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January 26, 2015

**VIA ELECTRONIC DELIVERY**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Room TWA325  
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation  
CG Docket No. 02-278**

Dear Ms. Dortch:

On January 22, 2015, Mark W. Brennan and Wesley B. Platt of Hogan Lovells US LLP, counsel to United Healthcare Services, Inc. ("United"), met with Maria Kirby, Legal Advisor to Chairman Wheeler, and Matthew Collins of the Commission's Office of General Counsel to discuss United's pending Petition for Expedited Declaratory Ruling ("Petition").<sup>1</sup>

In the Petition, United asks the Commission to confirm that a party is not liable under the Telephone Consumer Protection Act ("TCPA")<sup>2</sup> or the FCC's TCPA rules<sup>3</sup> for placing informational, non-telemarketing autodialed or prerecorded calls to wireless numbers for which valid "prior express consent" had been obtained but which, unbeknownst to the calling party, have subsequently been reassigned to another wireless subscriber.<sup>4</sup>

As described in United's previous filings, the record in this proceeding reflects strong support for granting the Petition, which will ensure that wireless consumers can continue to benefit from the important non-telemarketing, informational calls that they have consented to receive.<sup>5</sup> For example,

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<sup>1</sup> See United Healthcare Services, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Jan. 16, 2014) ("Petition").

<sup>2</sup> 47 U.S.C. § 227.

<sup>3</sup> 47 C.F.R. § 64.1200.

<sup>4</sup> Under the TCPA and the FCC's TCPA rules, callers must obtain "prior express consent" to place autodialed or prerecorded calls to wireless numbers. 47 U.S.C. § 227(b)(1)(A); 47 C.F.R. § 64.1200(a)(1).

<sup>5</sup> See, e.g., Letter from Mark Brennan, Counsel, United, *et al.* to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed July 28, 2014) ("United July 28, 2014 *Ex Parte*").

healthcare providers regularly place consented-to calls conveying critical, time-sensitive messages that directly benefit consumers.<sup>6</sup> These calls include, for example: appointment and exam scheduling reminders; prescription drug refill notices; annual influenza vaccine reminders; lab result discussions; pre-operative and home care follow-up instructions intended to prevent readmission; home healthcare instructions; and communications about the entities participating in a healthcare provider network or health plan.<sup>7</sup>

The FCC has previously concluded that healthcare-related calls serve an important public interest purpose, “to ensure continued consumer access to healthcare-related information,” and that they do not “tread heavily upon the consumer privacy interests” that the TCPA was intended to protect.<sup>8</sup> This conclusion is supported by a number of studies that have shown that sending calls and text messages to wireless phones can be an effective strategy to improving consumers’ health, which is especially critical in light of significant barriers faced in the United States for the delivery of high-quality healthcare.<sup>9</sup> For example, as America’s Health Insurance Plans explained in its comments on the Petition, voice and text messages to wireless telephones can be used to improve adherence with controlling blood pressure in patients with hypertension, and for prompting women to participate in follow-up treatments after irregular pap smears.<sup>10</sup>

The parties discussed how health plans are increasingly subject to legal requirements to improve healthcare outcomes and overall quality of service. Outreach to wireless telephone numbers provided by consumers is an important tool in meeting these requirements and improving the delivery of healthcare services while keeping healthcare costs down.<sup>11</sup> For example, the Affordable Care Act requires insurance exchanges to make a “reasonable effort” to contact all applicants who provide information that is inconsistent with the information maintained in official records.<sup>12</sup> The Affordable Care Act also specifically grants federal and state health and human services programs the authority to make notifications of “eligibility, recertification, and other needed communication regarding eligibility” by placing calls to a patient or client’s wireless telephone number.<sup>13</sup> Consumers that consent to participate in such outreach programs expect to receive healthcare-related messages on their wireless telephone and should not be prevented from receiving such messages because of the specter of class action lawsuits.<sup>14</sup>

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<sup>6</sup> See Petition at 2.

<sup>7</sup> See Reply Comments of United, CG Docket No. 02-278, at 4 (filed Mar. 24, 2014) (“United Reply”).

<sup>8</sup> See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 27 FCC Rcd 1830 ¶¶ 60, 63 (2012) (exempting healthcare-related calls to residential lines subject to the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) from consent, identification, time-of-day, opt-out, and abandoned call requirements otherwise applicable to prerecorded calls); see also Petition at 6; Comments of America’s Health Insurance Plans, CG Docket No. 02-278, at 4 (filed Mar. 10, 2014) (“AHIP Comments”).

<sup>9</sup> See AHIP Comments at 4-5 (noting that the Institute of Medicine has established engaging individuals in their own health care as a key goal for improving health and lowering healthcare costs).

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at 6.

<sup>12</sup> The Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 § 1411(e)(4)(a)(i).

<sup>13</sup> *Id.* § 3021(b)(6).

<sup>14</sup> See, e.g., Comments of Deb Schlier, CG Docket No. 02-278, at 1 (filed Feb. 11, 2014) (“Companies should be able to rely on the instruction of their customers for how to contact them as long as they act promptly to avoid further calls if they reach someone else.”) (“Schlier Comments”); Comments of William

In addition, the United representatives noted that granting the limited relief requested in the Petition would neither reduce a caller's incentive to avoid reassigned number calls nor cause an increase in calls to reassigned wireless telephone numbers. The healthcare organizations that are placing these calls are trying to reach a specific party about a specific matter; they have no incentive to keep calling consumers that have received a reassigned telephone number. Additionally, in the healthcare space, entities are already strongly incentivized to avoid calls to reassigned numbers and to otherwise keep contact information accurate. For example, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") prohibits breaches of protected health information and sets out specific steps that entities must follow in the event that a breach occurs.<sup>15</sup> Failing to comply with these requirements can bring significant penalties.<sup>16</sup>

Denying the Petition, on the other hand, could chill the provision of time-sensitive healthcare messages that wireless consumers strongly desire and have consented to receive. Smaller businesses, in particular, may be unable to bear the risk that placing such calls would necessarily entail and, as a result, cease placing them altogether.

As also described in United's previous filings, the Commission has ample legal authority to grant the Petition. For instance, the United representatives noted that the Commission could:

- Confirm that "prior express consent" encompasses autodialed and prerecorded calls to a telephone number until the caller learns that the number provided has been reassigned;
- Confirm that the term "called party" encompasses both the consenting party and the new subscriber until the caller learns that the two parties are not the same; or
- Recognize a good faith exception for informational calls to numbers that have been reassigned without the caller's knowledge.

None of these options would alter the caller's obligation to obtain "prior express consent" from the individual that provided his or her telephone number. Moreover, upon learning that a telephone number has been reassigned, the caller would need to obtain separate "prior express consent" to place calls to that number.

The parties also discussed United's proposed two-phased approach to addressing reassigned wireless number calls. Under this approach, liability would not attach for informational, non-telemarketing autodialed or prerecorded calls to reassigned wireless telephone numbers for which valid "prior express consent" had been obtained: (1) for a specified period of time after the number's reassignment unless the caller has actual knowledge of the reassignment ("Phase 1"); and (2) for a specified period of time after the conclusion of Phase 1 as long as the caller continues to

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Brush, CG Docket No 02-278, at 1 (filed Feb. 11, 2014) (arguing that the FCC should "[a]void penalizing companies that have done their due diligence by collecting express[] consent"); Comments of William Studley, CG Docket No. 02-278, at 1 (filed Feb. 11, 2014) ("If I have given my permission to a company to contact me via telephone or SMS text, that company should not be held responsible, or liable, if I have changed my phone number without their knowledge, as long as they make a good faith effort to correct their records in a timely fashion when they have been notified of the discrepancy.").

<sup>15</sup> See, e.g., 45 C.F.R § 164.404.

<sup>16</sup> See U.S. Department of Health and Human Services, Case Examples and Resolution Agreements, <http://www.hhs.gov/ocr/privacy/hipaa/enforcement/examples/> (last visited Jan. 26, 2015).

lack actual knowledge of the reassignment and has taken reasonable steps to learn about any reassignments (“Phase 2”). As United has previously explained,<sup>17</sup> such “reasonable steps” for Phase 2 could consist of one or more of the following:

1. Providing a mechanism for an individual to update his or her contact information;
2. Taking steps to encourage or require (*i.e.*, through contractual provisions) an individual to notify the caller if his or her telephone number changes;
3. Periodically requesting confirmation that an individual’s contact information remains accurate, such as by e-mail;
4. Seeking to confirm that an individual’s contact information remains accurate if the individual places an inbound call to the organization’s customer service line;
5. Adopting internal policies or procedures to help ensure that records remain accurate;
6. Updating calling lists in a timely manner when new contact information is received;
7. Subscribing to one of the third-party reassigned number verification services; or
8. Subscribing to a third-party database appending service that may identify changed contact information, including telephone numbers (these are different from the third-party reassigned number verification services).

These are but a few examples of “reasonable steps” steps that organizations could take to learn about telephone number reassignments, which may help minimize (but not eliminate) calls to reassigned telephone numbers. The availability and efficacy of such measures may vary dramatically based on a number of factors, including: the individual caller, the industry sector of the call, the purpose of the call, and the actions of the individual that the caller is trying to reach. In all cases though, such an approach would afford no protection to organizations that failed to promptly cease calls to a specific telephone number after learning that the number has been reassigned.

Finally, the parties discussed the need for any relief granted to be provided through a clarification rather than a rulemaking. Prospective relief would not answer the question posed by companies like United that face lawsuits based on calls already placed.<sup>18</sup> In addition, there is no need to further develop the record. With numerous comments filed in response to United’s Petition, as well as other pending petitions, the Commission already has a robust record with which to make a decision.<sup>19</sup>

Pursuant to Section 1.1206(b) of the Commission’s rules, I am filing this notice electronically in the above-referenced docket. Please contact me directly with any questions.

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<sup>17</sup> See United July 28, 2014 *Ex Parte* at 5-6.

<sup>18</sup> See *Humphrey v. United HealthCare Services, Inc.*, No. 2:14-cv-01792 (E.D. Cal.); *Matlock v. United HealthCare Services, Inc.*, No. 2:13-cv-2206 (E.D. Cal.); see also, *e.g.*, *Heinrichs v. Wells Fargo Bank*, No. 3:13-cv-054340WHA (N.D. Cal.).

<sup>19</sup> See Petition; ACA International, Petition for Rulemaking, CG Docket No. 02-278 (filed Jan. 31, 2014); Stage Stores, Inc., Petition for Expedited Declaratory Ruling and Clarifications, CG Docket No. 02-278 (filed June 4, 2014); Rubio’s Restaurant, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 15, 2014); Consumer Bankers Association, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 19, 2014).

January 26, 2015

Respectfully submitted,

*/s/ Mark W. Brennan*

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