PCMA

PHARMACEUTICAL CARE MANAGEMENT ASSOCIATION

January 16, 2015

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Ms. Christina Clearwater
Consumer and Governmental Affairs Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
Reference: CG Docket No. 02-278

Dear Ms. Clearwater:

We thank you for the opportunity to comment on the Petition for Expedited Declaratory Ruling and Exemption from the American Association of Healthcare Administrative Management (AAHAM). The Pharmaceutical Care Management Association (PCMA) is the national association representing America's pharmacy benefit managers (PBMs), which administer prescription drug plans and operate specialty pharmacies for more than 216 million Americans with health coverage through Fortune 500 companies, health insurers, labor unions, Medicare, Medicaid, the Federal Employees Health Benefits Program, and the Exchanges established by the Affordable Care Act.

Background

FCC seeks public comments on a petition AAHAM has filed with the Commission. AAHAM asks the Commission to confirm that "the provision of a telephone number by an individual to a healthcare provider constitutes 'prior express consent' for non-telemarketing, healthcare calls to that telephone number by or on behalf of the healthcare provider." As part of this request for clarification, AAHAM asks the Commission to confirm that provision of a telephone number to a healthcare provider constitutes prior express consent for calls "by or on behalf of the 'covered entity' as well as its 'business associates.'"

AAHAM also asks that the Commission "exempt from the TCPA's 'prior express consent' requirement certain non-telemarketing, healthcare calls when they are 'not charged to the called party.'" The TCPA permits the Commission to exempt from the prior express consent requirement autodialed or prerecorded calls to a wireless telephone number that are not charged to the called party, "subject to such conditions as the Commission may prescribe" to protect consumer privacy.

Comment

PCMA supports AAHAM's position and urges FCC to confirm the policy discussed in the petition that providing a phone number should constitute prior expressed consent. Telephonic

communications with patients is specifically sanctioned by the federal government and may be required in some cases. Contacting patients directly is a necessary tool throughout the health care system. For example, calling patients over the telephone is essential to pharmacy benefits management and medication therapy management programs. Additionally, prior case law in pharmacy benefits management, with decisions citing FCC's own language, reflects that providing a phone number constitutes prior expressed consent for patients to be called.

Calling Patients by Phone Is Specifically Sanctioned by Law and May Be Required in Some Instances

Many of PCMA's member companies administer benefits under the Medicare Part D prescription drug program. The Centers for Medicare and Medicaid Services, which regulates the program, specifically sanctions, and in some cases may require calling beneficiaries on the telephone to confirm prescription submissions and refills and otherwise help manage their drug benefits. Indeed, as a condition of dispensing and delivering a patient's prescription, CMS requires that retail and mail-order pharmacies obtain patient consent to deliver a prescription, new or refill, prior to each delivery.[i] For many beneficiaries, calling them by phone is the only practical way to fulfill this requirement.

With respect to Medicare Part D plans' required offering of medication therapy management services, CMS requires a "real-time interaction" with a patient, stating, "[t]his real-time interaction may be face-to-face or through other interactive methods such as the telephone."[ii] Additionally, CMS forbids plans to discriminate against certain groups of beneficiaries based on the nature of their communications to beneficiaries, specifically mentioning the use of text telephone (TTY) for phone-based communications, to facilitate communication with those who may be deaf or hard of hearing.[iii]

Contacting Patients by Telephone Is also Integral to Specialty Pharmacy Patient Care

Many of PCMA's companies also operate specialty pharmacies. A specialty pharmacy manages drug regimens for those with a complex, chronic condition, such as multiple sclerosis, hepatitis C, and rheumatoid arthritis; or a rare medical condition, such as cystic fibrosis, hemophilia, and multiple myeloma. Specialty pharmacies dispense and arrange delivery of specialty drugs, which are typically expensive, and increasingly, are biologics with potentially difficult side effects and require training with respect to their use and administration. Using dedicated, specialized personnel, specialty pharmacies provide patient education and clinical support beyond traditional dispensing activities for patients receiving these drugs. A specialty pharmacy's care team regularly contacts patients to assess, educate, and provide focused and personalized support, including:

- Educating patients on how to take medications correctly;
- Reviewing proper medication storage and handling;
- Helping with ways to manage side effects to help patients stay on therapy;
- Confirming patients' medications on hand before scheduling the next shipment;
- Ascertaining and communicating treatment issues to a prescriber; and,
- Coordinating care with third parties, as needed.

Each of these activities typically requires contacting a patient over the phone and could prove crucial in helping specialty pharmacy patients recover from or manage their condition. Thus, disallowing the calling of patients could have a devastating effect on care for those patients who suffer from severe or serious illnesses and need to take specialty drugs.

Case Law Has Upheld the Calling of Patients to Manage Pharmacy Benefits

As mentioned in AAHAM's petition, case law has also upheld the legitimacy of contacting patients via telephone. The court in Elkins v. Medco held that the plaintiff, by providing her cell phone number on her employer's prescription benefit form and certifying that the number was her home and contact number, had given her express consent to be contacted by the provider of that benefit, Medco, when it discovered that she was not taking full advantage of the benefits available to her.[iv] In fact, the court cites the FCC in its decision with respect to expressed consent, pointing to the Commission's finding that:

> "[P]ersons 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. Hence, [callers] will not violate our rules by calling a number which was provided as one at which the called party wishes to be reached."[v]

Thus, we believe it is clear that providing a phone number constitutes prior expressed consent for patients to be called for a health care message by or on behalf of a HIPAA-covered entity or its business associate, and that the recipient's written consent is not required.

Conclusion

We thank the Commission for the opportunity to share our thoughts and we look forward to working with you on these important issues. If there are any questions about our comments, please contact me at acosgrove@pcmanet.org.

Sincerely,

Andy Cosgrove
Vice President, Policy

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[i] See, CMS, "Announcement of Calendar Year (CY) 2014 Medicare Advantage Capitation Rates and Medicare Advantage and Part D Payment Policies and Final Call Letter," April 1, 2013. http://www.cms.gov/Medicare/Health-Plans/MedicareAdvtgSpecRateStats/downloads/Announcement2014.pdf

[ii] CMS, "Prescription Drug Benefit Manual Chapter 7 – Medication Therapy Management and Quality Improvement Program," Sec. 30.3. http://www.cms.gov/Medicare/Prescription-Drug-Coverage/PrescriptionDrugCovContra/Downloads/Chapter7.pdf

[iii] CMS, "Prescription Drug Benefit Manual Chapter 7 – Medication Therapy Management and Quality Improvement Program," Sec. 30.7. http://www.cms.gov/Medicare/Prescription-Drug-Coverage/PrescriptionDrugCovContra/Downloads/Chapter7.pdf

[iv] American Association of Healthcare Administrative Management, "Before the Federal Communications Commission, Petition for Expedited Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls," October 21, 2014.

[v] FCC, quoted in, Elkins v. Medco Health Solutions, Inc., No. 4:12 CV 2141 TIA, 2014 WL 1663406, at *7 (E.D. Mo. Apr. 25, 2014).