VENABLE LLP

600 MASSACHUSETTS AVE., NW WASHINGTON, DC 20001
T 202.344.4000 F 202.344.8300 www.Venable.com

November 28, 2018

Daniel S. Blynn

T 202.344.4619
F 202.344.8300
DSBlynn@venable.com

Patrick Webre, Bureau Chief
Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte* Notice: Scope of Granted Certiorari in JFPA case, CG Docket No. 02-278

Dear Mr. Webre:

On behalf of Inovalon, Inc. ("Inovalon"), we write to update our July 3, 2018 *Ex Parte* Submission regarding the Fourth Circuit decision issued in *Carlton & Harris Chiropractic, Inc. v. PDR Network LLC*. In that case, the appellate court held that the Hobbs Act requires deference to the Commission's interpretation of the Junk Fax Prevention Act ("JFPA"), and overturned the district court's conclusion that an unsolicited fax is not an advertisement under the JFPA when the sender has nothing to sell or is offering a free good or service. On November 13, 2018, the Supreme Court granted certiorari in *Carlton & Harris* limited solely to the question of whether the Fourth Circuit correctly concluded that deference to the FCC interpretation is automatic; the Supreme Court declined to consider the further question of whether faxes promoting free goods with no commercial nexus to the sender are "advertising." The specific grounds on which certiorari was granted underscores the need for prompt and favorable action on Inovalon's Petition which has been pending before the Commission for nine months and poses a different issue than that now before the Supreme Court.

As Inovalon pointed out in its Reply Comments, the issue raised by its Petition does not involve the question of whether and to what extent the Commission's Rules are entitled to deference.[1] Rather, the Petition asks the FCC to declare that, under the JFPA, the sending of a fax, the sole purpose of which is to establish, at no charge to the recipient, arrangements for the collection of medical records pursuant to a contract between the recipient and the carrier on whose behalf Inovalon is acting does not violate the JFPA because (1) such messages are clearly "transactional" within the meaning of the JFPA and the Commission's rules (especially given that Inovalon offered no commercially available product or service that the recipient even could purchase), and (2) even if treated as an advertisement, the offer to collect health information at no charge to the recipient of the fax is not the type of offer the JFPA was designed to curtail.[2] As

[1] *In re Inovalon, Inc.'s Petition for Expedited Declaratory Ruling*, Reply Comments, CG Docket No. 02-278, 1 (filed Apr. 10, 2018).

[2] *In re Inovalon*, Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, 6-8 (filed Feb. 19, 2018) (hereinafter, "*Inovalon Petition*").

Inovalon's Petition and Reply Comments make clear, the underlying facts and issue presented here are different than the issue the Supreme Court has now decided to hear. Moreover, if—as we submit it should—the Commission concludes that Inovalon's message is transactional as the FCC has defined that term, there is no need to decide the other question advanced in Inovalon's Petition (*i.e.*, whether faxes sent by a health insurance plan's designee to a patient's medical provider, pursuant to an established business relationship between the health plan and provider, requesting patient medical records are advertisements).

There are compelling reasons for the Commission to conclude that messages of the type addressed by Inovalon's Petition are transactional. Indeed, the Commission specifically has stated its agreement with the precept that "messages the purpose of which is to facilitate, ***complete*** or confirm" a transaction that the recipient has entered into are "not advertisements" under the JFPA.[3] That is manifestly the case here.[4] Indeed, for the Commission to now conclude that these types of messages—especially within the health care industry—are not "transactional" would raise the constitutional issue of whether the policy is narrowly tailored to serve a compelling governmental objective.[5] The detailed listing of the types of messages that fall within the Commission's definition of "transactional" makes clear that, in the Commission's sound view, the JFPA was never intended to unreasonably abridge communications—indeed important communications—that further public health interests in the United States.[6]

In sum, there is no reason of policy or administrative or judicial efficiency for further delay in acting upon Inovalon's Petition. The need for Commission guidance and clarity is compelling and unaffected by the Supreme Court's forthcoming action in *Carlton & Harris*. We are well aware that the Commission has a very heavy caseload on a variety of public interest issues. But the chilling effect of the putative class action lawsuit that has afflicted Inovalon and threatens others cannot be over emphasized.

---

[3] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3812-13, ¶ 49 (2006) (hereinafter, "*Junk Fax Order*").

[4] *Inovalon Petition*, at 6.

[5] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 565 (1980); *see also Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management*, Petition for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278, 16-23 (filed July 28, 2016) (hereinafter, "*Joint Petition*").

[6] *See Junk Fax Order* at ¶ 49; *see also Joint Petition*, at 16-23.

We submit, therefore, that Inovalon's Petition should be favorably decided with the utmost dispatch.

Respectfully Submitted,

/s/ *Daniel S. Blynn*
Daniel S. Blynn
James Arden Barnett, Jr, Rear Admiral, USN (Ret.)
Ian D. Volner
VENABLE LLP
600 Massachusetts Avenue, NW
Washington, DC 20001
(202) 344-4000

Counsel to Inovalon, Inc.