

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
American Association of Healthcare)	CG Docket No. 02-278
Administrative Management Petition for)	
Expedited Declaratory Ruling and Exemption)	
Regarding Non-Telemarketing Healthcare Calls)	

COMMENTS OF RITE AID

Rite Aid Hdqtrs. Corp. (“Rite Aid”) respectfully submits these comments to the Federal Communications Commission (“FCC” or “Commission”) in support of the American Association of Healthcare Administrative Management’s (“AAHAM”) Petition for Expedited Declaratory Ruling and Exemption regarding non-telemarketing healthcare calls (the “AAHAM Petition”).¹

In its petition, AAHAM seeks clarification from the Commission regarding two issues. First, AAHAM asks the Commission to confirm that providing a telephone number to a healthcare provider demonstrates “prior express consent” for healthcare calls to that number on behalf of the healthcare provider. Second, AAHAM asks the Commission to exempt from the “prior express consent” requirement healthcare calls that are not charged to the called party. Rite Aid generally supports the AAHAM Petition but respectfully requests the Commission to address certain additional issues that are presented by the AAHAM Petition as described below.

¹ American Association of Healthcare Administrative Management, Petition for Expedited Declaratory Ruling and Exemption, CG Docket No. 02-278 (filed Oct. 21, 2014).

I. INTRODUCTION

Rite Aid is the third-largest retail drugstore chain in the U.S., offering an assortment of healthcare and wellness products and services through a network of more than four thousand stores. From dispensing prescription and over-the-counter drugs to offering immunizations and healthcare screenings, Rite Aid offers comprehensive healthcare solutions to patients.

Given the increasing breadth and scope of these offerings, Rite Aid patients can elect to be contacted with important information and updates at the phone number of their choosing. This allows Rite Aid to quickly and efficiently communicate specific pharmacy and wellness alerts directly to the patient. For example, rather than requiring a patient to call a local Rite Aid store location and sort through a pre-recorded menu of options in order to determine if a prescription has been filled or a flu immunization is available, Rite Aid gives patients the option to be contacted by phone with a reminder as soon as the prescription or service is available. In general, Rite Aid contacts patients by phone with information that constitutes a “health care message” under the Health Insurance Portability and Accountability Act (“HIPAA”). Rite Aid patients appreciate these proactive efforts to keep their health a top priority.

Notwithstanding its efforts to provide excellent service to patients, however, Rite Aid (like so many other healthcare providers) now finds itself a defendant in multiple lawsuits brought under the Telephone Consumer Protection Act (“TCPA”) seeking statutory damages based on allegations that Rite Aid made prerecorded calls to a wireless phone without first obtaining prior consent.² In light of this litigation, Rite Aid has a direct and immediate interest in the Commission quickly resolving the issues presented by the AAHAM Petition.

² See, e.g., *Robert Zani v. Rite Aid Hdqtrs. Corp.*, Case No. 1:14-cv-09701-AJN (S.D.N.Y.). The TCPA is codified at 47 U.S.C. § 227 *et seq.*

II. THE COMMISSION SHOULD GRANT THE AAHAM PETITION TO THE EXTENT IT SEEKS CONFIRMATION THAT THE VOLUNTARY PROVISION OF A WIRELESS PHONE NUMBER TO A HEALTHCARE PROVIDER CONSTITUTES PRIOR EXPRESS CONSENT FOR HEALTHCARE CALLS TO THAT NUMBER

As AAHAM points out in its Petition, prior Commission decisions and relevant precedent support a determination that the voluntary provision of a wireless phone number to a healthcare provider constitutes “prior express consent” for healthcare calls to that number.³ For example, in 2008, the Commission held that the voluntary provision of a wireless phone number on a credit application constituted “prior express consent” to receive messages “regarding the debt” at that number.⁴ Far from a recent trend, the Commission’s treatment of the voluntary provision of a wireless phone number extends back to the *1992 TCPA Order*.⁵ In that order, the Commission stated 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.”⁶

Federal courts have also weighed in on this issue. In particular, the Eleventh Circuit clarified that the *2008 ACA Declaratory Ruling* applied equally to the voluntary provision of a wireless phone number during a healthcare transaction.⁷ This is also consistent with more recent cases in the healthcare context, whereby a patient’s voluntary provision of a cell phone number on a prescription benefit form authorized the benefit provider to contact the patient.⁸

Armed with ample legal authority to act and well aware of the positive benefits associated with facilitating direct communication between healthcare providers and the

³ AAHAM Petition at 5-7.

⁴ *See Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, FCC 07-232, Declaratory Ruling, 23 FCC Red 559, 564-65 ¶¶ 9-10 (2008) (“*2008 ACA Declaratory Ruling*”).

⁵ *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Red 8752 (1992) (“*1992 TCPA Order*”).

⁶ *Id.* at ¶31.

⁷ *See Mais v. Gulf Cost Collection Bureau, Inc.*, Case No. 13-14008, at 22-23 (11th Cir. Sept. 29, 2014).

⁸ *Elkins v. Medco Health Solutions, Inc.*, No. 4:12 CV 2141 TIA, 2014 WL 1663406, at *7 (E.D. Mo. Apr. 25, 2014).

underlying patient, the Commission should grant the AAHAM Petition to the extent it seeks confirmation that the voluntary provision of a wireless phone number to a healthcare provider constitutes prior express consent, including for HIPAA-related calls to that number.⁹ By providing additional clarity and removing administrative burdens, the Commission will ensure that critical healthcare information – such as prescription recalls and updates, upcoming health screenings, and immunization availability – is made known to patients as quickly as possible but with no accompanying uptick in unwanted telemarketing or abusive calls.

III. THE COMMISSION SHOULD RESOLVE THE SUBSTANTIAL CONFUSION THAT EXISTS IN THE MARKETPLACE REGARDING THE EXEMPTION FOR HIPAA-RELATED CALLS BY CONCLUDING THAT NO PRIOR CONSENT IS REQUIRED FOR SUCH CALLS TO EITHER RESIDENTIAL OR WIRELESS PHONES

The AAHAM Petition assumes without argument that non-telemarketing autodialed and prerecorded healthcare calls to wireless phones are subject to a prior express consent requirement.¹⁰ Based purely on a reading of Section 64.1200 of the Commission’s rules, however, this position is not entirely clear. Indeed, as evidenced by law firm blogs and other industry commentary on the *2012 TCPA Order*, substantial confusion exists in the marketplace about the scope of the HIPAA-related exemption.¹¹ Approximately half of the commentary we reviewed claims the exemption extends to wireless, and the other half claims it does not.

⁹ As noted by the U.S. Department of Health & Human Services: “[o]ften, the lines between a marketing communication and a communication for a treatment or health care purpose unavoidably overlap, as a necessary part of providing treatment for health care services and benefits is to encourage or advise individuals to purchase or use certain health-related products or services.” U.S. Department of Health & Human Service, *The HIPAA Privacy Rule and Refill Reminder and Other Communications about a Drug or Biologic Currently Being Prescribed for the Individual*, available at: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveridentities/marketingrefillreminder.html> (accessed Jan. 16, 2015). For this reason, Health & Human Services wisely created important exceptions to what is considered “marketing” to ensure that important healthcare communications to patients remain unimpeded. *Id.* Rite Aid urges the Commission to rely upon the expertise of Health & Human Services by declaring that all communications that constitute “health care messages” for purposes of HIPAA are *per se* non-telemarketing.

¹⁰ See, e.g., AAHAM Petition at 1.

¹¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 12-21, Report and Order, 27 FCC Rcd 1830 (2012) (“*2012 TCPA Order*”).

This confusion in the marketplace is understandable given the wording of Section 64.1200(a)(2), which provides that no person or entity may make a telemarketing call using an automatic dialing system or a prerecorded voice to any cell phone:

other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, *or a call that delivers a ‘health care’ message made by, or on behalf of, a ‘covered entity’ or its ‘business associate,’ as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.*¹²

As written, the final clause of Section 64.1200(a)(2) (shown above in *italics*) addressing healthcare messages is most appropriately read as separate and apart from the preceding clauses stating the requirement to obtain either (i) prior express *written* consent in general or (ii) prior express consent (written or otherwise) for calls made on behalf of tax-exempt nonprofit organizations.¹³ In other words, the most plausible reading of this paragraph would break the exemptions down as follows:

other than

(1) a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization,

or (2) a call that delivers a “health care” message made by, or on behalf of, a “covered entity” or its “business associate,” as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

When viewed this way, the first exemption deals with those calls where some form of consent is obtained or required – either (i) prior express *written* consent or (ii) in the case of non-profits, prior express consent (written or otherwise). And the second exemption deals with HIPAA-related messages, where no consent is required.

¹² 47 C.F.R. § 64.1200(a)(2) (emphasis added).

¹³ This is especially true in light of the presence of a comma after the phrase “on behalf of a tax-exempt organization” and before the phrase “or a call that delivers a ‘health care’ message.”

This reading of the exemption for wireless calls is buttressed by the essentially identical drafting in Section 64.1200(a)(3) where the Commission has provided the complete exemption for healthcare messages sent to residential lines.¹⁴ Moreover, there is no policy reason to create disparate treatment of residential lines and wireless phones, especially where HIPAA provides equal privacy protections for both types of communications.¹⁵

The alternative reading of Section 64.1200(a)(2) is that no person or entity may make a telemarketing call using an automatic dialing system or a prerecorded voice to any cell phone:

other than

(1) a call made with the prior express written consent of the called party or

(2) the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a ‘health care’ message made by, or on behalf of, a “covered entity” or its ‘business associate,’ as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

This reading suggests that the two categories of exemptions are (i) those calls where prior express written consent is obtained and (ii) calls by non-profit organizations and HIPAA-related calls, where prior express consent is required. In other words, HIPAA-related calls are grouped with calls by non-profit organizations and prior express consent – which can be written or otherwise – is required. Rite Aid views this reading of Section 64.1200(a)(2) as weaker than the first because there is no comma after “the prior express written consent of the called party” and

¹⁴ See 47 C.F.R. § 64.1200(a)(3)(v)(emphasis added): “No person or entity may...[i]nitiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, *unless the call... [d]elivers a ‘health care’ message made by, or on behalf of, a ‘covered entity’ or its ‘business associate,’ as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.*”

¹⁵ The Commission previously highlighted the sound policy reasons for exempting healthcare messages from the other calling restrictions in the *2012 TCPA Order*. *2012 TCPA Order* at ¶59. Specifically, the Commission discussed the six considerations underlying the FTC’s exemption of healthcare messages from its rules: (i) healthcare messages are already regulated extensively at the federal level; (ii) coverage of healthcare messages could frustrate Congressional intent and other federal statutes; (iii) in contrast to commercial telemarketing, the number of healthcare providers who might call a patient is inherently limited; (iv) there is no incentive or medical basis for healthcare providers to boost sales through increased call volume; (v) a “reasonable consumer” would not consider healthcare messages coercive or abusive; and (vi) healthcare related calls have not been the focus of the types of abuses the exemption was intended to remedy. *Id.* These policy reasons apply equally to wireless phones and residential lines.

before “or” in the first clause. Without such a comma, the natural grouping of categories includes those wireless calls where consent is required, on the one hand, and HIPAA-related wireless calls (where no consent is required), on the other hand.

Rite Aid also recognizes, however, that the Commission has recently indicated its view that the agency “has implemented different rules for HIPAA exemptions for calls to residential numbers and wireless numbers” in the Public Notice concerning this proceeding.¹⁶ This fact suggests that the Commission has adopted the second interpretation of Section 64.1200(a)(2) described above.¹⁷ Nevertheless, Rite Aid urges the Commission to recognize the confusion that exists in the marketplace concerning the scope of the exemption for HIPAA-related calls based purely on a reading of the language in Section 64.1200(a)(2) as evidenced by the widely varying views among industry observers and commentators. The Commission should resolve such confusion by declaring that the exemption for HIPAA-related calls to wireless numbers is the same as that for residential lines, i.e., no prior consent is required. Without further action by the Commission, this ambiguity will continue to negatively impact the public interest by inhibiting health care providers like Rite Aid from supplying important information concerning their patients’ health in the most timely and efficient manner for fear of subjecting themselves to endless TCPA-related litigation.

Moreover, in light of the confusion in the marketplace concerning the scope of the HIPAA-related exemption, the Commission should grant a retroactive waiver to Rite Aid and other similarly situated parties who have been subjected to TCPA-related litigation involving any

¹⁶ *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling and Exemption from American Association of Healthcare Administrative Management*, Public Notice, CG Docket No. 02-278, DA 14-1847 (rel. Dec. 17, 2014). Rite Aid also recognizes that the Commission may view its ability to grant such a broad exemption as potentially limited by 47 U.S.C. §227(b)(2)(C).

¹⁷ Rite Aid notes that under either interpretation of Section 64.1200(a)(2), prior express *written* consent is never the sole requirement for non-telemarketing calls to wireless phones using autodialed or prerecorded voices (i.e., oral consent is always sufficient to the extent any consent is required).

alleged prior express consent requirement for HIPAA-related calls to wireless numbers to the extent necessary. Recently, in another TCPA-related proceeding, the Commission acknowledged that “confusion” in the marketplace surrounding the rules applying to opt-out notices for facsimile transmissions “left some businesses potentially subject to significant damage awards.”¹⁸ This confusion in the marketplace existed as a result of the “inconsistency” between a footnote in a prior FCC order and the language of the adopted rule.¹⁹ The Commission resolved this inconsistency by granting the petitioning parties a retroactive waiver of the rule and invited similarly situated parties to also apply for a waiver.²⁰

Rite Aid submits that the confusion evident in the fax context is substantially similar to the confusion evident in the current healthcare context. In both cases, the Commission’s language has led to varying interpretations of what actions are needed to comply with the TCPA. Rite Aid urges the Commission to protect the public interest by granting it and similarly situated parties a retroactive waiver similar to the retroactive waiver in the fax context to the extent necessary.²¹

IV. IN THE EVENT THE COMMISSION DECLINES THE RELIEF REQUESTED IN SECTION III ABOVE, RITE AID SUPPORTS COMMISSION GRANT OF THE REQUEST BY AAHAM TO EXEMPT FROM ANY “PRIOR EXPRESS CONSENT” REQUIREMENT HEALTHCARE CALLS THAT ARE NOT CHARGED TO THE CALLED PARTY

¹⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission, Order*, CG Docket No. 02-278, 05-338, FCC 14-164, ¶27 (rel. Oct. 30, 2014) (“*Fax Order*”).

¹⁹ *Fax Order* at ¶24.

²⁰ *Id.* at ¶22.

²¹ The Commission may waive any of its rules for good cause shown. *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). A waiver may be granted if: (1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule. *Id.* at 1166. Special circumstances exist in this instance because the adopted regulation on its face is unclear and its current application creates unnecessary confusion for healthcare providers and others. Eliminating this confusion by clarifying the current rules and granting a retroactive waiver to affected healthcare providers would thereby serve the public interest.

The AAHAM Petition urges the Commission to grant a limited exemption from what it views as the restriction on autodialed and prerecorded voice calls and messages to wireless telephone numbers.²² As noted above, Rite Aid has offered an alternative reading of Section 64.1200(a)(2) which supports the conclusion that an even broader exemption for HIPAA-related calls to wireless phones already exists. In the event the Commission disagrees with this interpretation, however, Rite Aid supports Commission grant of the AAHAM Petition to the extent specified in Section IV thereof.

AAHAM accurately points out that certain “[n]on-telemarketing healthcare calls, as well as healthcare calls subject to HIPAA, are already exempt from the TCPA’s restriction on prerecorded voice message calls to residential telephone numbers.”²³ These calls facilitate the delivery of messages that convey important – and sometimes critical – information which the Commission has authority to exempt from the reach of the TCPA.²⁴ The policy considerations underlying the Commission’s treatment of these calls to residential numbers also apply to wireless calls which result in no charge to the consumer.

Indeed, the Commission has confirmed that some uncharged, informational calls to wireless numbers should be exempted from the TCPA’s restrictions. In a recent decision, the Commission decided that certain package delivery notifications to wireless numbers “are the types of normal, expected communications the TCPA was not designed to hinder.”²⁵ The Commission also noted that “consumers generally desire, expect, and benefit from” these notifications.²⁶ Rite Aid believes that the uncharged, informational healthcare messages it and

²² AAHAM Petition at 9-11.

²³ *Id.* at 9.

²⁴ *Id.* at 10.

²⁵ *Cargo Airline Association Petition for Expedited Declaratory Ruling Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 29 FCC Rcd 3432 ¶ 19 (2014).

²⁶ *Id.*

other healthcare providers may send are also the kind of communications that consumers “desire, expect, and benefit from.” As such, they are equally deserving of the exemption that AAHAM suggests.

V. CONCLUSION

For the foregoing reasons, Rite Aid respectfully requests that the Commission (i) grant the AAHAM Petition to the extent it seeks confirmation that the voluntary provision of a wireless phone number to a healthcare provider constitutes prior express consent for HIPAA-related calls to that number and (ii) resolve the substantial confusion that exists in the marketplace concerning the scope of the exemption for HIPAA-related calls by concluding that no prior consent is required for calls to either residential *or* wireless phones. Moreover, the Commission should grant a retroactive waiver to Rite Aid and other similarly situated parties who have been subjected to TCPA-related litigation involving any alleged prior express consent requirement for HIPAA-related calls to wireless numbers to the extent necessary. Alternatively, Rite Aid also supports grant of the request by AAHAM to exempt from any “prior express consent” requirement health care calls to wireless phones that are not charged to the called party.

Respectfully Submitted,

RITE AID

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