

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC**

In the Matter of	)	
	)	
Consumer And Governmental Affairs Bureau	)	CG Docket No. 18-152
Seeks Comment On Interpretation Of The	)	
Telephone Consumer Protection Act In Light	)	
Of D.C. Circuit’s <i>ACA International</i> Decision	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**COMMENTS OF ANTHEM, INC., BLUE CROSS BLUE SHIELD ASSOCIATION,  
WELLCARE HEALTH PLANS, INC., AND THE AMERICAN ASSOCIATION OF  
HEALTHCARE ADMINISTRATIVE MANAGEMENT**

**I. INTRODUCTION.**

Anthem, Inc. and its affiliated health plans, Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management (collectively, the “Healthcare Petitioners”) respectfully submit these comments in response to the Federal Communication Commission (“FCC” or “Commission”) Consumer & Government Affairs Bureau’s *Public Notice* in these proceedings.<sup>1</sup> The *Public Notice* seeks comment on issues regarding the “interpretation and implementation of the Telephone Consumer Protection Act [“TCPA”] following the recent decision of the U.S. Court of Appeals for the District of Columbia in *ACA International v. FCC*.”<sup>2</sup>

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<sup>1</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit’s ACA International Decision*, CG Docket Nos. 18-152, 02-278 (rel. May 14, 2018) (“*Public Notice*”).

<sup>2</sup> *Id.*; see *ACA Int’l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (striking down portions of *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“*2015 Declaratory Order*”).

The *Public Notice* provides the ideal opportunity for the Commission to grant without further delay the pending Petition for Expedited Declaratory Ruling and/or Clarification<sup>3</sup> filed by the Healthcare Petitioners. Twenty-three months ago, the Healthcare Petitioners asked the Commission to clarify certain aspects of the *2015 Declaratory Order* and to confirm the FCC's longstanding policy of harmonizing its interpretations of the TCPA with the regulation of the use of telephone numbers under the Health Insurance Portability and Accountability Act ("HIPAA"). The Healthcare Petitioners specifically asked the Commission to clarify, as set forth in Exhibits A and B:

1. That the provision of a phone number to a "covered entity" or "business associate," as those terms are defined under HIPAA, constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, or health care operations.
2. That the prior express consent clarification in paragraph 141 and the non-telemarketing health care message exemption granted in paragraph 147, both in the *2015 Declaratory Order*, be clarified to include HIPAA "covered entities" and "business associates." Specifically, each use of the term "healthcare provider" in paragraphs 141 and 147 of the *2015 Declaratory Order* should be clarified to encompass "HIPAA covered entities and business associates."

The first requested clarification flows from the *2015 Declaratory Order* and HIPAA. Given the Commission's expressed reluctance against "unnecessarily restrict[ing] consumer access to information communicated through purely informational calls,"<sup>4</sup> along with HIPAA's existing privacy safeguards, the Bureau should clarify that the provision of a telephone number

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<sup>3</sup> 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"); Reply Comments in Support of 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, at 3 (filed Oct. 4, 2016) ("Joint Petition Reply").

<sup>4</sup> *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Report and Order, 27 FCC Rcd 1830 ¶ 21 (2012).

to a covered entity or business associate demonstrates prior express consent under the TCPA for calls relating to treatment, payment, billing, and health care operations. With respect to the second request, when the purpose, content, and recipient of the call are the same, it would be impractical to require that the telephone number be provided to a healthcare provider rather than to a health plan or other HIPAA-covered entity or business associate.

Put differently, these clarifications touch on two related aspects of the *2015 Declaratory Order*: (1) *who* may place the call; and (2) *what* the call must be about. Regarding the “who” question, the Healthcare Petitioners asked the Commission to clarify that the provision of a phone number to a HIPAA “covered entity” or “business associate,” whether by an individual, another covered entity, or a party engaged in an interaction subject to HIPAA, constitutes prior express consent calls to the HIPAA-covered entity and business associates acting on its behalf, if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary. Regarding the “what” question, the Healthcare Petitioners asked the Commission to clarify that a HIPAA-regulated entity may place “treatment, payment, and operations” calls otherwise allowed under HIPAA. In short, the Joint Petition requested narrow clarifications to bring the FCC’s TCPA rules for healthcare-related calls more in line with consumer expectations and HIPAA.

Despite a thorough record that was striking in its virtual unanimity in support of the Joint Petition, the Commission did not issue a decision while the *2015 Declaratory Order* was under appeal at the D.C. Circuit. In the meantime, the threat of abusive class-wide litigation has chilled HIPAA-regulated entities from placing non-marketing calls about treatment, payment, or operations that patients want and expect. Now that the D.C. Circuit’s decision has been released, the time is ripe for the Commission to grant the Joint Petition without delay. Doing so will

finally afford certainty for pro-patient communications and the HIPAA-regulated entities that seek to make them.

## **II. THE COMMISSION SHOULD GRANT THE JOINT PETITION.**

The Joint Petition asks the Commission to issue a clarification or ruling that would allow the nation's integrated health care system to function as intended under HIPAA and improve consumer health outcomes. The calls and texts at issue in the Joint Petition are precisely those already allowed under HIPAA's comprehensive privacy and data security regime. The Healthcare Petitioners have not sought a new exemption from TCPA's prior express consent requirements. Moreover, the proposals in the Joint Petition apply only to non-telemarketing, HIPAA-governed communications as defined under HIPAA. Granting the Joint Petition would allow important communications to continue and to remain consistent with HIPAA and the HIPAA Privacy Rule, as well as longstanding Commission TCPA precedent.

Diverse stakeholders have urged the Commission to grant the Joint Petition expeditiously and confirm that HIPAA-regulated entities may place calls and texts that help patients and improve healthcare outcomes. The vast majority of comments have supported the Joint Petition and added to the substantial record demonstrating the value of these communications to critical public health goals.<sup>5</sup>

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<sup>5</sup> See, e.g., Comments of the Ass'n. for Community Affiliated Plans, CG Docket No. 02-278 (Aug. 26, 2016); Comments of AAHAM, CG Docket No. 02-278 (Sept. 16, 2016); Comments of CareMessage, CG Docket No. 02-278 (Sept. 16, 2016); Comments of Nat'l Ass'n. of Chain Drug Stores, CG Docket No. 02-278 (Sept. 16, 2016); Comments of America's Health Insurance Plans, CG Docket No. 02-278 (Sept. 19, 2016); Comments of Cardinal Health, Inc., CG Docket No. 02-278 (Sept. 19, 2016); Comments of AmeriHealth Caritas, CG Docket No. 02-278 (Sept. 19, 2016); Comments of Eliza Corporation, CG Docket No. 02-278 (Sept. 19, 2016); Comments of Envision Insurance Co., CG Docket No. 02-278 (Sept. 19, 2016); Comments of mPulse Mobile, Inc., CG Docket No. 02-278 (Sept. 19, 2016); Comments of Mercy Hospital, CG Docket No. 02-278 (Sept. 15, 2016); Comments of Silverlink Communications, LLC, CG Docket No. 02-278 (Sept. 19, 2016); Comments of TracFone Wireless, Inc., CG Docket No. 02-278 (Sept. 19, 2016); and Comments of United HealthCare, CG Docket No. 02-278 (Sept. 19, 2016). Numerous comments from individuals also supported the Joint Petition.

The strong, bipartisan Congressional support for the goals of the Joint Petition mirrors the near-unanimous support in the record. On October 13, 2017, a bipartisan group of members of the House of Representatives led by Representatives Bilirakis and Cardenas sent a letter asking Chairman Pai to act promptly to “afford clarity to covered entities and business associates making non-marketing communications that benefit patients.”<sup>6</sup> As this bipartisan coalition observed, “helpful, important non-marketing communications can be critical safeguards to reaching underserved populations and supporting more effective, efficient health care.”<sup>7</sup> Senators Booker and Nelson also sent a bipartisan letter to Chairman Pai on November 3, 2017. They noted that the calls and text messages subject to the Joint Petition convey “important medical and treatment information” and “improve patient outcomes.”<sup>8</sup> They also stated that “time is of the essence to ensure that consumers’ access to health care is not jeopardized” and asked the FCC to “resolve these issues as soon as possible (preferably within the next 90 days) and to protect communications allowed under HIPAA in light of their unique value to consumers and their positive impact on Americans’ health and well-being.”<sup>9</sup>

The breadth and depth of support for the Joint Petition is hardly surprising. The communications at stake include, for example, onboarding, wellness, informational, and follow-up and calls and texts that:

- Explain coverage and how to get needed care;
- Perform health screenings and identify at-risk members;
- Answer questions and ensure that members have access to care;
- Facilitate selection of primary care provider and schedule appointments;
- Remind members to get preventive care, such as shots;

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<sup>6</sup> See Letter from Rep. Gus Bilirakis, *et al.* to FCC Chairman Ajit Pai, at 1 (Oct. 13, 2017).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> See Letter from Sens. Corey Booker and Bill Nelson to FCC Chairman Ajit Pai, at 1 (Nov. 3, 2017).

<sup>9</sup> *Id.*

- Manage chronic conditions and enroll members in care/disease management programs;
- Educate members about proper emergency room utilization;
- Notify patients of changes in enrollment or disruptions in coverage due to non-payment;
- Facilitate transitions of care;
- Help ensure that members are filling and taking medications appropriately;
- Solicit member feedback on healthcare quality and other issues and ensure satisfaction;
- Obtain new contact information;
- Update members about benefits and/or network changes;
- Share details about plan features and programs; and
- Remind members about renewing their benefits

Patients need and expect these and other non-marketing treatment, payment, and operations calls and texts, irrespective of which party in the HIPAA ecosystem—physicians, health plans, clearinghouses, or business associates—places the communication or initially obtains the patient’s telephone number.

Federal and state regulators also expect HIPAA-governed entities to place calls and texts related to treatment, payment, and operations.<sup>10</sup> The Centers for Medicare and Medicaid Services (“CMS”), for example, has developed and oversees a number of patient healthcare experience surveys that are administered by HIPAA-regulated covered entities and business associates,<sup>11</sup> including the Consumer Assessment of Healthcare Providers and Systems (“CAHPS”) surveys that are designed to assess patient experience and care quality in a particular healthcare setting.<sup>12</sup> Consistent with patients’ and regulators’ expectations, HIPAA permits non-

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<sup>10</sup> See, e.g., Letter from Michael McMenamin, Principal, Winning Strategies Washington, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (filed May 25, 2017).

<sup>11</sup> See CMS, *Consumer Assessment of Healthcare Providers & Systems (CAHPS)*, <http://go.cms.gov/2qgJf9Y> (last visited June 10, 2018).

<sup>12</sup> See AHRQ, *CAHPS: Surveys and Tools to Advance Patient-Centered Care*, <http://bit.ly/2ekNN5i> (last visited June 10, 2018).

marketing communications related to treatment, payment, and operations while strictly regulating the circumstances under which they can be made.<sup>13</sup>

Given the copious empirical evidence in the record that these non-marketing communications improve health outcomes and expand access to coverage,<sup>14</sup> the Commission has ample policy and legal grounds to grant the Joint Petition and no reason not to do so.

### **III. THE COMMISSION SHOULD ACT WITHOUT FURTHER DELAY.**

Expedited treatment is increasingly critical because the *2015 Declaratory Order* has resulted in many consumers with wireless numbers being removed from health engagement programs to their detriment. These programs have an established track record of reducing rates of disease, unnecessary hospitalization, and other negative health outcomes. Public health imperatives demand swift action on this narrow, common-sense request, yet wireless-only households are now at risk of being left out.

There is no longer any reasonable basis for the Commission to delay grant of the Joint Petition, now that the D.C. Circuit has issued a decision regarding the *2015 Declaratory Order*. The D.C. Circuit's *ACA* decision confirms that the FCC has broad authority to harmonize the TCPA and HIPAA.<sup>15</sup> The Commission need not delay action on the Joint Petition while it decides the other issues raised in the *Public Notice*, including the treatment of ATDS or reassigned numbers. As one example, a less overbroad interpretation of ATDS would not afford relief to non-marketing prerecorded messages delivered by HIPAA-regulated entities to wireless numbers.

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<sup>13</sup> See, e.g., Attachment to *Ex Parte* Letter from Blue Cross Blue Shield Association to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed Aug. 9, 2017).

<sup>14</sup> See Joint Petition at 5-11 (collecting research studies).

<sup>15</sup> See *ACA Int'l*, 2018 WL 1352922, at \*19-22.

It has been nearly two years since the Joint Petition was filed. Given the voluminous evidence on the record in support of the Joint Petition, including bipartisan support from both the House and Senate, the Commission's failure to issue a decision on the Joint Petition has imperiled the critical healthcare services described above. As the Healthcare Petitioners have explained in numerous meetings before the Commission,<sup>16</sup> time is of the essence because, among other things, healthcare providers must make continuing elections regarding outreach services performed under various federal and state Medicare contracts.

#### **IV. CONCLUSION.**

The Commission should grant the Joint Petition promptly and remove the uncertainty created by the *2015 Declaratory Order* that has chilled healthcare-related communications. Doing so would support a critical public policy goal of providing effective and efficient medical care, especially to at-risk populations. Granting the Joint Petition would also support the Commission's longstanding policy of harmonizing HIPAA and the TCPA.

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<sup>16</sup> See, e.g., Letter from Mark W. Brennan and Arpan A. Sura of Hogan Lovells US LLP, Counsel to the American Association of Healthcare Administrative Management, to Marlene H. Dortch, Secretary, FCC (Apr. 9, 2018); Letter from Mark W. Brennan and Arpan A. Sura of Hogan Lovells US LLP, Counsel to the American Association of Healthcare Administrative Management, to Marlene H. Dortch, Secretary, FCC (Apr. 9, 2018); Letter from Mark W. Brennan and Arpan A. Sura of Hogan Lovells US LLP, Counsel to the American Association of Healthcare Administrative Management, to Marlene H. Dortch, Secretary, FCC (Dec. 4, 2017).



Respectfully submitted,

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## EXHIBIT A

The Petitioners propose the following prior express consent clarification for non-telemarketing calls allowed under HIPAA in paragraph 141:

Para. 141: “We clarify, therefore, that provision of a phone number to a **HIPAA “covered entity” or “business associate” as defined by HIPAA’s implementing regulations,<sup>1</sup> whether by an individual, another covered entity, or a party engaged in an interaction subject to HIPAA,** ~~healthcare provider~~ constitutes prior express consent for **treatment, payment, and health care operation** ~~healthcare~~ calls subject to HIPAA<sup>1</sup> by a ~~HIPAA-covered~~ entity and business associates acting on its behalf, ~~as defined by HIPAA,~~ if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary.” **Examples of Prior Express Consent include, but are not limited to, the provision of a telephone number by an employer or a party authorized to implement the health insurance enrollment, application or renewal process on its behalf, and a state Medicaid agency or another governmental entity and/or their business associate(s) as part of an interaction subject to HIPAA.**

The Commission itself noted this confused terminology in its footnote 473, and we respectfully seek clarification of what we understand was the Commission’s intention in this paragraph. If this reading to limit the content of a HIPAA-allowed non-marketing communication is correct, the phrase “are not necessarily among” should be revised to “are among” in footnote 473.

## **EXHIBIT B**

The Petitioners propose the following clarifications to paragraph 147 of the 2015

*Declaratory Order:*

¶ 147. Conditions on AAHAM's Request. We adopt the following conditions for each exempted call (voice call or text message) made by or on behalf of a ~~healthcare provider~~ **HIPAA covered entity or business associate**:

- 1) voice calls and text messages must be sent, if at all, only to the wireless telephone number provided by the patient;
- 2) voice calls and text messages must state the name and contact information of the ~~healthcare provider~~ **HIPAA covered entity or business associate** (for voice calls, these disclosures would need to be made at the beginning of the call);
- 3) voice calls and text messages are strictly limited to the purposes permitted in para. 146 above; must not include any telemarketing, solicitation, or advertising; may not include accounting, billing, debt-collection, or other financial content; and must comply with HIPAA privacy rules;
- 4) voice calls and text messages must be concise, generally one minute or less in length for voice calls and 160 characters or less in length for text messages;
- 5) a ~~healthcare provider~~ **HIPAA covered entity or business associate** may initiate only one message (whether by voice call or text message) per day, up to a maximum of three voice calls or text messages combined per week from a specific healthcare provider;
- 6) a ~~healthcare provider~~ **HIPAA covered entity or business associate** must offer recipients within each message an easy means to opt out of future such messages, voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call, voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future healthcare calls, text messages must inform recipients of the ability to opt out by replying "STOP," which will be the exclusive means by which consumers may opt out of such messages; and,
- 7) a ~~healthcare provider~~ **HIPAA covered entity or business associate** must honor the opt-out requests immediately.