of residential line exemptions.

45. *Call Blocking.* In significant part, the call blocking analysis follows our analysis of STIR/SHAKEN. Even though call blocking measures need not focus solely on scam or illegal robocalls, measures currently in place for landline customers frequently are focused in that manner.<sup>131</sup> To the extent that call blocking targets scam calls, that step—while important and beneficial—does not fully address the problem with lost confidence in the telephone network for the same reasons discussed above with respect to STIR/SHAKEN.

46. Although call blocking tools also can, in part, address legal but unwanted calls, the record here does not support a finding that such measures have the prevalence and degree of success needed to obviate the need for call limitations (or to enable the relaxation of call limitations) for the residential line exemptions. For one, the record does not demonstrate how successful blocking tools are today at blocking unwanted calls.<sup>132</sup> For another, the Commission has acknowledged and emphasized on numerous occasions in its call blocking orders that any single solution will not be sufficient to address the

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<sup>129</sup> See NANC Call Authentication Trust Anchor Working Group, *Report On Selection of Governance Authority and Timely Deployment of SHAKEN/STIR*, at 1 (May 3, 2018) (citing an estimated 2.4 billion robocalls per month in 2016, which would amount to 28 billion robocalls for the year) available at <https://docs.fcc.gov/public/attachments/DOC-350542A1.pdf>; see also Joint Consumer Organizations at 5 (presenting chart of monthly robocalls over time); see also *Call Blocking Tools Available To Consumers: Second Report On Call Blocking*, DA 21-772, para. 8 (CGB June 2021) (Second Call Blocking Tools Report) (citing a YouMail estimate of 58.5 billion robocalls in 2019). Another company, Hiya, estimates that 62% of robocalls in 2020 were spoofed. Second Call Blocking Tools Report, para. 8 (“Hiya reports that 62% of consumers knowingly received a spoofed call in 2020.” (footnote omitted)). While a relevant data point for broader inquiries about robocalls, the calculations based on YouMail data might be more likely to be representative for purposes of the current analysis. Significantly, Hiya appears to present international data, see generally Hiya, *State of the Call in 2021*, <https://hiya.com/state-of-the-call>, rather than the nationwide (U.S.) data presented by YouMail. In addition, Hiya does not provide data on its public website for purposes of estimating, using Hiya’s own data, the total number of robocalls that would remain in 2020 even assuming the 62% spoofed call figure were accurate as to the U.S. alone.

<sup>130</sup> See, e.g., Hearing Before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, House of Representatives, *Legislating To Stop the Onslaught of Annoying Robocalls*, Serial No. 116-26, at 3 (Apr. 30, 2019) (April 2019 House Hearing) (Prepared Statement of Hon. Mike Doyle) (“[W]hile some of these calls constituted legitimate alerts and reminders, those calls accounted for only 20 percent of the total amount of robocalls.”); *id.* at 66 (Ms. Saunders of Joint Consumer Organizations) (“According to the YouMail statistics, which I quote on Footnote 7, only 47 percent of the robocalls currently made are scams. The rest are robocalls, some proportion of those are the wanted robocalls, which we all agree. But there is a lot of—there are 20, 30, 40 percent of calls that are unwanted that still need to be addressed and need to be addressed through the Telephone Consumer Protection Act.”).

<sup>131</sup> See, e.g., Second Call Blocking Tools Report, DA 21-772, paras. 28, 31, 33-34, 35-36, 38, 39, 54, 59, 60, 67, 86, 89 (discussing call blocking offerings available for landline consumers focused on scam/fraud/illegal calls).

<sup>132</sup> While our recent *Call Blocking Report* catalogued the efforts providers and others are making at blocking and offering consumers blocking tools, it did not attempt to evaluate the success of such blocking in the fight against illegal robocalls more broadly. See Second Call Blocking Tools Report, DA 21-772.

full problem of unwanted robocalls, and that we therefore need to approach it from multiple angles.<sup>133</sup> Thus, even accepting that some tools seek to block calls beyond scam or illegal calls, we are not confident yet that they would curtail such calls to an appreciable degree. This concern about the tools' design is exacerbated by the limited extent of the public's use of them today. Tools blocking unwanted calls (as distinct from scam or illegal calls) do not appear to be widely in use by consumers today, even if available (and even if available at no cost). In a number of cases, they appear to be offered on an opt-in basis and/or otherwise require affirmative steps by the consumer to set it up.<sup>134</sup> Thus, although they are important tools even today, and have promise to become even more important over time, there is not sufficiently widespread use of tools that block unwanted calls that are not scam or illegal calls to adequately address the circumstances that have led to a loss of trust in the telephone network and associated risks to health and safety of life. Because these tools, however successful they may prove to be, will take substantial time to be deployed on a widescale basis by both IP and non-IP based providers, we do not find them to serve as an adequate remedy for the immediate scourge of illegal and unwanted robocalls that will continue to serve as a deterrent to residential telephone use today and in the immediate future. Thus, while blocking tools are incredibly valuable, additional steps to reduce the number of potentially unwanted calls overall: 1) reduce the risk that consumers will be disrupted by a high volume of such calls; and 2) reduce the risk that calls made under the TCPA exemptions will be blocked that, individually, may be wanted, but are not wanted at such high volumes. We will continue to monitor the success of blocking tools and reevaluate our numerical limits in light of our experience with these tools.

47. In sum, we conclude that our call limitations for the residential line exemptions are narrowly tailored to advance the compelling government interest in health and safety of life because they help restore residential landline consumers' trust and willingness to rely on the residential landline telephone network. Further, we do not find that other regulatory alternatives adequately meet this need. Indeed, not only do opt-out, STIR/SHAKEN, and call blocking each have a discrete sphere of likely impact, but even taken in the aggregate they do not address all aspects of the problem. This is sufficient to satisfy strict First Amendment scrutiny.

#### **D. Opt-Out Requirements for Exempt Calls to Residential Lines**

48. We deny ACA's request to reconsider the Commission's decision to extend to informational calls opt-out requirements that had previously applied only to telemarketing calls. These requirements mandate use of automated opt-out mechanisms, as well as opt-out lists and policies. Under the new rules, a consumer who wants to avoid further artificial or prerecorded informational calls can "opt out" by dialing a telephone number (required to be provided in the artificial or prerecorded voice message) to register his or her do-not-call request in response to that call.<sup>135</sup> Our rules also require that the caller provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request.<sup>136</sup> To effectuate an opt-out mechanism, callers must comply with the requirements of section 64.1200(d) of our rules, which governs the process for handling do-not-

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<sup>133</sup> See, e.g., *Advanced Methods to Target and Eliminate Unlawful Robocalls; Call Authentication Trust Anchor*, CG Docket No. 17-59, WC Docket No. 17-97, Fifth Further Notice of Proposed Rulemaking in CG Docket No. 17-59 and Fourth Further Notice of Proposed Rulemaking in WC Docket No. 17-97, FCC 21-105, paras. 56-59, 66-79 (rel. Oct. 1, 2021) (proposing that gateway providers must block calls under certain circumstances and noting that such action was part of a multi-pronged approach to combatting illegal robocalls); *Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59, Third Report and Order, Order on Reconsideration, and Fourth Further Notice of Proposed Rulemaking, 35 FCC Rcd 7614, 7616, 7618, paras. 4, 7 (2020) (recognizing that there is no single solution to the robocall problem, and that the Commission has fought this battle on multiple fronts).

<sup>134</sup> See, e.g., Second Call Blocking Tools Report, DA 21-772, paras. 32, 43, 49, 50, 52, 56, 57, 74, 86 (discussing blocking tools available on an opt-in basis and/or requiring some other affirmative steps by consumers).

<sup>135</sup> 47 CFR § 64.1200(b)(2).

<sup>136</sup> *Id.* § 64.1200(b)(3).

call requests.<sup>137</sup> ACA argues that such requirements would be burdensome and that the former rules requiring informational callers to provide only caller identification and a telephone number at the beginning of prerecorded and artificial voice calls are sufficient to protect consumers.<sup>138</sup> ACA further maintains that the Commission did not provide “any reasoned explanation, cost-benefit analysis, or assessment of the impact on the informational calls that might no longer be able to reach consumers.”<sup>139</sup>

49. As the Commission explained in the *TCPA Exemptions Order*, an opt-out mechanism gives consumers more say in how many calls they receive.<sup>140</sup> We believe consumers should be able to decide which types of calls they want to receive on their residential lines and which they wish to avoid.<sup>141</sup> We agree with the Joint Consumer Organizations that requiring callers making exempt calls to provide an automated opt-out mechanism will significantly empower telephone call recipients to stop unwanted calls.<sup>142</sup> In addition, eliminating opt-out requirements for prerecorded calls to residential lines, as the ACA Petition requests, would remove an additional tool that consumers can use to limit the number of artificial or prerecorded voice calls that they receive—a tool that is consistent with Congress’s direction in the TRACED Act of placing limits on the number of calls made pursuant to exemptions—and would lead to more unwanted calls.<sup>143</sup> While commenters argue that applying the same opt-out requirements that apply to telemarketers is a departure from longstanding precedent, they offer no persuasive reasons for why consumers should not be afforded the same tools to avoid unwanted informational calls as they have to combat unwanted telemarketing calls, particularly given the unrelenting number of unwanted robocalls consumers face today.<sup>144</sup> NCTA argues that businesses “have every incentive to communicate efficiently with and respect the privacy of their customers, as any failure to do so could result in reputational harm and a loss of business.”<sup>145</sup> And yet the evidence shows that consumers continue to be deluged with unwanted robocalls to their landlines.<sup>146</sup>

50. Informational callers have a variety of alternative methods they may use to reach consumers, including the use of live operators on any calls they make.<sup>147</sup> Our opt-out requirement

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<sup>137</sup> *Id.* § 64.1200(d). Under the rules, a caller must honor a residential subscriber’s do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. *See id.* § 64.1200(d)(3).

<sup>138</sup> ACA Petition at 9-11.

<sup>139</sup> *Id.* at 10.

<sup>140</sup> *TCPA Exemptions Order*, 35 FCC Rcd at 15196, para. 23.

<sup>141</sup> *But see* Sirius XM Comments at 11 (Applying the same do-not-call requirements for telemarketing calls to informational calls could mean that consumers will miss out on important service announcements, such as an automaker’s safety recall, service outage updates, or a continuing subscription’s upcoming renewal.).

<sup>142</sup> Joint Consumer Organizations Comments at 3; *see also* Joint Consumer Organizations *Ex Parte* at 4 (the right to opt out of misdirected or unwanted calls should apply to all types of calls—both telemarketing and non-telemarketing calls).

<sup>143</sup> *See* Joint Consumer Organizations Comments at 3 (asserting that eliminating this opt-out requirement would “undermine Congress’s intent to put limits on the calls made pursuant to exemptions, and would lead to more unwanted calls”); *see also* TRACED Act § 8.

<sup>144</sup> *See* AFSA Reply Comments at 2; PACE Comments; AICC Comments at 5.

<sup>145</sup> NCTA Reply Comments at 4.

<sup>146</sup> *See, e.g.*, Joint Consumer Organizations Comments at 11 (pointing to the substantial levels of complaints about prerecorded calls to residential landlines, the receipt of twice the number of unwanted calls by residential landlines as compared to those received by cell phones, and the escalation of complaints to government agencies about these increasing and unrelenting calls).

<sup>147</sup> The TCPA restricts only those informational calls delivered to residential lines with artificial or prerecorded voice messages. *See* 47 U.S.C. § 227(b)(1)(B).

prohibits only the use of an artificial or prerecorded voice message on future calls to the call recipient. It does not preclude further communication by any other means.<sup>148</sup> To the extent that consumers consider such calls beneficial, they have the ability not to exercise the option to opt out from receiving them and even to consent to receiving unlimited calls from a particular caller. We thus disagree with ACA's assertion that the Commission did not fully consider the cost-benefit impact of precluding informational calls after a consumer opts out of such calls. To the contrary, the Commission recognized that requiring an opt-out mechanism for informational calls will provide a significant benefit—it will “empower consumers to stop unwanted calls made pursuant to an exemption under section 227(b)(2)(B)”<sup>149</sup> and “give consumers more say in how many calls they receive”<sup>150</sup>—and it also considered the burden that adopting an automated, interactive opt-out mechanism will impose on callers who make prerecorded message calls.<sup>151</sup> In doing so, however, the Commission noted that “the technology that enables opt out is commonplace and easily accessible.”<sup>152</sup> Nevertheless, “we recognize that this requirement will impose some additional burden,” and to alleviate that burden, we allowed for a six-month implementation period before the opt-out requirements took effect.<sup>153</sup> We took that action to “ensure that affected calling parties can implement necessary changes in a cost-effective way that makes sense for their individual business models.”<sup>154</sup> Thus, we reject ACA's argument that we failed to consider the costs and benefits associated with the new rule.

51. Furthermore, we continue to disagree with commenters who argue that opt-out requirements for exempt callers are overly burdensome.<sup>155</sup> The Commission placed a similar condition on exemptions for calls to wireless numbers, and there is no evidence that callers have not been able to comply with such requirements in that context.<sup>156</sup> The technology that enables opt-out mechanisms is commonplace and easily accessible; the Commission's rules have required telemarketers to use the available tools and equipment since 2012.<sup>157</sup>

#### IV. DECLARATORY RULING

52. We grant ACA's request to confirm that an earlier Commission ruling on “prior express consent” for calls made by utility companies to wireless phone numbers applies equally to residential numbers.<sup>158</sup> As discussed herein, we incorporate by reference the guidance and compliance standards set forth in the *EEI Declaratory Ruling*, which addressed utility calls to wireless telephone numbers, to calls made to residential lines.<sup>159</sup> Specifically, we confirm that consumers who provide their wireless *or*

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<sup>148</sup> ACA Petition at 10.

<sup>149</sup> *TCPA Exemptions Order*, 35 FCC Rcd at 15195-96, para. 21.

<sup>150</sup> *Id.* at 15196, para. 23.

<sup>151</sup> *Id.* at 15196-97, para. 24.

<sup>152</sup> *Id.* at 15196, para. 24.

<sup>153</sup> *Id.* at 15197, para. 24; *id.* at 15200, para. 41.

<sup>154</sup> *Id.* at 15200, para. 41.

<sup>155</sup> See *TCPA Exemptions Order*, 35 FCC Rcd at 15196-97, para. 24; see also PACE Comments.

<sup>156</sup> See *Cargo Airline*, 29 FCC Rcd 3432, 3437-38, para. 18; *2015 TCPA Declaratory Ruling*, 30 FCC Rcd 7961, 7989, 8027-28, 8031-32, paras. 45-46, 138-39, 147-48.

<sup>157</sup> See *2012 TCPA Order*, 27 FCC Rcd at 1857, para. 69 (concluding “there is no indication in our record that implementing the proposed opt-out mechanism would be especially burdensome or pose extraordinary technical issues”).

<sup>158</sup> See ACA Petition at 18-20; see also *EEI Declaratory Ruling*, 31 FCC Rcd at 9065-68, paras. 27-34.

<sup>159</sup> See *EEI Declaratory Ruling*, 31 FCC Rcd at 9066-68, paras. 29-34. Because informational prerecorded calls to residential landlines were exempt without any numerical limitation in 2016 when the *EEI Declaratory Ruling* was

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residential telephone number to a company involved in the provision of their utility service when they initially sign up to receive utility service, subsequently supply the wireless or residential telephone number, or later update their contact information with their wireless or residential telephone number, have given prior express consent to be contacted by that company at that number with messages that are closely related to the utility service so long as the consumer has not provided instructions to the contrary.<sup>160</sup>

53. In addition, at the request of several Texas utility companies, and consistent with the Commission's treatment of prior express consent in other contexts, we take this opportunity also to confirm that the provision of a telephone number to the subscriber's utility service provider reasonably evidences prior express consent by the subscriber to be contacted at that number by an upstream electric utility that: (1) provides electricity service to the subscriber's retail electricity provider, to whom the telephone number is given by the subscriber;<sup>161</sup> or (2) is an affiliate of another utility company that provides some other type of utility service to the subscriber, to whom the telephone number is given by the subscriber.<sup>162</sup> In some instances, the upstream electric utility provider may be best positioned to provide subscribers with more timely information regarding issues that may be affecting their service.<sup>163</sup> This ensures that utility service providers involved in the provision of utility service to a subscriber but do not have a direct customer relationship with the subscriber can rely upon consent given to a retail utility provider to communicate with an affected subscriber on matters closely related to the utility service, such as situations in which the provision of electricity service is, or is scheduled to be, impacted due to issues

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issued, EEI did not request that the Commission address whether utility-related calls would satisfy the "prior express consent" requirement when placed to residential landlines. As a result, the Commission limited its ruling on "prior express consent" only to those calls made to wireless telephone numbers.

<sup>160</sup> 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 8796, 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*).

<sup>161</sup> According to Texas Utility, in all areas of Texas where competition currently exists, consumers must purchase electric service from a Retail Electric Provider (REP), which in turn obtains its electric delivery service and related services from a Transmission and Distribution Utility (TDU). While the REP provides external customer relations functions, the TDU provides the electric power service, operates, maintains, and repairs the utility plant, responds to service interruptions, and restores power. *See* Letter from Brett Heather Freedson, Counsel for American Electric Power Company, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 1-2 (filed Feb. 18, 2022) (Texas Utility Feb. 18 *ex parte*); Letter from Brett Heather Freedson, Counsel for American Electric Power Company, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 1 (filed Nov. 16, 2022).

<sup>162</sup> In both of these cases, the electric utility company that is calling the telephone subscriber does not have a direct customer relationship with the subscriber and thus does not receive the telephone number directly from the subscriber. *See* Letter from Brett Heather Freedson, Counsel to American Electric Power Company, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 1-3 (filed Dec. 6, 2021) (noting that Texas consumers purchase electrical service from a REP but may need to receive service-related calls from the electric utility companies that own and operate the power plants and transmission lines); Letter from Brett Heather Freedson, Counsel to American Electric Power Company, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 at 1-2 (filed Jan. 24, 2022); *see also ACA Declaratory Ruling*, 23 FCC Rcd at 564-65, paras. 9-10 (concluding that provision of a cell phone number to a creditor reasonably evidences consent by that cell phone subscriber to be contacted by a third-party debt collector at that telephone number regarding a debt associated with that transaction).

<sup>163</sup> *See* Texas Utility Feb. 18 *ex parte* at 2 ("the TDU maintains exclusive access to the information required to support its core utility operations").

related to the upstream utilities' generation or transmission of electricity.<sup>164</sup>

54. Consistent with the Commission's precedent, we confirm that calls closely related to utility services include those that warn about planned or unplanned service outages; provide updates about service outages or service restoration; ask for confirmation of service restoration or information about lack of service; provide notification of meter work, tree trimming, or other field work that directly affects the customer's utility service; notify consumers they may be eligible for subsidized or low-cost services due to certain qualifiers such as, for example, age, low income or disability;<sup>165</sup> or provide information about potential brown-outs due to heavy energy usage.<sup>166</sup>

55. With regard to calls regarding payment for current utility service, we also incorporate the Commission's prior ruling. Specifically, in the absence of facts supporting a contrary finding, prior to the termination of a customer's utility service, a customer who provided a residential telephone number when he or she initially signed up to receive utility service, subsequently supplied the residential telephone number, or later updated his or her contact information with a residential telephone number, is deemed to have given prior express consent to be contacted by their utility company with messages that are closely related to the service, as described above,<sup>167</sup> as well as calls to warn about the likelihood that failure to make payment will result in service curtailment.<sup>168</sup> After a customer's utility service has been terminated, however, routine debt collection calls by utilities to those customers will continue to be governed by existing rules and requirements, and we leave undisturbed the existing legal and regulatory framework for those calls.<sup>169</sup>

56. We agree with the petitioner and commenters who support this request that these types of informational communications from utility providers are critical to providing safe, efficient, and reliable service.<sup>170</sup> In fact, the Commission has long recognized that "[s]ervice outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public."<sup>171</sup> There are a wide range of potential risks to public health and safety presented by the interruption of utility services, and the use of artificial or prerecorded voice message calls can be critically important in speeding dissemination of time-sensitive information to the public.<sup>172</sup> We also note that no commenter opposes this request.

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<sup>164</sup> We emphasize that such communications would need to be informational in nature, and could not include telephone solicitation or telemarketing.

<sup>165</sup> This category of calls is limited to notification about eligibility or qualification to participate in a particular subsidy or subsidized program. This category of calls is not intended to include calls soliciting voluntary participation in programs such as, for example, energy saving programs to reduce monthly energy bills or donations to subsidize other energy consumers.

<sup>166</sup> *EEI Declaratory Ruling*, 31 FCC Rcd at 9066, para. 30. In so doing, the Commission noted that calls by the utility company solely for the purpose of communicating with its customers about the utility services it provides and the maintenance thereof, as described in the *EEI Declaratory Ruling*, are not telephone solicitations and do not constitute telemarketing. *Id.* at 9068, para. 34.

<sup>167</sup> *See supra* para. 54.

<sup>168</sup> *See EEI Declaratory Ruling*, 31 FCC Rcd at 9067-68, para. 32.

<sup>169</sup> *See id.*; *see also ACA Declaratory Ruling*, 23 FCC Rcd at 559, 564-65, paras. 1 n.2, 9-11 (noting that in addition to being subject to other TCPA requirements, debt collection calls are regulated by the FTC and are subject to the requirements of the Fair Debt Collection Practices Act).

<sup>170</sup> *See ACA Petition* at 18-20; *Joint Consumer Organizations Comments* at 13; *Cal Utilities Reply Comments* at 7; *CenterPoint Reply Comments* at 2; *NRECA Reply Comments* at 3.

<sup>171</sup> *1992 TCPA Order*, 7 FCC Rcd at 8778, para. 51.

<sup>172</sup> *See EEI Declaratory Ruling*, 31 FCC Rcd at 9066, para. 28.



57. To ensure that utility companies call only those consumers who have consented to receive artificial or prerecorded voice calls and that such calls are closely related to the provision of service, we reiterate that the utility company is responsible for demonstrating that the consumer provided prior express consent, as it is in the best position to keep records in the usual course of business showing such consent, and the utility company will bear the burden of showing it obtained the necessary prior express consent.<sup>173</sup> We also note that consumers have the right to revoke consent to such calls if they no longer wish to receive them, just as they can when these calls are made to wireless numbers.<sup>174</sup> As a result, we believe this ruling balances important public safety communications with consumer privacy interests.

## V. PROCEDURAL MATTERS

58. *Paperwork Reduction Act of 1995 Analysis.* This document contains non-substantive modifications to an information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. They will be submitted to the Office of Management and Budget (OMB) for approval as non-substantive changes. Because these changes are non-substantive, there is no new or modified information collection burden for small business concerns with fewer than 25 employees pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.<sup>175</sup>

59. *Supplemental Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980 (RFA),<sup>176</sup> the Commission has prepared a Supplemental Final Regulatory Flexibility Analysis (SFRFA) relating to this *Order on Reconsideration and Declaratory Ruling*. The SFRFA is contained in Appendix B.

60. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget concurs, that these rules are “non-major” under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of this *Order on Reconsideration and Declaratory Ruling* to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

61. *Materials in Accessible Formats.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice).

62. *Availability of Documents.* The *Order on Reconsideration and Declaratory Ruling* will be available via ECFS. This document will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. When the FCC Headquarters reopens to the public, this document will also be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 45 L Street NE, Washington, D.C. 20554.

63. *Additional Information.* For additional information on this proceeding, contact Richard D. Smith, [Richard.Smith@fcc.gov](mailto:Richard.Smith@fcc.gov) or (717) 338-2797, of the Consumer and Governmental Affairs Bureau, Consumer Policy Division.

## VI. ORDERING CLAUSES

64. **IT IS ORDERED**, pursuant to the authority contained in sections 1-4, 227, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, 405, and sections 1.2 and 1.429 of the Commission’s rules, 47 CFR §§ 1.2, 1.429, that this *Order on Reconsideration and Declaratory Ruling* **IS ADOPTED**.

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<sup>173</sup> See *id.* at 9067, para. 31.

<sup>174</sup> See *id.* at 9068, para. 33; see also *2015 TCPA Declaratory Ruling*, 30 FCC Rcd at 7993-94, paras. 55-58.

<sup>175</sup> 44 U.S.C. § 3506(c)(4).

<sup>176</sup> 5 U.S.C. § 603.

65. **IT IS FURTHER ORDERED** that the *Declaratory Ruling* in Section IV of this *Order on Reconsideration and Declaratory Ruling* **SHALL BE EFFECTIVE** upon release. **IT IS FURTHER ORDERED** that rule amendments adopted in Appendix A of this *Order on Reconsideration and Declaratory Ruling* **SHALL BE EFFECTIVE** six months after publication in the Federal Register, which shall be preceded by OMB approval of the modified information collection requirements adopted herein.<sup>177</sup>

66. **IT IS FURTHER ORDERED** that, pursuant to 47 CFR § 1.4(b)(1), the period for filing petitions for reconsideration or petitions for judicial review of any aspect of this *Order on Reconsideration and Declaratory Ruling* will commence on the date that a summary of this *Order on Reconsideration and Declaratory Ruling* is published in the Federal Register.

67. **IT IS FURTHER ORDERED** that the *TCPA Exemptions Order* adopted in CG Docket No. 02-278 on December 29, 2020, **IS AFFIRMED IN PART and REVERSED IN PART** to the extent indicated herein.

68. **IT IS FURTHER ORDERED** that the Petitions for Reconsideration filed by the ACA International et al. and Enterprise Communications Advocacy Coalition in CG Docket No. 02-278 on March 29, 2021 and March 17, 2021, respectively, **ARE GRANTED IN PART and DENIED IN PART** to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>177</sup> As explained above, *supra*, paras. 16-17, the effective date of the rule amendments will be the same as the effective date of the rules adopted in the *TCPA Exemptions Order* that contain information collection requirements under the PRA.

## APPENDIX A

## Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 as follows:

**PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**

1. The authority citation for part 64 continues to read as follows:

**Authority:** 47 U.S.C. 151, 152, 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 227b, 228, 251(a), 251(e), 254(k), 262, 276, 403(b)(2)(B), (c), 616, 620, 1401-1473, unless otherwise noted; Pub. L. 115-141, Div. P, sec. 503, 132 Stat. 348, 109

2. Amend § 64.1200 by revising paragraph (a)(3) to read as follows:

**§ 64.1200 Delivery Restrictions.**

\* \* \* \* \*

(a) \* \* \*

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message **that includes or introduces an advertisement or constitutes telemarketing** without the prior express written consent of the called party, **or that exceeds the applicable numerical limitation on calls identified in paragraphs (a)(3)(ii) through (v) of this subsection without the prior express consent of the called party.** **A telephone call to any residential line using an artificial or prerecorded voice to deliver a message requires no consent if the call:**

(i) \* \* \*

(ii) Is not made for a commercial purpose and the caller makes no more than three calls within any consecutive 30-day period to the residential line;

(iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing and the caller makes no more than three calls within any consecutive 30-day period to the residential line;

(iv) Is made by or on behalf of a tax-exempt nonprofit organization and the caller makes no more than three calls within any consecutive 30-day period to the residential line; or

(v) Delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103, and the caller makes no more than one call per day to each patient’s residential line, up to a maximum of three calls combined per week to each patient’s residential line.

\* \* \* \* \*

## APPENDIX B

## Supplemental Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Traced Act NPRM*.<sup>2</sup> The Commission sought written public comment on the proposals in the *Traced Act NPRM*, including comment on the IRFA.<sup>3</sup> The Commission subsequently incorporated a Final Regulatory Flexibility Analysis (FRFA) in the *TCPA Exemptions Order*.<sup>4</sup> This Supplemental FRFA conforms to the RFA and incorporates by reference the FRFA in the *TCPA Exemptions Order*. It reflects changes to the Commission's rules arising from this *Order on Reconsideration and Declaratory Ruling (Order)* prepared in response to the Petitions for Reconsideration filed by ACA International et al. (ACA) and Enterprise Communications Advocacy Coalition (ECAC).<sup>5</sup>

**A. Need for, and Objectives of, the *Order on Reconsideration***

2. This *Order* is part of the Commission's ongoing work to combat unwanted robocalls while permitting legitimate callers to deliver information consumers have consented to receive. Specifically, the *Order* grants petitioners' request to clarify and amend the rules so that callers may obtain consent either orally or in writing to exceed the numerical limits on artificial or prerecorded voice calls to residential telephone lines made under the exemptions contained in section 64.1200(a)(3)(ii)-(v) of the Commission's rules.<sup>6</sup> The Commission agrees with the petitioners and commenters, including both industry and consumer organizations, that the Commission did not intend to require that such callers obtain consent only in writing. While the text of the *TCPA Exemptions Order* did not specify that consent must be obtained in writing, the Commission agrees with petitioners that the amended rule implementing the numerical limitations inadvertently appeared to require prior express written consent to exceed those limitations. As a result, the Commission now amends section 64.1200(a)(3) of its rules to make clear that consent for informational, non-telemarketing calls to residential telephone lines can be obtained orally or in writing, consistent with longstanding Commission precedent.<sup>7</sup>

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<sup>1</sup> 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612, has been amended by the Contract With America Advancement Act of 1996, Public Law No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>2</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Notice of Proposed Rulemaking, 35 FCC Rcd 11186, Appx. B (2020) (*TRACED Act NPRM*).

<sup>3</sup> *Id.* at Appx. B.

<sup>4</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 35 FCC Rcd 15188 (2020) (*TCPA Exemptions Order*).

<sup>5</sup> See *ACA International et al.*, Petition for Partial Reconsideration, CG Docket No. 02-278 (filed Mar. 29, 2021) (*ACA Petition*); *Enterprise Communications Advocacy Coalition (ECAC)*, Petition for Reconsideration, CG Docket No. 02-278 (filed Mar. 17, 2021) (*ECAC Petition*).

<sup>6</sup> See *ACA Petition* at 4-9; *ECAC Petition* at 4-5. Section 64.1200(a)(3)(ii)-(v) of the amended rules placed numerical limitations on the number of artificial and prerecorded informational calls that can be made to a residential telephone line without consent under a recognized exemption (i.e. non-commercial calls, commercial calls that do not include an advertisement or constitute telemarketing, tax-exempt nonprofit organization calls, and HIPAA-related calls). See 47 CFR § 64.1200(a)(3)(ii)-(v). The Commission indicated that a caller must obtain the consent of the called party to exceed the numerical limitations. See *TCPA Exemptions Order*, 35 FCC Rcd at 15195, para. 20.

<sup>7</sup> See Appx. A.

3. The *Order* denies petitioners' request to reconsider the Commission's numerical limits on exempt non-telemarketing calls to residential lines. The Commission affirms that limiting the number of exempted calls to residential lines will greatly reduce the interruptions from unwanted calls and reduce the burden on residential telephone users to manage such calls.<sup>8</sup> The Commission continues to believe that limiting the number of calls that can be made to a particular residential line to three artificial or prerecorded voice calls within any consecutive thirty-day period strikes the appropriate balance between these callers reaching consumers with valuable information and reducing the number of unexpected and unwanted calls consumers currently receive. In addition, the limit of three calls per thirty-day period is "in line with" the conditions for exempted calls to wireless numbers.

4. The *Order* also denies petitioners' request to reconsider the Commission's decision to extend to informational calls opt-out requirements that had previously applied only to telemarketing calls. These requirements mandate use of automated opt-out mechanisms, as well as opt-out lists and policies. Under the new rules, a consumer who wants to avoid further artificial or prerecorded informational calls can "opt out" by dialing a telephone number (required to be provided in the artificial or prerecorded voice message) to register his or her do-not-call request in response to that call.<sup>9</sup> The rules also require that the caller provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request.<sup>10</sup> The Commission affirms that an opt-out mechanism gives consumers more say in how many calls they receive and that consumers should be able to decide which types of calls they want to receive on their residential lines and which they wish to avoid.

5. Finally, the *Order* grants the request of ACA to confirm that the Commission's ruling on "prior express consent" for calls made by utility companies to wireless phones applies equally to residential landlines.<sup>11</sup> The Commission confirms that consumers who provide their residential telephone number to a utility company when they initially sign up to receive utility service, subsequently supply the residential telephone number, or later update their contact information with their residential telephone number, have given prior express consent to be contacted by their utility company at that number with messages that are closely related to the utility service so long as the consumer has not provided "instructions to the contrary." The *Order* concludes that there are a wide range of potential risks to public health and safety presented by the interruption of utility services, and the use of prerecorded voice message calls can be critically important in speeding dissemination of time sensitive information to the public.<sup>12</sup>

#### **B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA and FRFA**

6. In the *Traced Act NPRM*, the Commission solicited comments on how to minimize the economic impact of the new rules on small businesses.<sup>13</sup> There were no comments filed that specifically addressed the rules and policies proposed in the IRFA. In the *TCPA Exemptions Order*, however, the Commission described three comments that focused on the challenges certain entities might face in complying with the opt-out requirements, given their small staffs and limited resources.<sup>14</sup> The FRFA

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<sup>8</sup> See *TCPA Exemptions Order*, 35 FCC Rcd at 15194, para. 15.

<sup>9</sup> 47 CFR § 64.1200(b)(2).

<sup>10</sup> *Id.* § 64.1200(b)(3).

<sup>11</sup> See ACA Petition at 18-20; see also *EEI Declaratory Ruling*, 31 FCC Rcd at 9065-68, paras. 27-34.

<sup>12</sup> See *EEI Declaratory Ruling*, 31 FCC Rcd at 9066, para. 28.

<sup>13</sup> *Traced Act NPRM*, Appx. B.

<sup>14</sup> *TCPA Exemptions Order*, Appx. B.

addressed those concerns.<sup>15</sup> The ACA Petition and ECAC Petition addressed in this *Order*, and associated comments, did not raise any concerns with the FRFA.

**C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration**

7. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.<sup>16</sup> The Chief Counsel did not file any comments in response to the rules adopted in this proceeding.

**D. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

8. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.<sup>17</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small government jurisdiction.”<sup>18</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>19</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>20</sup>

9. As noted above, the Commission incorporated a FRFA into the *TCPA Exemptions Order*. In that analysis, the Commission described in detail the various small business entities that may be affected by the final rules, including telemarketing bureaus and other contact centers.<sup>21</sup> This *Order* amends the final rules adopted in the *TCPA Exemptions Order* affecting entities that make calls to residential lines pursuant to an exemption in the Commission’s rules. The Supplemental FRFA accompanying this *Order* incorporates by reference the description and estimate of the number of small entities from the IRFA in the *Traced Act NPRM* and FRFA in the *TCPA Exemptions Order*.

**E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

10. In Section E of the FRFA in the *TCPA Exemptions Order*, the Commission described in detail the projected reporting, recordkeeping, and other compliance requirements for small entities arising from the rules adopted in the *TCPA Exemptions Order*. This Supplemental FRFA incorporates by reference the requirements described in Section E of the FRFA. In this *Order*, however, the Commission modifies rules adopted in the *TCPA Exemptions Order* to make clear that callers may obtain consent either orally or in writing to exceed the numerical limits on artificial or prerecorded voice calls to

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<sup>15</sup> *Id.*

<sup>16</sup> 5 U.S.C. § 604(a)(3).

<sup>17</sup> *See id.* § 603(b)(3).

<sup>18</sup> *See id.* § 601(6).

<sup>19</sup> *See id.* § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>20</sup> *See* 15 U.S.C. § 632.

<sup>21</sup> *TCPA Exemptions Order*, Appx. B.

residential telephone lines made under the exemptions contained in section 64.1200(a)(3)(ii)-(v) of the Commission's rules. This action should significantly reduce any compliance requirements for small entities. As the Commission emphasized in the *TCPA Exemptions Order*, callers can use exempted calls to obtain consent if the calls satisfy other applicable conditions. Such consent may be obtained verbally on the call. The Commission stated that consumers who welcome the calls would be likely to give such consent. And because the TCPA only restricts calls initiated with an artificial or prerecorded voice to a residential telephone, callers can use a live agent to make such calls without running afoul of the TCPA.<sup>22</sup>

#### **F. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

11. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>23</sup>

12. The Commission considered feedback in response to the ACA Petition and ECAC Petition in crafting the *Order*. We evaluated the comments with the goal of removing regulatory roadblocks and giving industry the flexibility to continue to make calls pursuant to any exemption previously carved out by the Commission, while still protecting the interests of consumers who do not want to receive unlimited calls from such entities and allowing consumers to opt out of future calls from such entities. For example, in the *TCPA Exemptions Order*, the Commission retained all existing exemptions for calls to residential numbers, concluding that such exemptions satisfy the TRACED Act's requirements regarding the classes of parties that may make such calls and the classes of parties that may be called. In this *Order*, the Commission takes further action to give industry even more flexibility to make calls to consumers by amending section 64.1200(a)(3) of the rules to make clear that consent for informational, non-telemarketing calls to residential telephone lines can be obtained orally or in writing, consistent with longstanding Commission precedent.<sup>24</sup> This should significantly minimize any compliance costs and burdens on small entities that are subject to the TCPA rules.

#### **G. Report to Congress**

13. The Commission will send a copy of the *Order on Reconsideration and Declaratory Ruling*, including this Supplemental FRFA, in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act.<sup>25</sup> In addition, the Commission will send a copy of the *Order on Reconsideration and Declaratory Ruling*, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Order on Reconsideration and Declaratory Ruling* (or summaries thereof) will also be published in the Federal Register.<sup>26</sup>

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<sup>22</sup> See 47 U.S.C. § 227(b)(1)(B); 47 CFR § 64.1200(a)(3).

<sup>23</sup> 5 U.S.C. § 603(c).

<sup>24</sup> See Appx. A.

<sup>25</sup> 5 U.S.C. § 801(a)(1)(A).

<sup>26</sup> See *id.* § 604(b).

## APPENDIX C

## List of Commenters

The following parties filed comments in response to the petitions filed in this matter (CG Docket No. 02-278):

<u>Commenter</u>	<u>Abbreviation</u>
The American Bankers Association, American Financial Services Association, Credit Union National Association, Mortgage Bankers Association, National Association of Federally-Insured Credit Unions, National Council Of Higher Education Resources, National Retail Federation, and Student Loan Servicing Alliance	ABA et al.
<b>ACA International, Edison Electric Institute, Cargo Airlines Association, and American Association of Healthcare Administrative Management</b>	<b>ACA et al.</b>
Alarm Industry Communications Committee	AICC
<b>American Financial Services Association</b>	<b>AFSA</b>
Andreas, Michael	Andreas
Anguiano, Juana	Anquiano
Armstrong, Kenneth	Armstrong
Baich, Kevin	Baich
Berenholz, Jeffrey	Berenholz
Bowser, Cynthia	Bowser
Brick, James	Brick
Brown, Jack	Brown
Burtis, Daniel	Burtis
Cain, Sheila	Cain
<b>California Utilities</b>	<b>Cal Utilities</b>
<b>CenterPoint Energy, Inc.</b>	<b>CenterPoint</b>
Chapa, Juanita	Chapa
Chavous, Marcus	Chavous
Cheves, Zentra	Cheves
Ciskey, Debra	Ciskey
Coleman, Christopher	Coleman
Crawford, Andrea	Crawford
Davisson, Kris	Davisson
DeClerck, Melissa	DeClerck
DeForest, Dena	DeForest
DeJesus, Ramon	DeJesus
Denny, Ronna	Denny
Diaz, Maryrose	Diaz
DiMatteo, Jeff	DiMatteo
Dominion Energy, Inc.	Dominion
Ellis, Stephanie	Ellis
<b>Enterprise Communications Advocacy Coalition</b>	<b>ECAC</b>
Esquivel, Patricio	Esquivel
Feldstein, David	Feldstein
Fett, Russell	Fett
Flecker, Arlynn	Flecker
Garner, Barbara	Garner
Griffin, Brian	B. Griffin



Griffin, Donald	D. Griffin
Heimburg, Darren	Heimburg
Hernandez, Jacqueline	Hernandez
Hoblick, Sandra	Hoblick
Hunter, Jeff	Hunter
<b>Jenkins, Brandy</b>	<b>Jenkins</b>
National Consumer Law Center, Consumer Action, Consumer Federation of America, Consumer Reports, EPIC, National Association of Consumer Advocates, U.S. PIRG	Joint Consumer Organizations
Kelley, David	Kelley
Klein, Brad	Klein
Kussart, Pauline	Kussart
Laurent, Mark	Laurent
Laws, Stephen	Laws
Lehr, Christian	Lehr
Martin, Stella	Martin
McMullen, Ryan	McMullen
Meyer, Mark	Meyer
Miller, Elizabeth	Miller
Mullins, Kathy	Mullins
Mock, Eric	Mock
<b>National Rural Electric Coalition Association</b>	<b>NRECA</b>
Navarret, Josephine	Navarret
<b>NCTA – The Internet &amp; TV Association</b>	<b>NCTA</b>
Newman, Dacy	Newman
Nichols, Dan	Nichols
Norgard, Stephanie	Norgard
Olson, Nathan	Olson
Ormson, Ronda	Ormson
Ortiz, Irma	Ortiz
Osborn, Robin	Osborn
Perrotta, Thomas	Perrotta
Perez, Lorraine	Perez
Peterson, Mary	Peterson
Plansky, Peter	Plansky
Pope, Jaime	Pope
Professional Association for Customer Engagement	PACE
Quinn, Hunter	Quinn
Rainey, Nancy	Rainey
Rainho, Richard	Rainho
Reddick, Bryan	Reddick
Rice, Brent	Rice
Rosenthal, Phillip	Rosenthal
Ross, Noni	Ross
Rowland, Mark	Rowland
Rozga, Max	Rozga
Ruh, Chris	Ruh
Schaefer, Dore	Schaefer
Schobel, Diana	Schobel
Segol, Richard	Segol
Shambre, Kathy	Shambre

Shoop, Charles  
Sirius XM Radio, Inc.  
Stephens, Jill  
Stewart, Rebecca  
St. Laurent, Jill  
Sundstrom, Alicia  
Terrasi, Robert  
Voss, Jeff  
Voss-Costa, Donna  
Warshaw, David  
Webb, Jerry  
Whipple, Jennifer  
Wilkinson, Kelly  
Williamson, Dana  
Williams, Richard  
Willis, Stacy  
Wisehart, Lynne  
Zuzik, John

Shoop  
Sirius XM  
Stephens  
Stewart  
St. Laurent  
Sundstrom  
Terrasi  
Voss  
Voss-Costa  
Warshaw  
Webb  
Whipple  
Wilkinson  
D. Williamson  
R. Williams  
Willis  
Wisehart  
Zuzik

\* filing both comments and reply comments (bold - reply comments only)