

UNITEDHEALTH GROUP®

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June 7, 2018

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

**RE: Advanced Methods to Target and Eliminate Unlawful Robocalls
 CG Docket No. 17-59 / DA 18-31**

Submitted Electronically: FCC Electronic Comment Filing System

Dear Ms. Dortch:

UnitedHealth Group (“UHG”) is pleased to respond to the Federal Communications Commission’s (“FCC”) *Second Further Notice of Proposed Rulemaking*,¹ which seeks comments regarding proposals to establish one or more reassigned telephone numbers database(s) that could be checked by callers to avoid contacts with consumers which may violate the Telephone Consumer Protection Act (“TCPA”).

UHG provides the following recommendations to the FCC. First, separate from the *Second Further NPRM*, UHG encourages the FCC to grant the pending Joint Petition² and confirm that HIPAA-regulated entities are not subject to TCPA liability for certain non-marketing HIPAA-governed calls for which prior express consent had been obtained through a health plan, healthcare provider or other HIPAA-regulated entity. Second, though UHG has concerns with the practicality of a mandatory centralized reassigned numbers database, if the FCC adopts the voluntary framework approach proposed in the *Second Further NPRM*, it should provide a safe harbor for good-faith callers that “reasonably rely” on available databases to avoid placing calls to reassigned numbers. Failure to include such a safe harbor will chill important messages to consumers and could lead to liability where database users have relied on the database in good faith. Third, the FCC should reduce the burdens of accessing any database, as well as the design of the proposed database(s), as UHG proposes below.

¹ *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Rulemaking, CG Docket No. 17-59 (March 23, 2018) (“*Second Further NPRM*”).

² See Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278 (filed July 28, 2016) (“Joint Petition”).

About UHG

UHG is dedicated to helping people live healthier lives and making the health care system work better for everyone through two distinct business platforms—UnitedHealthcare, our health benefits business, and Optum, our health services business. Our workforce of 285,000 people serves the health care needs of nearly 140 million people worldwide, funding and arranging health care on behalf of individuals, employers, and the government. As America's most diversified health and well-being company, we not only serve many of the country's most respected employers, we are also the nation's largest Medicare health plan - serving nearly one in five seniors nationwide - and one of the largest Medicaid health plans, supporting underserved communities in 28 States and the District of Columbia.

UHG and others providing health care services frequently communicate with consumers by telephone or text. UHG's communications with members include information about benefits, programs, reminders for prescription refills and appointments, annual influenza vaccine reminders, pre-operative care instructions, and post-discharge follow-up communications intended to prevent readmission. These types of messages can generate meaningful member engagement and health care results:

- Text messaging was found to improve the health of HIV-positive patients by improving medication adherence and patient knowledge of proper self-care.³
- A report by the California Healthcare Foundation recommends use of telephone contacts for patients with chronic conditions as a way to monitor patient behaviors, provide reminders of follow-up care, and deliver education and counseling services.⁴
- Phone-based coaching and text messages in Optum's Quit for Life® tobacco cessation program contribute to an average tobacco quit rate of 49 percent.⁵

By taking steps to ensure that health care entities can continue to use telephone and text messaging for important communications, the FCC will materially enhance the health and well-being of millions of Americans. In particular, the FCC should grant the pending Joint Petition filed by a diverse array of healthcare stakeholders, which asks the FCC to clarify the TCPA's treatment of certain non-telemarketing calls and text messages already permitted under HIPAA's comprehensive privacy rules.⁶

Safe Harbor

As we conduct ongoing business with our members, we rely on the contact information that we receive from individuals and employers. As we articulated in a Petition to the FCC in 2014,⁷ we do not believe that callers should be subject to liability under the TCPA for informational, non-telemarketing autodialed and prerecorded calls to wireless numbers for which valid prior

³ Jennifer Uhrig, Agency for Healthcare Research and Quality, *Using Short Message System to Improve Health Care Quality and Outcomes Among HIV-Positive Men*, AHRQ Publication No. 12-0070-1-EF (June 2011) accessed at: <https://healthit.ahrq.gov/sites/default/files/docs/page/uhrigsuccesstory.pdf>.

⁴ California Healthcare Foundation, *Using Telephone Support to Monitor Chronic Disease*, June 2005, accessed at: <https://www.chcf.org/wp-content/uploads/2017/12/PDF-UsingTelephoneSupportToManageChronicDisease.pdf>.

⁵ Optum survey data, cumulative from 2006 to 2015.

⁶ See Joint Petition.

⁷ United Healthcare Services, Inc., *Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Jan. 16, 2014) ("Petition").

express consent has been obtained but which, unbeknownst to the calling party, have subsequently been reassigned from one subscriber to another. Although we believe this is the most defensible way to read the TCPA, we respectfully request that the FCC confirm this interpretation.

UHG targets communications to specific individuals for particular purposes (e.g., the person who has the prescription up for refill or who has an upcoming appointment). Significantly, Congress intended the TCPA to regulate the hundreds of thousands of telephone solicitors who call individuals to sell goods and services. The calls made by UHG are not the public nuisance targeted by the TCPA. There is no need or incentive for UHG to contact anyone other than the intended recipient. It is inconsistent with the letter and purpose of the TCPA to expose to litigation callers that dial numbers for which they have obtained prior express consent to call just because those numbers have been reassigned without the caller's knowledge.

Even with the development of a potential database of reassigned phone numbers, good faith errors can occur. The significant and growing litigation risk from such calls - and the potential for devastating TCPA class action damage awards - threatens organizations that have earnestly and in good faith attempted to meet their TCPA obligations.⁸ This risk also has the potential, contrary to goals of the TCPA expressed by Congress and the FCC, to chill the provision of time-sensitive, non-telemarketing informational messages that consumers strongly desire and have consented to receive.

Patients welcome and expect these types of time-sensitive, non-marketing healthcare communications. Indeed, as the Joint Petition makes abundantly clear, the opt-out rate for such communications is extremely low. Even if one of these calls or text messages is made to a reassigned phone number, the recipient can easily opt out by either: (1) informing the caller that they no longer want to receive calls or (2) replying to a text message with an opt-out request. Any minor inconvenience to the limited number of individuals who receive such calls to reassigned numbers is heavily outweighed by the significant benefits to the health and well-being of millions of others.

The FCC has long established rules to confirm that good-faith callers are not liable for calls for which they have "reasonable reliance" on the prior express consent of a called party,⁹ and the FCC should therefore confirm that parties are not subject to TCPA liability for such healthcare-related calls when made to a reassigned number, provided such calls were made in reasonable reliance on the collection of prior express consent.

Safe Harbor Related to Database Use

As noted in comments filed by the U.S. Chamber of Commerce,¹⁰ there are concerns with the establishment, maintenance, use, and practicality of a database of reassigned phone numbers. The Chamber asserts that it would exceed the FCC's authority to require that businesses

⁸ See: U.S. Chamber Institute for Legal Reform, *TCPA Litigation Sprawl* (August 2017) accessed at: http://www.instituteforlegalreform.com/uploads/sites/1/TCPA_Paper_Final.pdf

⁹ See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, CG Docket No. 02-278, at ¶ 1 (2012) (confirming "that sending a one-time text message confirming a consumer's request that no further text messages be sent does not violate the [TCPA] or the Commission's rules as long as the confirmation text has the specific characteristics described in the petition").

¹⁰ See Comments of U.S. Chamber of Commerce, CG Docket No. 17-59 (Aug. 28, 2018).

access the database to check for reassigned numbers before placing calls. While UHG takes no position on the extent of the FCC's authority, we do agree with the Chamber that if the FCC determines it has authority to move forward with a database, it should be accompanied by a safe harbor protecting callers from TCPA liability if the caller takes affirmative steps to comply with the law by using the database.

A safe harbor is consistent with the statute and the U.S. Court of Appeals for the D.C. Circuit's decision in *ACA International v. FCC*, which observed that the creation of a safe harbor would have "greater potential to give full effect to the Commission's principle of reasonable reliance."¹¹ The D.C. Circuit did not find that a safe harbor for calls to reassigned numbers was *per se* arbitrary and capricious; rather, it concluded that the specific one-call implementation was too restrictive under the statute and suggested that the FCC's safe harbor needed to be more capacious to comport with the notion of "reasonable reliance."

Concerns Regarding Burden

We believe that it would be burdensome to require businesses to continuously check a changing database. The expense and effort to check every phone number before calls are placed would be significant, and it may delay the timing of conveying important information to members. As a result, we recommend requiring callers to check the database no more than quarterly.

Additionally, callers will need to undertake additional steps to ensure the accuracy of the information as they cannot simply remove a phone number from their records if it appears in a reassigned phone numbers database. While we want to avoid unintended calls to non-members after a phone number has been reassigned, callers also need to cross check with their systems to confirm whether there is still a legitimate reason to call a specific phone number, such as a phone number reassigned to another family member in the same household or another person who happens to have a separate business relationship with the company.

These and numerous other operational challenges support further the need for the FCC to, at a minimum, provide a safe harbor for callers who check one or more reassigned number database solutions on a periodic basis (e.g., quarterly basis).

Database Design

If the FCC moves forward in designing a database for reassigned phone numbers, UHG recommends the following:

- A single database should be utilized as a central source of truth instead of a variety of sources.
- Data should be reported by service providers at least as frequently as callers are required to check the database. For example, service providers could be required to report on a quarterly basis, and callers could be required to check the database on a quarterly basis.
- To reduce operational burdens, callers should not be required to enter single phone numbers in the database. Instead, automated data matching should be permitted. A

¹¹ *ACA International v. FCC*, 885 F.3d 687, 709 (D.C. Cir. 2018).

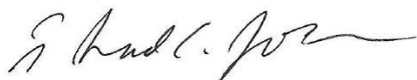
real time API web service call would be a preferred format to facilitate automation. If that is not an option, a CSV flat file would also be an acceptable format.

- Contractors and vendors should have access to the database, with appropriate checks in place to ensure they have a legitimate business relationship with a caller.
- To assist in the matching of people's calling preferences and self-reported contact information with reassigned phone numbers, the reassigned phone number database should include the minimum necessary information along with the phone numbers to ensure that callers are removing the phone numbers from their databases for the right people. We suggest including the following data elements in order of priority:
 - Reassigned phone number
 - Phone number de-assigned date
 - Phone number re-assigned date
 - Original assigned person's name
 - New assigned person's name
 - Location information (city, state, zip code or address)

The dates of de-assignment and re-assignment of a phone number are especially important so callers can match the information with the contact information and permissions that they have received from their customers.

UHG welcomes the opportunity for constructive discussion and collaboration. Thank you for your thoughtful consideration of our comments. Please do not hesitate to contact us if you have any questions.

Sincerely,



Thad C. Johnson
Chief Legal Officer
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Richard J. Mattera
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