Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of the Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for the Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order	)	CG Docket No. 02-278
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	

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

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At the request of the staff of the Federal Communications Commission's ("FCC" or "Commission") Consumer Protection & Governmental Affairs Bureau ("Bureau") and pursuant to Section 1.2 of the FCC's rules,[1] Anthem, Inc. and its affiliated health plans ("Anthem"), Blue Cross Blue Shield Association (the "Association"), WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management ("AAHAM") (collectively, the "Petitioners") respectfully petition the Commission to issue an expedited declaratory ruling

[1] 47 C.F.R. § 1.2.

and/or clarification of the FCC's Telephone Consumer Protection Act ("TCPA") 2015 Omnibus Declaratory Ruling and Order (the "*2015 Declaratory Order*").[2]

The Commission should clarify and confirm the regulation of the use of health plan member telephone numbers under the TCPA with the regulation of the same use under the Health Insurance Portability and Accountability Act ("HIPAA").[3] In doing so, the Commission should protect non-telemarketing calls allowed under HIPAA[4] in light of their unique value to and acceptance by consumers. The *2015 Declaratory Order* could be interpreted in a way that discourages and burdens important health care communications that are allowed by the more specific HIPAA regulation, and encouraged by federal and state public health policies. The Federal Government, acting through the Commission, should continue to interpret the TCPA holistically with HIPAA in order to balance competing policy goals. Indeed, historically the Commission has looked to HIPAA to guide application of the TCPA to healthcare calls. In sum, the TCPA rules should be clarified to ensure that they are interpreted in a way that is harmonized, consistent with the FCC's prior decisions *and* HIPAA, to allow consumers to receive necessary and vital non-telemarketing calls allowed under HIPAA.

Further, expedited treatment of this Petition is necessary because the requested clarification affects the messaging of critical health care decisions and information that helps consumers become engaged in their own positive health outcomes. In accordance with HIPAA, such messaging is used to notify consumers about health care services that are included in an existing plan of benefits. Confusion around the *2015 Declaratory Order* has resulted in many

[2] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015).

[3] Pub. L. No. 104-191 (1996), *codified at* 42 U.S.C. § 1320d *et seq.*

[4] The FCC has made clear that the term "call" includes text messages. *Id*. at p. 7964, n.3 (citation omitted).

consumer populations with wireless numbers being removed from these health programs, without their knowledge. This is resulting in detrimental health outcomes,[5] certainly not a desired or consumer-friendly result. Nor are such outcomes in the public interest.

Without such immediate clarification, detrimental health outcomes are in danger of occurring at a higher rate and creating greater confusion among the health care community. The issue is also one of significant public interest for millions of citizens who rely upon needed communication to make informed and time-sensitive health care decisions.

The issues raised in this Joint Petition are not new or novel to the Commission and have been the subject of previous petitions and requests for clarification in the past.[6] Moreover, the requests are neither inconsistent with the Commission's stated positions and policy nor violate the spirit of the Commission's intended purpose with respect to its TCPA interpretation.

Specifically, Petitioners request that the FCC issue a ruling and/or clarify the *2015 Declaratory Order* as follows:

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. (*See* Exhibit A for suggested language.)

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[5] *See infra* pp. 5-10 for evidence on the relative health outcomes of included vs. excluded populations.

[6] *See, e.g.,* American Association of Healthcare Administrative Management, *Petition for Expedited Declaratory Ruling and Exemption*, CG Docket No. 02-278 (filed Oct. 21, 2014) ("AAHAM Petition"); *Ex parte* Letter of Blair Todt, Senior Vice President, Chief Legal and Administrative Officer, WellCare Health Plans, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (Aug. 27, 2015); *In re Anthem, Inc., Petition for Declaratory Ruling and Exemption*, Comments of WellCare Health Plans, Inc., CG Docket No. 02-278 (Sept. 30, 2015); *Ex parte* Letter of Michelle G. Turano, Vice President, Federal Government Affairs, WellCare Health Plans, Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (Feb. 9, 2016); and *Ex parte* Letter from John Currier, President, American Assoc. of Healthcare Administration Management to Marlene H. Dortch, Secretary, FCC (Apr. 8, 2016).

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." (*See* Exhibit B for suggested clarifying language.)

Nothing about these requests limits a consumer's important right under the TCPA to revoke consent. Moreover, the consumer's heightened interest in preventing telemarketing calls would also be respected, as this proposal only applies to non-telemarketing health care communications as defined under HIPAA.[7] The effect of these clarifications is to provide continued harmony between the TCPA and HIPAA, as the FCC has done in prior rulings[8], and in the process, protect important, necessary, widely accepted health care communications.

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[7] 45 C.F.R. §§ 164.501 and 164.508(a)(3); *see also* http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/marketing/ (last visited July 21, 2016).

[8] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd. 1830, 1852-56 (2012) ("*2012 Report & Order*"). This ruling also provided consistency with the Federal Trade Commission's Telemarketing Sales Rule, which also respected the HIPAA framework for health related calls. FTC Telemarketing Sales Rule, Final Rule Amendments, 16 C.F.R. Part 310, 73 Fed. Reg. 51164, 51192 (Aug. 29, 2008) ("FTC 2008 TSR Amendments") ("delivery of healthcare-related prerecorded calls subject to HIPAA already is regulated extensively at the federal level" is one of six considerations by the FTC to justify exemption from the TSR's written express agreement requirements). The Petitioners note that the requests in this Petition do not seek to disturb the Commission's well-settled determination that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *See Rules and Regulations Implementing the Telecommunications Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd. 8752, 8769 (1992) ("*1992 Report & Order*"); *see also*, *e.g.*, *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, Declaratory Ruling 23 FCC Rcd 559, 564-65 (2008) ("*ACA Declaratory Ruling*") (stating that a party who provides his 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," and that such consent is valid not only for calls made by the original creditor, but also for those made by a third party collector acting on behalf of that creditor).

I. NON-TELEMARKETING HEALTH CARE RELATED COMMUNICATIONS HAVE IMPORTANT BENEFITS, ARE WELCOMED BY CONSUMERS, AND NEED TO REACH MOBILE PHONES TO BE EFFECTIVE.

Empirical studies demonstrate that health care-related texts and calls lead to more engaged patients, better patient outcomes, and lower health care costs for consumers. These are critical public health goals. For example, many Americans are not receiving recommended health tests and screenings. Among adults in the age groups recommended for cancer screenings, about two in five were not up to date with colon cancer screening, one in four women were not up to date with breast cancer screening, and one in five women were not up to date with cervical cancer screening.[9] Text messages in particular have proven effective in delivering health care reminders and increasing adherence to treatment attendance at health care appointments.[10] In studies among low-income urban populations, researchers found that 72.7% of parents who received text reminders brought their children in for recommended follow-up vaccination appointments.[11] With some 20,000 children hospitalized annually for influenza, any increase in inoculation rates directly improves public health.[12]

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[9] *Many Americans Not Getting Routine Cancer Screenings: CDC*, HealthDay News, May 7, 2015, available at https://consumer.healthday.com/cancer-information-5/breast-cancer-news-94/many-americans-not-getting-routine-cancer-screenings-cdc-699217.html (last visited July 20, 2016) (citing to Stephanie Bernik, M.D., chief, surgical oncology, Lenox Hill Hospital, New York City; Louis Potters, M.D., chief, radiation medicine, North Shore-LIJ Cancer Institute, New Hyde Park, N.Y.; U.S. Centers for Disease Control and Prevention, news release, May 7, 2015).

[10] Kati Annisto, Marita Koivunen & Maritta Valimaki, *Use of Mobile Phone Text Message Reminders in Health Care Services: A Narrative Literature Review*, 16(10) J. Med. Internet Res. e222 (2014).

[11] Melissa S. Stockwell, MD, MPH, et al., *Text Message Reminders for Second Dose of Influenza Vaccine: a Randomized Controlled Trial*, 135(1) Pediatrics e83-e91 (2015), available at http://pediatrics.aappublications.org/content/135/1/e83.

[12] *See* Stockwell et al., *Effect of a Text Messaging Intervention on Influenza Vaccination in an Urban, Low-Income Pediatric and Adolescent Population*, 307(16) JAMA 1702–08 (2012); Maanvi Singh, *Texted Reminders Help Parents Get Kids In For Flu Shots*, http://www.npr.org/sections/health-shots/2014/12/29/373767691/texted-reminders-help-parents-get-kidsin-for-flu-shots (last visited June 3, 2016).

Additionally, 20% to 30% percent of prescriptions are never retrieved and up to 50% percent of medications are not taken as prescribed.[13] This non-adherence produces between $100 and $289 billion of avoidable costs annually.[14] Telephone outreach, to be effective, needs to use technology that is (or is at risk of being deemed) an automatic telephone dialing system ("ATDS").[15] Automated technology saves enormous time and money by harnessing technology to take over expensive, time intensive manual processes. These time and cost savings enable communications that are important for public health goals, which is why the use of automated technologies in the health care industry have historically been and should continue to be treated very differently from other contexts. Those cost savings directly benefit patients in lowered overall health care costs. Further, where members number in the hundreds of thousands, if not millions, compliance with outreach requirements is practically impossible without automated systems. Critical outreach on a large scale simply cannot occur without these technologies. Even if a health benefit plan sought to make calls with manual technology, the case-by-case determination of what systems would not be deemed ATDS under the *2015 Declaratory Order* creates an irreducible amount of risk.

Further, automated telephonic outreach, to be effective, must reach consumers' residential *and* mobile phones. In 2015, 47.4% of American households relied exclusively on wireless devices for telephone service, up from 29.7% in 2010, and "more than two-thirds of all

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[13] Brian Fung, *The $289 Billion Cost of Medication Noncompliance, and What to Do About It*, THE ATLANTIC, Sept. 11, 2012, available at http://www.theatlantic.com/health/archive/2012/09/the-289-billioncost-of-medication-noncompliance-and-what-to-do-about-it/262222/ (last visited June 3, 2016).

[14] *Id.*

[15] 47 U.S.C. § 227(a)(1). For purposes of this Petition, the term "automated" includes text messages or voice calls made using an ATDS and calls delivering a pre-recorded or artificial voice message.

adults aged 25–34 and of adults renting their homes" live in wireless-only households.[16] Wireless-only households are more likely to have numerous health challenges, such as financial barriers, substance abuse, and lack of influenza vaccinations.[17] Hard-to-reach populations are especially prone to use cell phones as their primary means of telephonic communication.[18] Other means of outreach, such as mailings and calls to landlines, are not effective in reaching most consumers, especially young people, minorities, and low-income groups, and this results in much lower engagement and participation rates, with a resulting negative impact to health outcomes.

The benefits of automated technologies have spurred federal policies, particularly through the Centers for Medicare and Medicaid Services ("CMS"), which is a branch of the U.S. Department of Health and Human Services ("HHS"). CMS has long recognized the benefits of communication technologies as indicated in HIPAA and the HIPAA regulations. One such example are health benefit companies that administer Medicaid benefits under contract with state Medicaid agencies, and contracts require telephonic contact with members for many purposes.[19] These agencies now require outreach that necessitates the use of automated technologies, which

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[16] Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2015*, Div. of Health Interview Statistics, Nat'l Ctr. for Health Statistics, Centers for Disease Control and Prevention (Dec. 2015), available at http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf (last visited June 3, 2016), at 1.

[17] *Id.* at 3.

[18] Stockwell et al., *Text4Health: Impact of Text Message Reminder–Recalls for Pediatric and Adolescent Immunizations*, available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3483980/ (last visited June 3, 2016).

[19] For example, Kansas requires texts to provide prevention information, Louisiana requires use of Text4baby, and Indiana requires provision of care management services by telephone. Additionally, Maryland regulations require companies administering Medicaid benefits for special needs populations to engage in "documented outreach efforts," including phone contact to members who fail to attend appointments or comply with a care regimen. COMAR 10.09.65.04.

is the only way to proactively engage and assist patients in need of support given constraints in time and resources, and the vast number of patients in need.[20]

Available data shows that a large majority of consumers desire access to programs that use telephonic contact for health care. A survey of commercially insured consumers found the highest acceptance for health management programs when they are mobile contacts.[21] Additionally, for the flu vaccination reminders discussed above, parents receiving reminders for their children reported appreciation for the texts.[22] Further, consumers overwhelmingly elect to continue receiving automated outreach despite having easy and free mechanisms to opt-out.[23] It is clear that consumers desire this outreach, recognizing there are concrete health benefits.

Indeed, telephonic outreach using automated technologies can save lives. For example, colon cancer is the number two cancer killer in the United States, with 52,000 fatalities annually.[24] In one patient health engagement outreach program, a telephonic campaign to a group of 400,000 Medicare beneficiaries to encourage recommended colorectal cancer screening

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[20] It should also be noted that health benefit companies do not use automation exclusively or blindly. Indeed, many programs integrate automated communication with nurses and other support staff where applicable. For example, Anthem utilizes text messages to schedule a home visit to its members for breast cancer screening.

[21] Elizabeth Boehm, et al., *Mobile and Social Gain Ground in Wellness and Disease Management*, Forrester Research, available at https://www.forrester.com/Mobile+And+Social+Gain+Ground+In+Wellness+And+Disease+Management/fulltext/-/E-res58231 (last visited June 3, 2016).

[22] Singh, *supra* note 12 ("They actually said it showed that the doctor's office cared about them.").

[23] For an example of consumer behavior in response to health care communications, Walgreens' prescription refill reminder calls have an overall "opt-out" rate of less than 1.5%. *Kolinek v. Walgreen Co.*, Case No. 13-cv-04806 (N.D. Ill.), Plaintiff's Motion for Preliminary Approval of Class Action Settlement (March 26, 2015) (Dkt. No. 98) at 11.

As another example, only 4% of Anthem members receiving Lifeline phones cancel out of receiving texts on the phone. On a broader level, Anthem supports "opt-out" requests for all of its members, and has experienced an overall "opt-out" rate for calls of 0.35%, indicating that the overwhelming majority of its members want health care messages by phone that help improve their health.

[24] www.cdc.gov/cancer/colorectal/statistics.

resulted in identification of 299 cases, about half of which were in a stage of early detection.[25] This outreach saved lives through early detection – and in the process saved $24,000 to $34,000 *per* early cancer stage detected – resulting in approximately $9 million in monetary savings, plus massive avoidance of pain and suffering.[26]

Telephonic outreach via automated technology also has been shown to be successful in encouraging consumers to receive other important physician-recommended screenings, with improved rates found for diabetic glaucoma screenings (with 51.6% compliance among those receiving intervention versus 42.5% for those who do not), mammography (20.6% versus 10.7%); and cervical cancer screening (15% versus 8.9%).[27] Telephonic outreach has been shown to reduce post-discharge hospital readmission rates, with a study showing that discharged patients receiving follow-up outreach had a readmission rate of 9%, as compared to 15% for patients not receiving outreach.[28]

Citing 100 previous studies, HHS found that the "rapid expansion of mobile health ('mHealth') programs through text messaging provides an opportunity to improve health

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[25] *Ex parte* Letter from S. Jenell Trigg, Counsel to Eliza Corp., to Marlene H. Dortch, Esq., Secretary, FCC (March 31, 2016) re: written *ex parte* presentation to Consumer Protection and Governmental Affairs Bureau on *Health Information Technology and Patient Health Engagement* ("PHE *Ex Parte* Presentation"), slide 8.

[26] *See id.*

[27] PHE *Ex Parte* Presentation, slide 16. As another example, one commonly supported service in the industry, the Lifeline program, provides a further example of telephone and text outreach success. A government benefit program supported by the Federal Universal Service Fund, Lifeline helps low-income subscribers obtain access to phone service. Texting programs for preventative care are also proving successful in encouraging members to follow medical guidelines for physical exams, preventive screenings, flu shots, and vaccinations, and raising awareness of preventative health benefits. Early results are encouraging. For example, members receiving text reminders through Anthem's Connect4Health program to schedule annual physical exams are up to 10 times more likely to attend such exams within 90 days, and 71% of the members said reminders helped remind them to see a doctor. *See also* Rebecca R. Ruiz, *F.C.C. Chief Seeks Broadband Plan to Aid the Poor*, N.Y. TIMES, May 28, 2015, at A1, available at http://www.nytimes.com/2015/05/28/business/fcc-chief-seeks-broadband-plan-to-aid-the-poor.html.

[28] PHE *Ex Parte* Presentation, slide 15.

knowledge, behaviors, and clinical outcomes, particularly among hard-to-reach populations."[29] HHS confirmed that such improvements include smoking cessation, improved diabetes management, treatment compliance, immunization rates, and increased sexual health knowledge.[30] Recognizing the benefits of health care outreach, recent administrative policies encourage proactive use of programs utilizing text messaging and calls using automated technologies. Federally supported text messaging initiatives include Text4baby, which provides information and referral times keyed to the developmental stage of the child[31]; QuitNowTXT, which aids smoking cessation[32]; and Health Alerts On-the-Go, which provides information to the Centers for Disease Control and Prevention, including seasonal flu and public health emergencies.[33]

Health benefit companies administer Medicaid benefits under contract with state Medicaid agencies, and all contracts require telephonic contact with members for many purposes. For example, Kansas requires texts to provide disease prevention information, Louisiana requires use of Text4baby, and Indiana requires provision of care management services by telephone. Additionally, Maryland regulations require companies administering

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[29] U.S. Dep't of Health and Human Svcs., Health Resources and Services Admin., *Using Health Text Messages to Improve Consumer Health Knowledge, Behaviors, and Outcomes: An Environmental Scan*, May 2014 (Abstract), http://www.hrsa.gov/healthit/txt4tots/environmentalscan.pdf (last visited May 24, 2016).

[30] *Id.*; *see also* U.S. Dep't of Health and Human Svcs., Text4Health Task Force, *Health Text Messaging Recommendations to the Secretary*, https://web.archive.org/web/20130425185731/http:/www.hhs.gov/open/initiatives/mhealth/recommendations.html (last visited June 3, 2016).

[31] "Text4baby is the first mobile information service designed to promote maternal and child health through text messaging," and is "supported and promoted by a public-private partnership" of over 1,200 entities. https://text4baby.org/index.php/about (last visited June 3, 2016).

[32] QuitNowTXT was developed "to provide health departments, academic institutions, and government agencies with an algorithm and database of messages designed to serve as smoking cessation intervention for individuals who are ready to quit smoking." *See* http://smokefree.gov/healthcare-professionals (last visited June 3, 2016).

[33] *See* http://www.cdc.gov/mobile/registration/learnMore.html (last visited June 3, 2016).

Medicaid benefits for special needs populations to engage in "documented outreach efforts," including phone contact to members who fail to attend appointments or comply with a care regimen.[34]

Similarly, the U.S. Office of Personnel Management ("OPM") requires plans that participate in Federal Employee Health Benefits to submit audited Healthcare Effectiveness Data and Information Set ("HEDIS") metrics. These metrics are components of HEDIS and disease management value-based care goals and are imperative to increasing the quality of life and care of health benefits plans' members. OPM requires that many of the telephonic outreach occur within a very short turnaround – as short as forty-eight hours.[35]

These agencies now require what has been known for many years from a practical perspective: automated forms of outreach are the only way to proactively engage and assist patients in need of support, given constraints in time and resources, and the vast number of patients in need. A survey of commercially-insured consumers found the highest acceptance for health management programs when they are mobile contacts.[36]

[34] COMAR 10.09.65.04.

[35] One example of a mandated call is follow-up after a mental health hospitalization in order to reduce readmission and ER visits. Another example is the behavior change program for members with chronic conditions struggling with depression. These calls include life coaches that educate members on wellness and prevention programs.

[36] For an example of consumer behavior in response to health care communications, Walgreens' prescription refill reminder calls have an overall "opt-out" rate of less than 1.5%. *Kolinek v. Walgreen Co.*, Case No. 13-cv-04806 (N.D. Ill.), Plaintiff's Motion for Preliminary Approval of Class Action Settlement (March 26, 2015) (Dkt. No. 98) at 11. As another example, only 4% of Anthem members receiving Lifeline phones cancel out of receiving texts on the phone. On a broader level, Anthem supports "opt-out" requests for all of its members, and has experienced an overall "opt-out" rate for calls of 0.35%, indicating that the overwhelming majority of its members want health care messages by phone that help improve their health.

II. HEALTH CARE CALLS ARE AUTHORIZED AND COMPREHENSIVELY REGULATED BY HIPAA.

HIPAA, and the Privacy Rule issued pursuant to HIPAA, authorize and regulate the use of "protected health information" ("PHI").[37] Courts have held that PHI regulated by HIPAA includes telephone numbers.[38] The Privacy Rule established a "foundation of Federal protection for personal health information, carefully balanced to avoid creating unnecessary barriers to the delivery of health care."[39] HIPAA applies to all Covered Entities, which includes not only health care providers, but also Petitioner Anthem's affiliated health plans, the organizations represented by AAHAM's members,[40] the Association, and WellCare, as well as health care clearinghouses. HIPAA also applies to Covered Entities' Business Associates, which include service providers to the Covered Entities that need access to PHI to perform their services.[41] In fact, as part of a comprehensive and integrated health care ecosystem, all three classes of Covered Entities and their Business Associates are important to the "[w]idespread use of health IT within the health care industry [that] will improve the quality of health care, prevent medical

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[37] PHI is "individually identifiable health information" that is "(i) Transmitted by electronic media; (ii) Maintained in electronic media; or (iii) Transmitted or maintained in any other form or medium." *See* definition of "protected health information" at 45 C.F.R. § 160.103. "Individually identifiable health information" consists of health information, including demographic information, that identifies an individual or could be used to identify an individual, and includes information which "[r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual." *See id.*

[38] *See, e.g., Baisden v. Credit Adjustments, Inc.*, 813 F. 3d 338, 346–47 (6th Cir. 2016); *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F. 3d 1110, 1125–26 (6th Cir. 2014).

[39] HHS Use and Disclosure Guidance at 1.

[40] AAHAM's members are health care administrative professionals that are typically employed by Covered Entities or Business Associates.

[41] 45 C.F.R. § 160.103.

errors, reduce health care costs, increase administrative efficiencies, decrease paperwork, and expand access to affordable health care."[42]

The Privacy Rule draws careful distinctions between using and disclosing PHI for permissible health care-related communications, which do not require specific prior authorization, and communications that do require prior written authorization. Covered Entities are permitted to make health care-related communications *without prior authorization* (or, in TCPA terms, prior express consent), for the purposes of treatment, payment, and health care operations under the Privacy Rule's general rules.[43] The following communications are also allowed without prior authorization:

- Communications made for treatment of the individual by a health care provider, including case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or settings of care to the individual;

- Communications made to describe a health-related product or service (or payment for such product or service) that is provided by, or included in a plan of benefits of, the Covered Entity making the communications, including communications about: the entities participating in a health care provider network; replacement of, or enhancements to, a health plan; and health-related products or services available only to a health plan enrollee that add value to, but are not part of, a plan of benefits; and

- Communications for case management or care coordination for the individual, to the extent these activities do not fall within the definition of treatment.

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[42] HHS guidance: http://www.hhs.gov/hipaa/for-professionals/special-topics/health-information-technology/index.html (last visited July 26, 2016).

[43] 45 C.F.R. § 164.502 ("Uses and disclosures of protected health information: General rules). And each Covered Entity is allowed to use and disclose PHI without prior authorization for its own treatment, payment and health care operations. 45 C.F.R. § 164.506(b)(1).

HHS acknowledged the importance of "facilitat[ing] those communications that enhance the individual's access to quality health care,"[44] and "that some of these communications are required by State or other law."[45]

HIPAA requires Covered Entities to obtain a valid authorization before using an individual's PHI for marketing purposes. The Privacy Rule's definition of marketing excepts several communications from the definition, however, notwithstanding the possibility that the patient will be required to pay for a prescription, an insurance co-pay, or doctor's fees unless a Covered Entity receives remuneration in exchange for making the communication.[46] The Privacy Rule authorizes non-marketing communications between Covered Entities, their Business Associates and their patients or members without prior authorization "[t]o avoid interfering with, or unnecessarily burdening communications about, treatment or about the benefits and services of health plans and health care providers,"[47] while restricting the ability to use PHI for true marketing purposes.

Regardless of how PHI will be used and whether or not prior authorization is required, health plans and other Covered Entities regulated by the HIPAA Privacy Rule are always subject to stringent privacy requirements in their handling of PHI. Covered Entities are required to

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[44] *Standards for Privacy and Individually Identifiable Health Information; Final Rule*, 67 Fed. Reg. at 53186.

[45] *Id.*

[46] 45 C.F.R. § 164.501 ("marketing" definition, effective Mar. 26, 2013); *see also* Omnibus Final Rule, 78 Fed. Reg. at 5592–5597 (Jan. 25, 2013). *See* 45 C.F.R. § 164.508(a)(3). To be clear, the Privacy Rule excepts from the definition of "marketing" refill reminders and other communications about a drug or biologic that is currently being prescribed for the individual, provided that financial remuneration received by the covered entity in exchange for making the communication, if any, is reasonably related to the covered entity's cost of making the communication. *See* paragraph (2)(i) of the definition of "marketing" at 45 C.F.R. § 164.501. Financial remuneration means payment to a covered entity (or business associate, if applicable) from or on behalf of a third party whose product or service is being described. "Marketing" is defined as a communication about a product or service encouraging recipients of the communication to purchase or use the product or service. 45 C.F.R. § 164.501.

[47] *Standards for Privacy and Individually Identifiable Health Information; Final Rule*, 67 Fed. Reg. 53182, 53183 (Aug. 14, 2002).

provide privacy notices, which may include a disclosure that phone numbers will be used for outreach.[48] The Privacy Rule requires Covered Entities to implement safeguards to protect PHI,[49] and appoint a privacy officer responsible for the implementation of policies and procedures and for receiving complaints.[50] Congress provided strict criminal and civil penalties for violations and designated the Office for Civil Rights (the "OCR") within HHS as the interpreter and primary enforcer for these rules. The OCR is responsible for enforcing the civil monetary provisions, and the U.S. Department of Justice is responsible for enforcing the criminal penalty provisions. State Attorneys General also are authorized to bring civil actions in Federal Court for HIPAA violations on behalf of harmed residents.[51] Civil penalties range from $100 to $50,000, with a cap of $1.5 million for violations of the same provision.[52] HIPAA also carries criminal liability for any person knowingly violating HIPAA who (1) uses or causes to be used a unique health identifier; (2) obtains individually identifiable health information without authorization from a covered entity; or (3) discloses PHI to another person.[53]

By contrast, the *2015 Declaratory Order* could erroneously be interpreted to provide that a Covered Entity or Business Associate cannot use PHI for automated outreach to a cell phone to deliver a health care message unless the calling party can also prove prior express consent – a requirement that the Privacy Rule expressly does *not* require.

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[48] HHS, Health Information Privacy: Model Notices of Privacy Practices, http://www.hhs.gov/ocr/privacy/hipaa/modelnotices.html (last visited June 3, 2016).

[49] *Id*. § 164.530(c)(1).

[50] 45 C.F.R. § 164.530(a)(1).

[51] 42 U.S.C. § 1320d-5(d)(2).

[52] 45 C.F.R. § 160.401.

[53] 42 U.S.C. § 1320d-6(a).

III. THE FCC SHOULD CLARIFY ITS EXISTING RULINGS TO MAINTAIN HARMONY WITH HIPAA AND TO REFLECT THE IMPORTANCE AND PUBLIC HEALTH BENEFITS OF HEALTH CARE CALLS.

The Commission has historically recognized, deferred to, and respected the framework for Covered Entities under HIPAA and its implementing regulations. In the Commission's *2012 Report & Order*, the Commission recognized that, "[w]e note at the outset that HIPAA regulations cover *all* communications regarding protected health information and *all* means of communications regarding such information."[54] Therefore, the Commission created exemptions for health care-related calls made to residential lines and wireless devices in its implementing regulations for the *2012 Report & Order*.[55] The FCC expressly stated that "[a]s has the FTC, we find that HIPAA's existing protections . . . already safeguard consumer privacy, and we therefore do not need to subject these calls to our consent, identification, opt-out, and abandoned call rules."[56] Moreover, the Commission expressly recognized that all Covered Entities, not just health care providers, would be permitted to place such health care-related calls.[57] The *2015 Declaratory Order*, however, could be read to be inconsistent with the FCC's prior Orders and the intentions of Congress for HIPAA to be the primary protector of patient privacy, as well as the legal foundation for use of telephone numbers.

The Commission should continue to harmonize its TCPA regulations with the detailed regulatory scheme under HIPAA.

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[54] *2012 Report & Order*, *supra* note 8, at 1854 ¶ 61.

[55] *See* 47 C.F.R. §§ 64.1200(a)(3)(v) (residential lines) and 64.1200(a)(2) (wireless devices).

[56] *2012 Report & Order*, at 1854 ¶ 61.

[57] This view was also consistent with the FTC's recognition of all Covered Entities as exempt from its similar telemarketing regulations and was further consistent with the FCC's prior 1992 determination that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *See 1992 Report & Order* at 8769, *supra* note 8.

A. The FCC Should Clarify that Prior Express Consent Exists When a Covered Entity or Business Associate Receives a Number as Part of an Interaction Subject to HIPAA.

Petitioners request that the FCC make clear that the provision of a phone number to a Covered Entity or Business Associate (as those terms are defined under HIPAA), whether by an individual, another Covered Entity, or a party engaged in an interaction subject to HIPAA, such as an employer or governmental entity[58], constitutes prior express consent for health care treatment, payment, and health care operations calls to that number. This clarification is

[58] The Federal Government and its agencies, such as CMS and HHS, are not subject to TCPA's prohibitions. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2015) ("The United States and its agencies, it is undisputed, are not subject to the TCPA's prohibitions because no statute lifts their immunity."). The Supreme Court also ruled that a federal government contractor may be eligible for derivative immunity when it acts under the authority "validly conferred" by the Federal Government and the contractor follows the direction of the Federal Government. *Id.* at 673-74. Therefore, validly authorized contractors, such as health insurance providers that administer Medicare and Medicaid programs under the authority and direction of CMS and HHS have derivative immunity from TCPA. The FCC has affirmed this position on the basis of *Campbell-Ewald* and its own "longstanding administrative precedent" under prior TCPA decisions that a caller "is exempt from liability because it is calling on behalf of a principal and the principal would not be liable if it had placed the calls itself." *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al*., Declaratory Ruling, FCC 16-72, CG Docket No. 02- 278, at 10 ¶17 (July 5, 2016) (citing to *2003 TCPA Order*, *the ACA Declaratory Ruling* and the *State Farm Declaratory Ruling*) ("*2016 Declaratory Ruling*").

In its *2016 Declaratory Ruling*, the Commission stated, "[b]ased on the federal common law of agency, we clarify that a government contractor who places calls on behalf of the federal government will be able to invoke the federal government's exception from the TCPA when the contractor has been validly authorized to act as the government's agent and is acting within the scope of its contractual relationship with the government, and the government has delegated to the contractor its prerogative to make autodialed or prerecorded- or artificial-voice calls to communicate with its citizens." *Id*. at 9 ¶17 (footnote omitted).

The FCC has not expressly addressed whether contractors that operate pursuant to validly conferred authority under state agencies are subject to TCPA. In the health care industry, state agencies implement public health programs under the direction of the federal government. The States are required to operate in compliance with federal policies and regulations (Federal Policy Guidance, Medicaid.gov., available at https://www.medicaid.gov/federal-policy-guidance/federal-policy-guidance.html (last visited July 21, 2016)). Health insurance plans and their managed care organizations ("MCOs"), are authorized via contract with the state Medicaid agency under federal law to administer Medicaid's benefits to citizens on its behalf. *See, e.g*., 42 U.S.C. §§ 1396u-2 (Sec. 1932 of the Social Security Act) and 42 C.F.R. § 438, Managed Care. State Medicaid agencies and MCOs are also governed under HIPAA as Covered Entities. *See* 45 C.F.R. § 160.103.

Petitioners do not request an expansion of the *2016 Declaratory Ruling*. Instead, Petitioners simply request herein that the FCC recognize, based on its own longstanding precedent, that a governmental entity that provides a telephone number to a Covered Entity or Business Associate as part of an interaction subject to HIPAA, at minimum, confers such prior express consent to a Covered Entity and its Business Associates as its duly authorized agents.

necessary, consistent with court precedent,[59] and provides deference to the already-stringent HIPAA framework. For example, if a telephone number is regulated by HIPAA as PHI, and the recipient is regulated by HIPAA as a Covered Entity or Business Associate, and therefore the use of the number is subject to HIPAA, then the TCPA should be interpreted consistent with HIPAA and allow use of the number to contact the patient/member with a non-telemarketing HIPAA message. The TCPA's protection, however, of a consumer's right to control unwanted calls would be respected by allowing the consumer to revoke the consent.

The Petitioners accordingly propose the following clarification for prior express consent for non-telemarketing calls subject to HIPAA in paragraph 141 and footnote 473:

> 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, 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[] by a ~~HIPAA~~ covered entity and business associate~~s~~ 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) engaged in an interaction subject to HIPAA.**

Note 473: The phrase "are not necessarily among" should also be revised to "are among."

[59] *See, e.g.*, *Baisden v. Credit Adjustments, Inc.*, 813 F.3d 338, 345-46 (6th Cir. 2016) (adopting the holding of *Mais* and finding that "consumers may give 'prior express consent' under the FCC's interpretations of the TCPA when they provide a cell phone number to one entity as part of a commercial transaction, which then provides the number to another related entity from which the consumer incurs a debt that is part and parcel of the reason they gave the number in the first place"); *Penn v. NRA Grp., LLC*, No. CIV. JKB-13-0785, 2014 WL 2986787, at *3 (D. Md. July 1, 2014) (finding "prior express consent" where plaintiff provided cell phone number to hospital in relation to medical services and received calls in reference to an unpaid debt from those services); *Hudson v. Sharp Healthcare*, No. 13-cv-1807-MMA, 2014 WL 2892290, at *6 (S.D. Cal. June 25, 2014) (finding plaintiff consented to receive calls when she orally provided her number and then signed an attestation form with the number); *Elkins v. Medco Health Sols., Inc.*, No. 4:12CV2141 TIA, 2014 WL 1663406, at *7 (E.D. Mo. Apr. 25, 2014) (finding plaintiff consented to receive calls from a pharmacy benefits specialist when she gave her cell phone number at the time of enrollment in a group health plan).

The health care industry is unique in the complexity and coordination of services that must be managed across different types of entities. Congress directed the Secretary of HHS to create a carefully crafted, integrated, and comprehensive regulatory scheme to balance the use and disclosure of PHI and consumer privacy with the delivery of high-quality and effective health care using advancements in technology.[60] The HIPAA Privacy Rule was designed to meet this congressional mandate. HHS recognized in its implementation of the Privacy Rule that:

> [r]eady access to treatment and efficient payment for health care, both of which require use and disclosure of protected health information, *are essential to the effective operation of the health care system.* In addition, certain health care operations – such as administrative, financial, legal and quality improvement activities – *conducted by or for health care providers and health plans are essential to support treatment and payment.*[61]

In the health care ecosystem, the provision of a consumer's telephone number is often but not always given directly to the Covered Entity or its Business Associate.[62] Covered Entities and

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[60] *See* 42 U.S.C. § 1320d-2; *see also* HHS OCR Privacy Brief, Summary of the HIPAA Privacy Rule, HIPAA Compliance Assistance (May 2003) at 1-2, *available at* http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf (last visited Sept. 22, 2015) ("OCR Privacy Rule Summary").

[61] HHS OCR HIPAA Privacy, *Uses and Disclosures for Treatment, Payment, and Health Care Operations*, 45 C.F.R. § 164.506 (Dec. 3, 2002, rev. April 3, 2003) at 1 (emphases added), available at http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/usesanddisclosuresfortpo.html (last visited July 20, 2016) ("HHS Use and Disclosure Guidance").

[62] For example, a telephone number can come from a hospital as part of its admissions process, and then passed via medical record transfer for use in care transition or home-based care after the patient is discharged. Or it can come from an employer (or the employer's third party agent such as a benefits manager) as part of the employee's enrollment, application, or renewal process for health insurance coverage. As a practical matter, the employer is the often the only entity that can collect the required information directly from the employee and the employee should reasonably expect that the employer will pass this information to the health plan, as the employer cannot execute or complete the insurance enrollment, application, or renewal transaction without involvement of the health plan.

The employer, therefore, is *not* an intermediary as the FCC has used that term, but rather the authorized representative of the consumer to complete the consumer's enrollment in a health plan. *See* GroupMe/Skype Declaratory Order, 29 FCC Rcd. 3442 at *5 ¶ 11 (2014)("While the scope of the consent must be determined upon the facts of each situation, we here find GroupMe's administrative texts to be within the scope of the consent given by the consumer. Given that, we find it to be a reasonable extension of the reasoning of the ACA Order to interpret the TCPA to permit a text sender such as GroupMe to send such autodialed text messages based on the consent obtained and conveyed by an intermediary, with the caveat that if consent was not, in fact, obtained, the sender, such as GroupMe, remains liable.") The FCC continued, "We stress that our clarification in no way mitigates GroupMe's duty (or that of any other caller), except in emergencies, to obtain the prior express consent of the called party before

their Business Associates receive a consumer's telephone number as part of other interactions conducted pursuant to HIPAA's regulations, such as from state Medicaid agencies, emergency rooms, and social service organizations (e.g., during enrollment for benefits or discharge to post-acute care). The enrollment, application, or renewal process conducted by an employer or via state or federally authorized website is a direct grant of prior express consent to the health plan or its Business Associate operating on behalf of the health plan. The same is true for telephone numbers that may come from a state or federal agency for implementation of regulations and statutes designed to improve health outcomes. The consumer would have provided his or her number as part of enrollment, renewal or other interaction subject to HIPAA authorized by the state or federal agency. Such agencies would likely be classified as Covered Entities under HIPAA.[63] In all the examples above and foreseen, the wireless number is used within the same interaction subject to HIPAA, and within the scope intended by the person providing the number. Furthermore, consent can be revoked at any time.

HIPAA recognizes the importance of administrative, coverage, and operational communications to the delivery of high-quality, affordable, and effective health care. Indeed, many government-funded health programs, including Medicare and Medicaid, require that such communications be delivered, to ensure that beneficiaries receive the appropriate services.[64]

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placing an autodialed or prerecorded call to that party's wireless telephone number. The TCPA holds a caller liable for TCPA violations even when relying upon the assertion of an intermediary that the consumer has consented to the call." *Id.* ¶ 12.

[63] *See* 45 C.F.R. § 160.103 (defining "Health plan" to include various state and federal administered programs or coverage).

[64] Significantly, each of the types of messages listed in AAHAM's Petition can be classified as related to "treatment, payment and health care operations" under HIPAA. And each Covered Entity is allowed to use and disclose PHI *without* an individual's authorization for its own treatment, payment and health care operations pursuant to the HIPAA Privacy Rule. 45 C.F.R. § 164.506(c).

Such messages are not considered marketing under the HIPAA Privacy Rule[65] and therefore, should also be allowed under the Prior Express Consent Clarification (*and* ideally the HIPAA Non-Telemarketing Exemption). Statements that serve to prohibit health plans from full benefit of the Prior Express Consent Clarification are discriminatory and do not serve the public interest.

Clarifying the *2015 Declaratory Order* will not only allow consumers to receive important, non-telemarketing health care related calls, it will harmonize such rules with the FCC prior decisions and HIPAA.

B. The FCC Should Clarify that All Covered Entities and Business Associates are Treated Equally in Paragraphs 141 and 147 of the *2015 Declaratory Order*.

At the request of AAHAM, Paragraph 141 of the *2015 Declaratory Order* clarified that provision of a telephone number in the health care context constitutes prior express consent. Also at the request of AAHAM, Paragraph 147 of the *2015 Declaratory Order* created an exemption for certain non-telemarketing health care calls from prior express consent.[66]

The *2015 Declaratory Order* granting AAHAM's requests, however, created some unintended confusion regarding its application to all three classes of Covered Entities and their Business Associates. As for paragraph 141, the FCC stated "that provision of a phone number to a health care provider constitutes prior express consent for health care calls subject to HIPAA 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."[67] Similarly, the narrow exemption created in paragraph 147 states that it applies to calls "made by or on behalf of a healthcare provider." It could be

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[65] *See* 45 C.F.R. § 164.501.

[66] AAHAM Petition, at 4.

[67] *2015 Declaratory Order*, at 8029 ¶ 141.

interpreted erroneously that only telephone numbers submitted directly to a HIPAA health care provider, and not to any other HIPAA Covered Entity or Business Associate, qualify for relief under the clarification and exemption.

The health care industry anticipated that the new rules surrounding prior express consent for non-telemarketing, health care related calls and exemption would benefit *all* Covered Entities and their Business Associates, particularly since all three classes of Covered Entities and all Business Associates are subject to the same rigorous privacy and data security regulations and strict prohibitions against the use of PHI for marketing under the HIPAA Privacy Rule.[68]

To ensure that all Covered Entities and their Business Associates benefit from the *2015 Declaratory Order*, the Petitioners also propose the below clarifications, also reflected at Exhibit B, confirming our understanding that the provisions apply not only to a "healthcare provider" but to the other HIPAA "covered entities" and "business associates" as follows:

> ¶ 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,

[68] *See 2012 Report & Order*, at 1854 ¶ 61.

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.

IV. THE *2015 DECLARATORY ORDER* SHOULD BE CLARIFIED TO REMEDY CONSTITUTIONAL CONCERNS.

Finally, potentially excluding health plans and health care clearinghouses from the paragraphs 141 and 147 of the *2015 Declaratory Order* would violate the First Amendment by preferring one speaker over another notwithstanding that both provide identical speech.[69] To be consistent with the Constitution, the Commission's decisions must treat all speech about a given topic the same way and not distinguish between speakers. When the Commission has a choice between possible interpretations of the statutes, it must choose the interpretation that avoids creating a constitutional violation because Congress is presumed to have intended its statutes to be consistent with the Constitution.[70]

The Supreme Court has recently and repeatedly held that the government violates the First Amendment when it seeks to restrict some speech based on its content or the speaker, but

[69] *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) (striking down a state code that imposed more stringent restrictions on signage from a nonprofit group than on signs conveying other messages or from other speakers); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) (striking down Vermont's prescription privacy law, because "[t]he State has burdened a form of protected expression that it found too persuasive" while leaving "unburdened those speakers whose messages are in accord with its own views").

[70] *See Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1436 (D.C. Cir. 1996) (explaining that a law "must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score"); *see also Bartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (construing unfair labor practices provisions of the NLRA to exempt handbill distribution so as to avoid First Amendment violations); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) ("Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions.") (citations omitted).

allows other such speech by similar entities, unless the government can satisfy strict scrutiny.[71] An exemption that permits certain calls only by certain speakers (e.g. health care providers, and not other HIPAA covered entities), violates the First Amendment's prohibitions against viewpoint discrimination.[72]

Overly restrictive exemptions would not be sufficiently narrowly tailored to avoid running afoul of the Constitution.[73] The Commission can avoid these constitutional concerns by confirming a speaker-neutral exemption for all non-telemarketing calls allowed under HIPAA placed by Covered Entities or their Business Associates.

V. CONCLUSION

In summary, HIPAA comprehensively governs the privacy and security requirements associated with communications between Covered Entities, Business Associates, patients, members, and other key stakeholders in the health care ecosystem. We respectfully submit that the Commission should ensure harmony between the TCPA, its prior decisions and rulings, and HIPAA and clarify and confirm that:

(1) 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. (*See* Exhibit A for suggested language); and

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[71] *See, e.g.*, *Reed*, 135 S. Ct. at 2231.

[72] *See, e.g., Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015) ("[U]nderinclusiveness can raise 'doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.'"); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Sorrell*, 131 S. Ct. at 2664 (holding that heightened judicial scrutiny is warranted for privacy regulations restricting dissemination of prescriber information because they impose a "specific content-based burden on protected expression").

[73] *See Cahaly v. Larosa*, 796 F.3d 399, 406–07 (4th Cir. 2015) (concluding that a content-based statute prohibiting unsolicited political calls by automated technologies was unconstitutional where it failed to "pass muster under strict scrutiny"); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232–33 (10th Cir. 1999).

(2) the clarification of the prior express consent in paragraph 141 exemption granted in paragraph 147 of the *2015 Declaratory Order* extends to all HIPAA "covered entities" and "business associates," so that each use of the term "healthcare provider" in paragraph 147 of the *2015 Declaratory Order* should be interpreted to read "HIPAA covered entities and business associates."

For all the reasons set forth herein, we respectfully request that the Commission issue an expedited declaratory ruling and/or clarification.

Respectfully submitted,

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July 28, 2016

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,[] 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[] by a ~~HIPAA~~ covered entity and business associate~~s~~ 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.