



February 9, 2016

EX PARTE VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Anthem, Inc., Petition for Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls (“Anthem”); Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Application of the Telephone Consumer Protection Act (“TCPA”) and Omnibus Declaratory Ruling and Order to Managed Healthcare Plans, CG Docket No. 02-278, WC Docket No. 07-135*

Dear Ms. Dortch:

On February 5, 2016, the undersigned, representing WellCare Health Plans, Inc. (“WellCare”), met with several members of the Consumer and Governmental Affairs Bureau of the Federal Communications Commission (“FCC”), including Acting Bureau Chief Alison Kutler, Deputy Bureau Chief Mark Stone, Chief Kurt Schroeder, and Kristi Thornton. Joining me at this meeting were, Mike Merola and Michael McMEnamin, of Winning Strategies Washington. At the meeting, we discussed the Anthem’s FCC Petition and the TCPA Omnibus Declaratory Ruling and Order, released July 10, 2015 (hereafter “2015 Order”). WellCare noted the following in supplementation of our letter of December 3, 2015 and comments submitted to the Commission on September 30, 2015, and December 17, 2015.

WellCare appreciated the FCC’s willingness to accept this further meeting and its consideration of the unique role that government-sponsored managed healthcare plans play within the healthcare industry in supporting critical public policy goals by ensuring effective and efficient care to at-risk populations. WellCare focuses exclusively on the most challenging and neediest populations and has statutory and contractual mandates from our Federal and State government partners to improve the health outcomes of our members.

During our meeting, we discussed the need for government-sponsored managed healthcare plans to focus on affirmative outreach and include essential communications relating to appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications and home healthcare instructions. We continued to express concern that the 2015 Order could be read to prohibit WellCare from



fulfilling these obligations to place time-sensitive healthcare calls to members to support and enhance critical healthcare services and to ensure that members have the information necessary to make well-informed decisions regarding their healthcare.

As we discussed, we remain of the view that Congress intended the Health Insurance Portability and Accountability Act (“HIPAA”) to be the controlling framework for the privacy of healthcare-related communications, and that the Commission should accordingly limit its reading of the application of the TCPA rules for calls regulated by HIPAA. We understand the Commission’s 2012 Order to recognize that, “in view of the privacy protections afforded under HIPAA,” “all prerecorded health care-related calls to residential lines that are subject to HIPAA” were “exempt from our consent, identification, time-of-day, and abandoned call requirements.”¹ In that Order, the FCC expressly recognized “health care plans” would be permitted to place such calls.² This view was consistent with the Federal Trade Commission’s recognition of a “health plan” as exempt from its similar telemarketing regulations³ and was 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.”⁴

Some concerns, however, have arisen that the 2015 Order expresses a regulatory approach that is inconsistent with the FCC’s prior Orders and, we would submit, the intentions of Congress to have HIPAA be the primary protector of the security of patient privacy and security. To resolve these concerns, we suggest two specific changes.

1. The concerns we express arose from the fact that some are reading a particular paragraph in the 2015 Order to conflict with the prior Orders. In particular, we discussed the phrase in ¶ 141:

We clarify, therefore, that provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA⁴⁷³ 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.

¹ *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 F.C.C. Rcd. 1830, 1852 (Feb. 15, 2012). In exempting such calls, the Commission relied on Section 227(b)(2)(B) of the TCPA, which provides the Commission with the authority to exempt certain calls to residential lines from the TCPA’s requirements. *Id.* at 1853.

² *Id.* at 1855 n.190.

³ See Telemarketing Sales Rule, Final Rule Amendments, 73 Fed. Reg. 51164, 51190-91 n.318 (2008).

⁴ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Report and Order, 7 FCC Rcd. 8752, 8769 (Oct. 16, 1992) (“1992 Order”). The U.S. Court of Appeals for the Ninth Circuit indeed recently confirmed the deference owed to this interpretation. *Baird v. Sabre, Inc.*, No. 14-55293 (Feb. 3, 2106) (*unpublished*) (affirming dismissal of TCPA action).



⁴⁷³ See 45 C.F.R. § 160.103 (definition of “health care”). While AAHAM indicates that HIPAA’s privacy rules define “health care messages,” we find no such definition in the rules. *See* AAHAM Petition at 3 n.7. The definition AAHAM provides in its Petition is the definition of “health care.” We note, additionally, that insurance coverage calls, which are included in AAHAM’s list of “healthcare calls,” are not necessarily among the topics in HIPAA’s definition of “health care.” AAHAM Petition at 3; *see also* Shields Comments on AAHAM Petition at 2. Our clarification extends only to calls that are subject to HIPAA.

WellCare’s concern is that the sentence in ¶ 141 should have used a broader term to make clear that the provision of a telephone number to *any* HIPAA covered entity would allow the same access to using modern telecommunications technology to support health care. In particular, we urged the Bureau to clarify that the 2015 Order was intended in this way, which would be made clear if the Bureau used the statutory term “covered entity” for undefined term “healthcare provider” in the paragraph:

We clarify, therefore, that provision of a phone number to a HIPAA “covered entity” or “business associate” ~~healthcare provider~~ constitutes prior express consent for healthcare calls subject to HIPAA⁴⁷³ 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.

The Commission itself noted this confused terminology in its footnote 473, and we ask the Bureau to clarify what we understand was the Commission’s intention in this paragraph. If this reading is correct, the phrase “are not necessarily among” should be “are among” in footnote 473.

2. In this same vein, we request that the Bureau clarify that the exemption granted in ¶ 147 should extend not only to a “healthcare provider” but to all of the other HIPAA “covered entities” and “business associates,” so that each use of the term “healthcare provider” in ¶ 147 of the 2015 Order should be changed to read “HIPAA covered entities and business associates,” so that the Commission’s 2015 Order is read in harmony with the HIPAA regulations, as would be consistent with the Commission’s prior Orders. Thus clarified, ¶ 147 would read:

¶ 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.

Likewise, it would be better if ¶ 146 were clarified that the exemption extends not merely to calls with a “healthcare treatment purposes” but to healthcare “treatment” and “health care operations” as defined by HIPAA.⁵ These broader terms would help to eliminate concerns with the potential inconsistency with the prior Orders. As explained in WellCare’s prior comments, we encourage the FCC to clarify that the types of calls placed by managed healthcare plans fulfill the same exigent purposes recognized in its 2015 Order.⁶

⁵ See 45 C.F.R. § 164.501.

⁶ See Comments of WellCare Health Plans, Inc. GC Docket 02-278, at 11-12 (Sept. 30, 2015).



We believe that these simple clarifications would go a long way towards clarifying that managed healthcare plans may make calls consistent with the healthcare provider exemption clarification in the 2015 Order, and it would be entirely consistent with the Commission's stated desire to harmonize the approaches articulated in HIPAA and the TCPA.

We urge the Bureau to issue a clarification of these points quickly. Managed healthcare plans support critical public policy goals by ensuring effective and efficient care to at-risk populations. These Bureau clarifications would lift an unnecessary and unintended burden from this vital industry.

In accordance with Section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically with your office. Please contact the undersigned with any questions in connection with this filing.

Respectfully submitted,

Michelle G. Turano
Vice President, Federal Government Affairs