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March 31, 2016

VIA ELECTRONIC FILING

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
Office of the Secretary
445 Twelfth Street, SW
Washington, DC 20554

Re: *Ex Parte* Notice, Written Presentation, *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al*, Declaratory Ruling and Order, CG Docket No. 02-278 and WC Docket No. 07-135 (2015) and *In re Anthem, Inc. Petition for Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls*, CG Docket No. 02-278

Dear Ms. Dortch:

On March 29, 2016, Lucas Merrow, Founder and Chief Technology Officer for Eliza Corporation (“Eliza Corp.”) and the undersigned, met separately with the following Federal Communications Commission (“FCC” or “Commission”) personnel: (1) Travis Litman, Senior Legal Advisor, and Jennifer Thompson, Special Advisor and Confidential Assistant, Office of Commissioner Jessica Rosenworcel; (2) Diane Cornell, Special Advisor; Jamile Kadre and Anthony Jones, Legal Interns, Office of Chairman Tom Wheeler; (3) Robin Colwell, Chief of Staff, Office of Commissioner Michael O’Rielly; and (4) David Grossman, Chief of Staff, Office of Commissioner Mignon Clyburn. The policy and legal issues discussed related to the FCC’s Telephone Consumer Protection Act 2015 Omnibus Declaratory Ruling and Order (“*2015 Declaratory Order*”),¹ as well as the attached written presentation that highlights the significant benefits that Patient Health Engagement (“PHE”) executed in accordance with the Health Insurance Portability & Accountability Act, as amended (“HIPAA”),² and the HIPAA Privacy Rule³ play in providing quality, affordable and efficient health care. The attached presentation is titled, “Health Information Technology and Patient Health Engagement” (“PHE Presentation”). In the meeting

¹ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, CG Docket No. 02-278 and WC Docket No. 07-135, 30 FCC Rcd 7961 (2015).

² Pub. L. No. 104-191, 110 Stat. 1936 (1996), *codified*, as amended at 42 U.S.C. §§1320 et seq.

³ 45 C.F.R. Parts 160 and 164.



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we discussed how the *2015 Declaratory Order* has negatively affected the delivery of PHE. We also take this opportunity to discuss the importance of the petition for clarification filed by Anthem, Inc.⁴ We have expounded on certain issues in this notification given time limitations in the meeting.

In each meeting we discussed how the *2015 Declaratory Order* has negatively affected the delivery of PHE. We discussed how the field of PHE has used various channels of communications to help engage individuals in their healthcare over the past fifteen years. During this time, PHE has amassed an extensive track record of measurably improving quality, cost, and outcomes in healthcare, to the acclaim of Federal and State agencies, health care professionals, renowned medical-based organizations and patients. PHE Presentation, pp. 4 and 19. In fact, in many instances, PHE has reduced pain and suffering and saved lives with early cancer screenings and preventive care. *See, e.g.*, PHE Presentation. p. 8. Other measurable improvements in healthcare outcomes and costs for patients and the healthcare system detailed in the PHE Presentation include:

- Significant reduction in 30-day hospital readmission rates, from 15% for people not included in post-hospital discharge support to 9% of people that are (p. 15)
- Increase from 10% to 89% for patient monitoring of PT/INR screenings (p. 9)
- Increase in the percentage of persons receiving key preventive health screenings (p. 16)

However, recent developments directly related to the *2015 Declaratory Order* threaten the use of PHE in delivering important health information to consumers. Prerecorded, interactive messages delivered by phone have been shown to be one of the most effective and efficient methods for improving patient engagement and health outcomes. A reduction in the use of this effective PHE channel will simply result in negative health outcomes, particularly for wireless-only households. PHE Presentation, p. 7 (citing to Centers for Disease Control Study on the correlating health characteristics of wireless-only households, which are more likely to have greater health issues and at-risk behavior).

We discussed our concerns (and that of many other healthcare professionals)⁵ that two important provisions in the *2015 Declaratory Order* could be misinterpreted to exclude health

⁴ See *In re Anthem, Inc. Petition for Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls*, CG Docket No. 02-278 (June 10, 2015) (“Anthem Petition”).

⁵ See *Ex parte* Letter of Blair Todt, Senior Vice President, Chief Legal and Administrative Officer, WellCare Health Plans, Inc., to Marlene H. Dortch, Secretary, FCC (Aug. 27, 2015); *In re Anthem, Inc., Petition for Declaratory Ruling and Exemption*, Comments of WellCare Health Plans, Inc., CG Docket No. 02-278 (Sept. 30, 2015) (“WellCare Anthem Petition Comments”); *In re Anthem, Inc., Petition for Declaratory Ruling and Exemption*, Comments of United Healthcare Services, Inc., CG Docket No. 02-278 (Sept. 30, 2015) (“United Healthcare Anthem Petition Comments”); and *Ex parte* Letter of Michelle G. Turano, Vice President, Federal Government



plans. Health plans are one of three statutorily designated “Covered Entities”⁶ as defined by HIPAA’s implementing regulations⁷, and are subject to the same detailed and rigorous privacy and data use protections as healthcare providers under the HIPAA Privacy Rule.⁸ In fact, as part of a comprehensive and integrated healthcare ecosystem, all three classes of Covered Entities are important to the “[w]idespread use of health IT within the health care industry [that] will improve the quality of health care, prevent medical errors, reduce health care costs, increase administrative efficiencies, decrease paperwork, and expand access to affordable health care.”⁹

If health plans and health care clearing houses (two other Covered Entities) were excluded from the benefits of the *2015 Declaratory Order*, it would circumvent the carefully drawn regulatory scheme under HIPAA to provide quality, affordable and efficient healthcare as intended by Congress while ensuring the proper safeguards for a consumer’s protected health information (“PHI”).¹⁰ We provided a brief overview of the history of HIPAA, in which Congress directed the Secretary of the U.S. Department of Health and Human Services (“HHS”) to create a carefully crafted, integrated, and comprehensive regulatory scheme to balance the use and disclosure of PHI and consumer privacy with the delivery of quality and efficient health care using advancements in technology.¹¹ The HIPAA Privacy Rule was designed to meet this congressional mandate. HHS recognized in its implementation of the Privacy Rule that “[r]eady access to treatment and efficient payment for health care, both of which require use and disclosure of protected health information, *are essential to the effective operation of the health care system.* In addition, certain health care operations – such as administrative, financial, legal and quality improvement activities – *conducted by or for health care providers and health plans are essential to support treatment and payment.*”¹²

We also discussed the history and need for the initial HIPAA-exemptions from the written prior express consent/agreement requirements for telemarketing prerecorded calls under the

Affairs, WellCare Health Plans, Inc., to Marlene H. Dortch, Secretary, FCC (Feb. 9, 2016) (“WellCare *Ex parte* Letter re Anthem Petition”).

⁶ Each Covered Entity is defined under HIPAA’s implementing regulations. *See* 45 C.F.R. § 160.103.

⁷ *See* 45 C.F.R. § 160.102 (“(a) Except as otherwise provided, the standards, requirements, and implementation specifications adopted under this subchapter apply to the following entities: (1) A health plan. (2) A health care clearinghouse. (3) A health care provider who transmits any health information in electronic form in connection with a transaction covered by this subchapter. (b) Where provided, the standards, requirements, and implementation specifications adopted under this subchapter apply to a business associate.”).

⁸ *See* 45 C.F.R. § 164.500(a).

⁹ HHS guidance: <http://www.hhs.gov/hipaa/for-professionals/special-topics/health-information-technology/index.html> (last visited Mar. 30, 2016).

¹⁰ PHE Presentation, pp. 1, 2 and 29.

¹¹ *See* 42 U.S.C. § 1320d-2; *see also* HHS OCR Privacy Brief, Summary of the HIPAA Privacy Rule, HIPAA Compliance Assistance (May 2003) at 1-2, *available at*: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/privacysummary.pdf> (last visited Sept. 22, 2015) (“OCR Privacy Rule Summary”).

¹² HHS OCR HIPAA Privacy, *Uses and Disclosures for Treatment, Payment, and Health Care Operations*, 45 C.F.R. § 164.506 (Dec. 3, 2002, rev. April 3, 2003) at 1 (emphases added), *available at*: <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/usesanddisclosuresfortpo.html> (last visited March 29, 2016) (“HHS Use and Disclosure Guidance”).



Federal Trade Commission (“FTC”) Telemarketing Sales Rule (“TSR”) amendments in 2008¹³ and the FCC’s T CPA 2012 Report and Order.¹⁴ We emphasized that both the FCC and FTC acknowledged that healthcare-related calls have not been the source of consumer complaints associated with typical prerecorded calls and text messages. PHE Presentation, pp. 29 and 30. In fact, a preliminary review of FCC consumer complaint data indicates that the number of complaints involving PHE and other related healthcare calls are “statistically zero” given the tens of thousands of complaints received by the FCC.¹⁵ We also noted that the six prong rationale for the FTC’s initial HIPAA-exemption in 2008 and concurred by the FCC in 2012 (PHE Presentation, p. 29) remains valid today.

The HIPAA Privacy Rule established a “foundation of Federal protection for personal health information, carefully balanced to avoid creating unnecessary barriers to the delivery of health care.”¹⁶ The FCC and FTC have both acknowledged that HIPAA and the HIPAA Privacy Rule subjects all Covered Entities to the same strict and comprehensive privacy and data security protections.¹⁷ It is necessary that healthcare providers, health care plans *and* health care clearinghouses be able to work together, and to communicate with consumers and each other for coordinated, integrated care to be delivered.¹⁸ Therefore, all three categories of Covered Entities are important to fulfill this statutory and regulatory scheme, as they work closely together in this nation’s complex healthcare system.

However, the 2015 Declaratory Order’s prior express consent (“PEC”) clarification (“PEC Clarification”) and the limited exemption of certain non-telemarketing healthcare calls from PEC that are not charged to the called party (“HIPAA Non-Telemarketing Exemption”) could be misinterpreted to exclude health plans and health care clearinghouses. Both provisions only reference “health care providers.”¹⁹ We discussed that although the terms health care

¹³ FTC Telemarketing Sales Rule, Final Rule Amendments, 16 C.F.R. Part 310, 73 Fed. Reg. 51164 (Aug. 29, 2008) (“FTC 2008 TSR Amendments”). The FTC also recognized the congressional objective of the HIPAA Privacy Rule in its deliberations over the 2008 amendments. *Id.* at FR 51190 (“In enacting HIPAA to set standards under which the healthcare sector could share and use health information and communicate with patients, Congress recognized that the use of advanced communications technology could compromise an individual’s privacy interests, and accordingly, directed HHS to promulgate rules that would appropriately balance patient interests in protecting the privacy of their healthcare information with the Congressional ‘objective of reducing the administrative costs of providing and paying for healthcare’”). One of the FTC’s primary considerations for the HIPAA-related exemption was that “coverage of such calls by the amendment could frustrate the Congressional intent embodied in HIPAA, as well as other federal statutes governing healthcare-related programs.” *Id.* at FR 51192.

¹⁴ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830 (“2012 Report and Order”).

¹⁵ See Eliza Corp. Ex parte Notification of meeting with FCC Enforcement Bureau, Telecommunications Consumer Division personnel on March 29, 2016; see also PHE Presentation, at 30.

¹⁶ HHS Use and Disclosure Guidance at 1.

¹⁷ 2012 Report and Order at 1854 ¶61; see also FTC 2008 TSR Amendments, at 73 Fed. Reg. 51187.

¹⁸ Such use and disclosures of PHI between Covered Entities is necessary for the healthcare ecosystem to operate efficiently and effectively and is thereby allowed under the HIPAA Privacy Rule. 45 C.F.R. § 164.506(c).

¹⁹ 2015 Declaratory Order, at 8028-32 ¶¶141 and 147, respectively.



provider, health plan, etc. are often used interchangeably in industry and by consumers, they do have a distinct definition and purpose under HIPAA.

We discussed the importance of the American Association of Healthcare Administrative Management's ("AAHAM") Petition that requested that the FCC clarify that submission of a wireless number by a consumer in the healthcare context constitutes prior express consent.²⁰ AAHAM illustrated that the clarification was necessary given continued class action litigation against healthcare-related entities,²¹ and there was a need for the FCC to expressly state that its previous rulings and declaratory orders were not limited to creditors or the financial services industry, but also apply to the healthcare industry.²² However, the *2015 Declaratory Order* granting AAHAM's request is not so clear. The FCC stated "that provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA 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."²³ Notwithstanding the multiple references that only HIPAA-defined entities are subject to the clarification, we shared our primary concern that this sentence could be misinterpreted to mean that the provision of a telephone number must be made *directly* to a healthcare provider (instead of potentially being submitted to one of the two other classes of Covered Entities), and then shared with Covered Entities and their Business Associates. We believe that the AAHAM Petition wanted to ensure that calls made by a Covered Entity (which includes a healthcare provider) under the PEC Clarification also extend to its Business Associates acting on its behalf. We do not believe that AAHAM nor the FCC intended for health care providers to be the sole gateway for consumer telephone numbers, as in standard industry practice data flows in both directions among Covered Entities, as allowed under HIPAA.²⁴

If the PEC Clarification was intended by the FCC to apply only to health care providers as the point of submission of a telephone number, we emphasized that the current language is not only discriminatory to other Covered Entities, but is also inconsistent with the FCC's prior decisions that state that, "persons who knowingly release their phone numbers have in effect

²⁰ AAHAM Petition, at 4.

²¹ *Id.*

²² *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8769 ¶ 31 (1992) ("*1992 TCPA Order*"); *Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559, 564-65 ¶¶ 9-10 (2008) ("*2008 ACA Declaratory Ruling*"), and *In re GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling*, CG Docket No. FCC 14-33, Declaratory Ruling, 29 FCC Rcd 3442 (2014) ("*GroupMe Declaratory Order*"). Several courts have affirmed the same. See AAHAM Petition, at 6; see also *Baisden v. Credit Adjustments, Inc.*, Case No. 15-3411 (6th Cir. Feb. 12, 2016) (supporting FCC's previous rulings regarding effective PEC).

²³ *2015 Declaratory Order*, at 8029.

²⁴ 47 C.F.R. §§ 164.502 and 164.506(c).



given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”²⁵

To ensure that all Covered Entities benefit from the PEC Clarification and are subject to the “scope of the consent” requirements, the FCC should have stated that “the provision of a phone number to **a covered entity** constitutes prior express consent for healthcare related calls subject to HIPAA by a covered entity and business associates acting on its behalf, as defined by HIPAA, if the covered entity and business associates are making calls within the scope of the consent given, and absent instructions to the contrary.” This is a simple but very nuanced and important change.

The healthcare industry anticipated that the PEC Clarification and HIPAA Non-Telemarketing Exemption would benefit *all* Covered Entities and their Business Associates, particularly since all three classes of Covered Entities and all Business Associates are subject to the same rigorous privacy and data security regulations and strict prohibitions against the use of PHI for marketing under the HIPAA Privacy Rule.²⁶ Although the FCC’s discussion regarding the HIPAA-exemption primarily referenced health care providers, the actual text of the rules adopted in the *2012 Report and Order* clearly states that the HIPAA exemption applies to *all* Covered Entities and their Business Associates.

No person may . . . initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or pre-recorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than . . . 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 160.103.²⁷

However, the issue with the *2015 Declaratory Order* is that there are no formal rules in the Code of Federal Regulations to help clarify the potential ambiguity, hence the need for a clear and unambiguous statement from the FCC that the submission of a telephone number to any Covered Entity constitutes PEC.

We also discussed that the issues regarding the PEC Clarification are further compounded by the FCC’s statements in the *2015 Declaratory Order* in its discussion of the type of healthcare messages that would be subject to the PEC Clarification (and the HIPAA Non-Telemarketing Exemption). The FCC questioned whether calls from health plans regarding insurance coverage

²⁵ See e.g., *1992 TCPA Order*, 7 FCC Rcd at 8769 ¶31; see also Anthem Petition at 6-7 (citing to judicial support of this basic principle).

²⁶ See PHE Presentation, p. 21; see also *2012 Report and Order*, at 1854 ¶61.

²⁷ 47 C.F.R. § 64.1200(a)(2) (emphases added); see also 47 C.F.R. § 64.1200(a)(3)(v) for substantially similar text pertaining to Covered Entities and Business Associates for prerecorded calls to residential numbers.



are included under HIPAA's definition of "health care."²⁸ These statements are puzzling, even if the FCC hedged a little by using the term "not necessarily."²⁹

We believe that the FCC unreasonably relied on the definition of "health care" under HIPAA to justify this exclusion. Although AAHAM listed insurance coverage under its list of various types of "health care messages,"³⁰ the FCC stated that "insurance coverage" is not one of the enumerated items in the HIPAA Privacy Rule's definition of "health care."³¹ First, the definition of "health care" is not as limited as the FCC claimed. The plain language of the HIPAA Privacy Rule does *not* exclude insurance coverage calls in its definition of health care. The regulatory definition of "health care" includes the phrase, "includes, but is not limited to," which, by its plain terms, expands the definition beyond what is expressly listed.³² We also observed that the AAHAM Petition listed several other classifications of communications that should be considered healthcare messages - messages that are very closely related to insurance and payment such as "Available payment options," "Account communications and payment notifications," and "Social Security disability eligibility."³³ It is curious that the FCC isolated insurance coverage as one type of message that *may* not be included as a healthcare message under HIPAA but did not object to or comment on those other payment/insurance-related types of messages. None of the aforementioned types of messages are expressly listed in HIPAA's definition of "health care" either, but each are very important to the effective and efficient delivery of healthcare services.

Significantly, each of the types of messages listed in AAHAM's Petition can be classified as related to "treatment, payment and health care operations" under HIPAA.³⁴ And a Covered Entity is allowed pursuant to the HIPAA Privacy Rule to use and disclose PHI *without* an individual's authorization for its own treatment, payment and health care operations.³⁵ Significantly, such messages are not considered marketing under the HIPAA Privacy Rule³⁶ and therefore, should also be allowed under the PEC Clarification *and* the HIPAA Non-Telemarketing Exemption. We emphasized that the FCC recognized in its *2012 Report and Order*, that "HIPAA regulations cover *all* communications regarding protected health information and *all* means of communication regarding such information."³⁷ Thus, communications from any Covered Entity regarding payment, treatment and health care

²⁸ *2015 Declaratory Order*, at 8029 ¶142 and n.473.

²⁹ *Id.* at 8029 n.473 ("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.'*" (citations omitted) (emphases added)).

³⁰ AAHAM Petition, at 2-3.

³¹ *2015 Declaratory Order*, at 8029 n.473 (citing to AAHAM Petition at 3 n.7 and 45 C.F.R. § 160.103).

³² 45 C.F.R. § 160.103 ("Health care includes, but is not limited to, the following: . . .").

³³ AAHAM Petition at 2-3.

³⁴ 45 C.F.R. § 164.501.

³⁵ 45 C.F.R. § 164.506(b)(1).

³⁶ *See* 45 C.F.R. §164.501; *see also* HHS.gov Marketing guidelines: <http://www.hhs.gov/hipaa/for-professionals/privacy/guidance/marketing/index.html> (last visited Mar. 29, 2016).

³⁷ *2012 Report and Order*, at 1854 ¶61 (emphases added); *see also* PHE Presentation, at 30.



operations, and any other healthcare-related matters identified in HIPAA's regulations, are calls that are subject to HIPAA.³⁸

We also emphasized that health plans do more than deliver insurance coverage-related or administrative communications. Health plans, like healthcare providers, provide vital, timely, and in the FCC's words, "exigent" information directly related to the treatment and clinical support of a patient, such as pre-operative instructions and post-discharge follow-up; prescription refill reminders and drug-recall notifications; and disease management and in-home patient monitoring to improve health outcomes, PHE Presentation, p. 24. And yet, the *2015 Declaratory Order's* HIPAA Non-Telemarketing Exemption only appears to apply to "health care providers." Potentially excluding health plans (and health care clearinghouses) from the HIPAA Non-Telemarketing Exemption would not only be inconsistent with HIPAA, the HIPAA Privacy Rule, and the FCC's *2012 Report and Order*, but would also be discriminatory and a violation of the First Amendment if the government preferred one speaker over another notwithstanding that both speakers provide identical speech.³⁹ The potential exclusion of health care plans in the *2015 Declaratory Order* will raise serious constitutional issues.

Therefore, we request that the FCC also extend its HIPAA Non-Telemarketing Exemption to include all Covered Entities and their Business Associates that are subject to same strict requirements for privacy and data security by substituting the term "healthcare provider" with "covered entities and their business associates." We observed that it would be illogical if the *2015 Declaratory Order's* exemption for *non-telemarketing* calls applied only to healthcare providers, when the *2012 Report and Order* that exempted *marketing-related calls* as defined

³⁸ The same is true for the selective types of calls the FCC lists as not subject to its HIPAA Non-Telemarketing Exemption, such as billing and accounts, because the FCC deems they do not have a "healthcare treatment purpose." *2015 Declaratory Order*, at 8031 ¶146. HHS, as the federal authority for regulating healthcare communications, has deemed all such calls are subject to HIPAA.

³⁹ See *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218 (2015) (striking down a State code that imposed more stringent restrictions on signage from a nonprofit group than on signs conveying other messages or from other speakers); see also *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011) (striking down Vermont's prescription privacy law, because "[t]he State has burdened a form of protected expression that it found too persuasive. At the same time, the State has left unburdened those speakers whose messages are in accord with its own views. This the State cannot do.") Specifically, in reference to HIPAA, see *Adheris, Inc. v. Sebelius*, Complaint for Declaratory, Injunctive and Other Relief, Case No. 1:13-cv-01342-EGS (D.D.C. 2013) ("Complaint"). Adheris claimed that that HHS violated its free speech rights with an amended definition of marketing under the HIPAA Privacy Rule that "treats identical speech differently depending upon who compensates the speaker for the speech and whether the speaker derives a profit for that speech." Complaint at ¶56.

In response to the Complaint claiming impermissible content-based and speaker-based restrictions, HHS postponed the effective date of its enforcement of the amended marketing restrictions and issued clarifying guidance that resolved the constitutional issues and settled the dispute. See Center for Democracy and Technology, *New Refill Reminder Guidance a Win for Patients and Pharmacies* (Sept. 20, 2013) available at: <https://cdt.org/blog/new-refill-reminder-guidance-a-win-for-patients-and-pharmacies/> (last visited Mar. 30, 2016) ("Refill reminder programs serve important public health purposes, yet they can also be costly to conduct. This guidance makes them far more likely to be employed. . . . HHS should be commended not only for the content, but for the precision, thoughtfulness and clarity of this guidance.").



under TCPA but not under HIPAA, apply to *all* Covered Entities and their Business Associates. This inconsistency is arbitrary, particularly since the *2012 Report and Order* used a hypothetical of an insurance coverage-related prerecorded call as an example of a “health care-related call” allowed under HIPAA.⁴⁰

We also emphasize herein the importance of the Anthem Petition, notwithstanding the subsequent release of the *2015 Declaratory Order* a month after the Anthem Petition was filed. Anthem’s request that the FCC adopt an “opt-out” regime instead of an “opt-in” regime for non-telemarketing healthcare related calls and text messages is still relevant and beneficial today because of the issues discussed herein about the potential for misinterpretation and other deficiencies of the PEC Clarification and the HIPAA Non-Telemarketing Exemption as applied to health plans and health care clearinghouses. We also support the comments and *ex parte* filings in support of the Anthem Petition.⁴¹

Finally, we discussed the FCC’s strong support of the use of new technology to make basic and advanced healthcare accessible to all citizens, regardless of income, location, race or ethnicity. Expanding the benefits of new technology that supports telemedicine to all citizens is major priority of the FCC, evidenced by the creation of a new “Connect2Health FCC Task Force.”⁴² FCC Chairman Wheeler stated, “[w]e must leverage all available technologies to ensure that advanced health care solutions are readily accessible to all Americans, from rural and remote areas to underserved inner cities. By identifying regulatory barriers and incentives and building stronger partnerships with stakeholders in the areas of tele-health, mobile applications, and telemedicine, we can expedite this vital shift.”⁴³ This is also a very important issue to Commissioner Mignon Clyburn, especially for in areas which lack access to quality care and high-speed Internet and computers. “Telehealth is showing promise for expanded care in rural communities, especially in states like Mississippi.”⁴⁴

We commend the FCC for this important telemedicine effort. There is also great value in using today’s technology with new and state of the art applications to help bridge these gaps in quality healthcare until broadband and new technology can be fully deployed in underserved and unserved communities. We also hope that the FCC will take expedient and definitive steps to eliminate the regulatory barriers and disincentives detailed herein that hamper the use of PHE to deliver beneficial healthcare solutions to everyone via prerecorded and text messages.

⁴⁰ *2012 Report and Order*, at 1855 n.187 (“This communication is not considered marketing under HIPAA and would be allowed.”) (citation omitted).

⁴¹ See United Healthcare Anthem Petition Comments, WellCare Anthem Petition Comments, and WellCare *Ex parte* Letter re Anthem Petition.

⁴² FCC News, *FCC Chairman Announces New Connect2Health FCC Task Force* (Mar. 4, 2014).

⁴³ *Id.*

⁴⁴ Katie Dvorak, *FCC’s Clyburn: Telemedicine shows promise for rural communities*, Fierce HealthIT (Dec. 5, 2014): available at: <http://www.fiercehealthit.com/story/fccs-clyburn-telemedicine-shows-promise-rural-communities/2014-12-05> (last visited Mar. 30, 2016).



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In sum, we illustrated that there is sufficient ambiguity in the *2015 Declaratory Order* that health plans face increased litigation risks, and unnecessary costs which increase the costs of healthcare to everyone. All three Covered Entities under HIPAA – healthcare providers, health plans *and* health care clearinghouses – should receive the same regulatory treatment and exemptions from TCPA liability, as provided in previous FCC proceedings. To impose certain limitations or prohibitions on one type of Covered Entity and not another merely based on the content of speech or based on the type of speaker is not only inconsistent with Federal laws, it is also unconstitutional. We respectfully submit that an expedient clarification by the FCC that all Covered Entities and their Business Associates are included the FCC’s regulatory scheme for TCPA is very important and necessary to serve the public interest.

This ex parte notification is being filed electronically in accordance with Section 1.1206(b)(2) of the Commission’s rules. 47 C.F.R. 1.1206(b)(2). Please contact the undersigned if you have questions or comments.

Sincerely,

/s/ S. Jenell Trigg

S. Jenell Trigg
Counsel to Eliza Corporation

Attachment

cc: Travis Litman
Jennifer Thompson
Diane Cornell
Jamile Kadre
Anthony Jones
Robin Colwell
David Grossman