

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

In the Matter of	)	
	)	
Advanced Methods to Target and Eliminate	)	CG Docket No. 17-59
Unlawful Robocalls	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	

**COMMENTS OF THE AMERICAN ASSOCIATION OF HEALTHCARE  
ADMINISTRATIVE MANAGEMENT**

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**I. INTRODUCTION AND SUMMARY**

The American Association of Healthcare Administrative Management (“AAHAM”) respectfully submits these comments in response to the Federal Communication Commission (“FCC” or “Commission”) Consumer & Government Affairs Bureau’s *Public Notice*, which “seek[s] data and other information on the progress of robocalling initiatives among government, industry, and consumers” for an FCC staff report on robocalling.<sup>1</sup> The report will “encompass both the progress made by industry, government, and consumers in combatting illegal robocalls, and the remaining challenges to continuing these important efforts.”<sup>2</sup>

AAHAM commends the Commission for its efforts to reduce illegal robocalls by adopting call-blocking and anti-spoofing measures and taking enforcement action against those responsible for fraudulent and illegal robocalling schemes. Unlawful spoofers, scammers, and bad actors represent the root cause of the “illegal robocalls” referenced in the *Public Notice*, and

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<sup>1</sup> *Consumer and Governmental Affairs Bureau Seeks Input for Report on Robocalling*, CG Docket Nos. 17-59 (rel. June 20, 2018) (“*Public Notice*”).

<sup>2</sup> *Id*; see also *Advanced Methods to Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9706, 9727 (2018) (“*Call Blocking Order*”).

these calls harm consumers as well as legitimate businesses. Despite the Commission's efforts, however, illegal robocalls persist and negatively impact AAHAM's members and their companies. AAHAM therefore urges the Commission to continue pursuing technological solutions and enforcement actions against bad actors. The Commission should also collect and release granular statistics regarding illegal robocalls to facilitate rational, data-driven policymaking and help measure the progress of FCC efforts.

The Commission should also recognize that legitimate businesses are not the primary source of "illegal robocalls." In the vast majority of cases, good-faith callers simply attempt to reach individuals with which they have business relationships. Nevertheless, these callers have found themselves ensnared in the unreasonable liability traps created by the Commission's *2015 TCPA Order* and other harmful Telephone Consumer Protection Act ("TCPA") decisions.<sup>3</sup> The ensuing class-action litigation has sapped millions of dollars from legitimate businesses without any commensurate benefit to consumers. By reforming its legal treatment of autodialers, reassigned numbers, revocation of consent, and healthcare communications under the TCPA, the Commission will help ensure that good-faith callers can continue to provide valuable and timely information that consumers want and expect.

## **II. AAHAM SUPPORTS THE COMMISSION'S EFFORTS TO PROTECT CONSUMERS FROM ILLEGAL ROBOCALLS BY BAD ACTORS**

AAHAM is the premier professional organization in healthcare administrative management focused on education and advocacy in the areas of reimbursement, admitting and registration, data management, medical records, and patient relations. AAHAM was founded in 1968 as the American Guild of Patient Account Management. Initially formed to serve the

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<sup>3</sup> See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) ("*2015 TCPA Order*").

interests of hospital patient account managers, AAHAM has evolved into a national membership association that represents a broad-based constituency of healthcare professionals. AAHAM is a major force in shaping the future of healthcare administrative management, and one of its main priorities has been working with stakeholders towards a reasonable TCPA framework for the healthcare profession.

Despite the Commission's laudable initiatives to stand up caller-authentication and call-blocking features, illegal robocalls negatively impact the work that AAHAM's members do on a daily basis. For example, AAHAM's members continue to receive illegal robocalls from bad actors, scammers, and fraudsters at members' workplaces or even at their homes. These illegal robocalls frustrate AAHAM members' ability to conduct their business and communicate with consumers. Moreover, the unreasonable liability exposure created by the *2015 TCPA Order* continues to chill AAHAM members' ability to conduct outreach that patients have requested and are expecting. AAHAM therefore encourages the Commission to take additional measures to modernize the TCPA by refining its technological solutions, targeting bad actors, collecting accurate data, and reducing the liability exposure faced by legitimate, good-faith callers.

### **III. THE COMMISSION CAN STRENGTHEN ITS ROBOCALL POLICYMAKING AND ENFORCEMENT BY IDENTIFYING, OBTAINING, AND RELEASING MORE PRECISE ROBOCALLING DATA**

AAHAM supports the Commission's efforts to quantify the nature and extent of illegal robocalls. The Commission should focus its inquiry on collecting additional data about criminal and fraudulent activity instead of outreach from legitimate businesses.

Recent assertions that legitimate businesses represent the root cause of "robocalls" rest on wrongheaded assumptions. The National Consumer Law Center ("NCLC"), for example, claims that "[t]he problem of abusive, unwanted robocalls is not limited to scam calls," which according

to NCLC “represent only one small part of the invasive robocall problem in the United States.”<sup>4</sup> To support this conclusion, NCLC relies on unverified data from a single call-blocking app—YouMail—that categorizes “alerts and reminders” together with “scams” as “robocalls.”<sup>5</sup> But there is no basis to conflate the larger category of “robocalls” with the specific subset of “abusive, unwanted robocalls” that NCLC elsewhere acknowledges as the real problem facing consumers. Indeed, NCLC appears to be lumping together legitimate, non-marketing notifications with potential criminal activity. As NCLC concedes, consumers overwhelmingly choose not to block “alerts and reminders,” which constitute more than a quarter of the supposed “robocalls” (and for which the caller may in fact have had obtained lawful consent).<sup>6</sup> On the other hand, NCLC’s own data shows that consumers routinely block “scams.”<sup>7</sup> NCLC therefore misleadingly suggests that good-faith callers are the driver for unwanted and illegal calls instead of spoofers, scammers, and bad actors.

More comprehensive and granular data is clearly needed. Fortunately, this proceeding gives the Commission a timely opportunity to measure the scope and scale of the problem and assess solutions to protect consumers. As an initial matter, the Commission should define with specificity what it means when it proposes to measure the volume of “illegal robocalls.” Rather than adopt a flawed approach that conflates all communications from legitimate account notifications to criminal deception, the Commission should track and release quantitative data about alleged unlawful spoofing, fraud, and scam activities. Complaint data should also identify

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<sup>4</sup> See Comments of National Consumer Law Center *et al.*, CG Docket Nos. 02-278, 18-152, at 4 (filed June 13, 2018).

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.*

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

the practices being used by such bad actors (*e.g.*, spoofing, caller ID blocking) and the stories being told by scammers, except where such data may need to remain confidential for investigative purposes. In addition, the Commission should release more information about the actions taken in response to spoofing, fraud, and scam complaints.

Educational measures can also help. AAHAM encourages the Commission to work with the Federal Trade Commission and other stakeholders to help educate consumers about illegal robocalls and avoid being taken in by unfair and deceptive practices. These measures will help ensure that the Commission's TCPA and robocall-related policymaking and enforcement rest on accurate information instead of overgeneralizations.

#### **IV. THE COMMISSION SHOULD ADDRESS KEY TCPA ISSUES FACING GOOD-FAITH CALLERS REGARDING THE USE OF AN AUTOMATIC TELEPHONE DIALING SYSTEM, CALLS TO REASSIGNED NUMBERS, AND CONSENT REVOCATION.**

Along with focusing on bad actors and collecting data to inform the efficacy of ongoing robocall initiatives, the Commission should revisit its TCPA liability interpretations following the *ACA International v. FCC*<sup>8</sup> decision to mitigate the unreasonable liability exposure that good-faith businesses continue to face.

**First**, the Commission should grant the Petition for Declaratory Ruling filed by a diverse array of industry stakeholders, including AAHAM,<sup>9</sup> and clarify that: (1) to be an automatic telephone dialing system ("ATDS"), equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention; and (2) only calls made using actual ATDS capabilities are subject to the TCPA's restrictions.

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<sup>8</sup> *ACA Int'l, et al. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

<sup>9</sup> U.S. Chamber Institute for Legal Reform *et al.*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018).

As an initial matter, the Commission should clarify that ATDS equipment must possess the functions referred to in the statutory definition: storing or producing numbers to be called, using a random or sequential number generator, and dialing those numbers. The TCPA defines an ATDS as a device that has the capacity to “store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers.”<sup>10</sup> A device must be able to generate numbers in either random order or in sequential order to satisfy the definition. Otherwise, the device cannot do anything “using a random or sequential number generator.”<sup>11</sup> Next, it must be able to store or produce those numbers called using that random or sequential number generator. This ability to store or produce telephone numbers to be called, alone, is insufficient; the clause “using a random or sequential number generator” modifies this phrase, requiring that the phone numbers stored or produced be generated using a random or sequential number generator. Finally, the device must be able to dial those numbers. The Commission should not deviate from the TCPA’s straightforward statutory language.

In addition, the Commission should confirm that the TCPA is only implicated by the *present use of actual* ATDS capabilities in making calls. This interpretation would best give effect to the words “use” and “make,” which the TCPA employs in the present tense. Clarifying that an ATDS does not include devices that dial human-generated lists of numbers, meanwhile, would comport with the plain meaning of the word “automatic” and the FCC’s original understanding of that word.<sup>12</sup> It would also heed the D.C. Circuit’s suggestion that the absence of human intervention is important, “given that ‘auto’ in autodialer—or equivalently, ‘automatic’

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<sup>10</sup> 47 U.S.C. § 227(a)(1).

<sup>11</sup> *Id.* at (a)(1)(A)-(B).

<sup>12</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14115 ¶ 132 (2003) (“The basic function of such equipment, however, has not changed— the capacity to dial numbers without human intervention.”).



in ‘automatic telephone dialing system’—would seem to envision non-manual dialing of telephone numbers.’”<sup>13</sup> To that end, the Commission should adopt a bright-line safe harbor under which a caller is not deemed to use an ATDS if there is any human intervention to generate or dial the number(s).

**Second**, the Commission should clarify the treatment of calls to wrong or reassigned numbers by: (1) confirming that the TCPA’s statutory phrase “called party” means “expected” recipient; and (2) allowing callers to “reasonably rely” on the “prior express consent” that they had received. As Chairman Pai has noted, an intended recipient approach “respects Congress’s intent that the TCPA balance the privacy rights of the individual and the commercial speech rights of the telemarketer,” by giving “individuals the right to stop unwanted, wrong-number phone calls in the first instance” and informing “a caller that he has the wrong number.”<sup>14</sup> The intended recipient approach also “rightfully sanctions the bad actors” who “repeatedly call after an individual has told them they’ve got the wrong number.”<sup>15</sup>

AAHAM also supports proposals by the Commission and numerous commentators to adopt a safe harbor for callers that check third-party TCPA compliance databases. As CTIA has noted, “[t]he Commission may reasonably determine that ‘called party’ means ‘intended’ or ‘expected’ recipient, and that when a caller checks one or more database(s) but nevertheless reaches a reassigned number inadvertently, the caller does not violate the TCPA because it has established that it ‘intended’ or ‘expected’ to reach the prior subscriber (who had granted consent).”<sup>16</sup> Similarly, the Commission can and should establish a safe harbor as an

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<sup>13</sup> *ACA Int’l*, 885 F.3d at 703 (citation omitted).

<sup>14</sup> *2015 TCPA Order* at Dissent of then-Commissioner Pai.

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

<sup>16</sup> Comments of CTIA, CG Docket No. 17-59, at 12 (filed June 7, 2018).

interpretation of “reasonable reliance.” Either or both interpretations would incentivize callers to use products that help avoid placing calls to wrong or reassigned numbers.

**Third**, the Commission should allow callers to adopt reasonable mechanisms for consumers to opt out of unwanted calls. In particular, AAHAM urges the Commission to adopt the approach that the Second Circuit articulated in the *Reyes*<sup>17</sup> decision, which confirmed that callers and called parties may agree to specific consent revocation methods, including through the terms and conditions of a bilateral consumer contract. The *Reyes* approach would best harmonize TCPA consent revocation with common law contract principles and give callers the certainty needed to honor consumer preferences in a predictable manner.

**V. GRANTING THE HEALTHCARE COALITION’S JOINT PETITION WILL HELP PATIENTS RECEIVE CRITICAL, TIME-SENSITIVE HEALTHCARE COMMUNICATIONS**

In addition to adopting TCPA reforms of general applicability, the Commission should grant without further delay the pending Joint Petition for Expedited Declaratory Ruling and/or Clarification<sup>18</sup> filed by Anthem, AAHAM, Blue Cross Blue Shield, and Wellcare.<sup>19</sup> Submitted more than twenty-three months ago, the Joint Petition asks the Commission to clarify certain aspects of the *2015 TCPA 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

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<sup>17</sup> *Reyes v. Lincoln Automotive Fin. Svcs*, 861 F. 3d 51, 54 (2d Cir. 2017).

<sup>18</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); 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).

<sup>19</sup> See Comments of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management, CG Docket Nos. 18-152, 02-278 (June 13, 2018).

Health Insurance Portability and Accountability Act (“HIPAA”). The Joint Petition specifically requests that the Commission clarify:

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 TCPA 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 TCPA Order* should be clarified to encompass “HIPAA covered entities and business associates.”

These narrow clarifications would cover non-marketing calls that HIPAA’s comprehensive privacy and data security regime already permit. Importantly, the Joint Petition does not seek a new exemption from TCPA’s prior express consent requirements. And the proposals in the Joint Petition apply only to non-telemarketing communications, as defined under HIPAA.

The Joint Petition has earned the overwhelming endorsement of commenters in the record.<sup>20</sup> The strong Congressional support for the Joint Petition mirrors the consensus in the record. A bipartisan group of members of the House of Representatives urged Chairman Pai to act promptly to “afford clarity to covered entities and business associates making non-marketing

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<sup>20</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). There were also numerous comments from individuals in support of the Joint Petition.

communications that benefit patients.”<sup>21</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>22</sup> Senators Booker and Nelson also urged Chairman Pai to grant the Joint Petition, noting that the calls and text messages subject to the Joint Petition convey “important medical and treatment information” and “improve patient outcomes.”<sup>23</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>24</sup>

The breadth and depth of support for the Joint Petition is hardly surprising, given the communications at stake that, for example:

- Explain coverage and how to get needed care;
- 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;
- 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;
- 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

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<sup>21</sup> See Letter from Rep. Gus Bilirakis, *et al.* to FCC Chairman Ajit Pai, at 1 (Oct. 13, 2017).

<sup>22</sup> *Id.* at 2.

<sup>23</sup> See Letter from Sens. Corey Booker and Bill Nelson to FCC Chairman Ajit Pai, at 1 (Nov. 3, 2017).

<sup>24</sup> *Id.*

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 obtains the patient’s telephone number in the first instance. The Commission should grant the Joint Petition and support the critical public policy goal of providing effective and efficient medical care, especially to at-risk populations.

## **VI. CONCLUSION**

AAHAM supports the Commission’s to reduce unwanted robocalls from bad actors and encourages the FCC to collect and release additional information about illegal robocalls from spoofers, scammers, and bad actors. Doing so will help the Commission appropriately frame its policymaking and target its enforcement efforts.

Respectfully submitted,

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