



WASHINGTON, DC

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April 18, 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, *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:

The undersigned teleconferenced with Mark Stone, Deputy Bureau Chief of the Consumer & Governmental Affairs Bureau (“CGA Bureau”) on April 14, 2016, as a follow-up to Eliza Corporation’s (“Eliza Corp.”) *ex parte* filing dated March 31, 2016.¹ The issues discussed were consistent with the *ex parte* filing, which requested that the FCC issue a clarification of the two HIPAA-related decisions in the FCC’s Telephone Consumer Protection Act 2015 Omnibus Declaratory Ruling and Order (“2015 Declaratory Order”).² We also discussed the adequacy of the petition filed by Anthem, Inc. (“Anthem”) to issue the necessary clarifications in an expeditious manner.³

¹ See *Ex parte* Notice, Written Presentation, from S. Jenell Trigg, Counsel to Eliza Corporation, to Marlene H. Dortch, Esq., Secretary, FCC (March 31, 2016) (presentation to CGA Bureau).

² *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).

³ *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”).



The undersigned emphasized that commenters to the Anthem Petition also raised the same issues regarding the *2015 Declaratory Order* as Eliza Corp.'s *ex parte*⁴ and therefore, the clarifications that Eliza Corp. and other parties have requested would be within the scope of the Anthem Petition. We also discussed whether Anthem's request to apply an "opt-out" regime applied to all health care calls, including those initially exempted in the FCC's *2012 Report and Order*.⁵ The undersigned stated that the Anthem Petition was narrow in its request⁶ and the opt-out regime should apply only to the PEC exemption initially requested by the American Association of Healthcare Administrative Management ("AAHAM")⁷ and granted in part by the FCC in 2015 (the "HIPAA Non-Telemarketing Exemption").⁸ If the FCC were to grant Anthem's request to apply an "opt-out" regime to non-telemarketing health-care related calls, the undersigned emphasized such a grant should not disturb or modify in any way the HIPAA exemption from written prior express consent adopted under full notice and comment rulemaking in the *2012 Report and Order* and its corresponding rules for residential lines and wireless devices.⁹

Significantly, the 2012 HIPAA Exemption, which is consistent with the FTC's 2008 Telemarketing Sales Rule, also exempts Covered Entities and their Business Associates from the opt-out, abandoned call, consent, identification, and time-of-day requirements.¹⁰ And for very good reason. In its deliberations for the amended TSR in 2008, the FTC stated that a partial exemption from the TSR amendment while still requiring compliance with its opt-out requirements "may create a health or safety risk."¹¹ The FTC "was persuaded that a complete exemption from

⁴ See *In re Anthem, Inc., Petition for Declaratory Ruling and Exemption*, Comments of WellCare Health Plans, Inc., CG Docket No. 02-278 (Sept. 30, 2015); *In re Anthem, Inc., Petition for Declaratory Ruling and Exemption*, Comments of United Healthcare Services, Inc., CG Docket No. 02-278 (Sept. 30, 2015); and *Ex parte* Letter of Michelle G. Turano, Vice President, Federal Government Affairs, WellCare Health Plans, Inc., to Marlene H. Dortch, Secretary, FCC (Feb. 9, 2016). See also Letter from John Currier, CRCE-I, Executive Director Revenue Cycle Management, Gibson Area Hospital & Health Services, AAHAM President, to Marlene H. Dortch, Esq, Secretary, FCC (April 8, 2016)(letter stating full support of Eliza Corp.'s *ex parte* filings and reinforcing importance of Patient Health Management for all Covered Entities and their Business Associates, not just healthcare providers).

⁵ *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, 1852-56 ¶¶57-65 (2012).

⁶ Anthem Petition, at 3 ("Anthem strongly supports the general thrust of [Chairman Wheeler's] proposal, provided that the urgent calls exception not be limited to bank fraud and medical refills but also (a) include the additional specific health care calls and text messages described in this Petition . . .").

⁷ *In re American Association of Healthcare Administrative Management Petition for Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls*, CG Docket No. 02-278 (Oct. 21, 2014) ("AAHAM Petition").

⁸ *2015 Declaratory Order*, at 8030-8032 ¶¶143-148.

⁹ See 47 C.F.R. §§ 64.1200(a)(3)(v) and 64.1200(a)(2), respectively.

¹⁰ *2012 Report and Order*, 1853-54 ¶60.

¹¹ FTC Telemarketing Sales Rule, Final Rule Amendments, 16 C.F.R. Part 310, 73 Fed. Reg. 51164, 51191 (Aug. 29, 2008) ("FTC 2008 TSR Amendments").



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the amendment for healthcare-related calls is necessary.”¹² The FCC agreed, stating that “our record affirmatively supports adopting the FTC’s approach.”¹³

Eliza Corp. fully supports an opt-out regime for non-telemarketing calls subject to the exemption of PEC for calls not charged to the called party initially requested by the American Association of Healthcare Administrative Management (“AAHAM”).¹⁴ The opt-out provisions for the HIPAA Non-Telemarketing Exemption adopted in the *2015 Declaratory Order* require that consumer requests for opt-out be respected by any reasonable method.¹⁵ Covered Entities and Business Associates have different patient management systems, different internal IT platforms and procedures, and various types of calls, as well as state and federal requirements for different health programs. As such, they can support various reasonable methods of opt-out. Eliza Corp. respectfully requests that the FCC retain the opt-out requirements in the *2015 Declaratory Order* for any expansion of the scope of calls subject to the HIPAA Non-Telemarketing Exemption.

This *ex parte* notification is being filed electronically in accordance with Section 1.1206(b)(1) of the Commission’s rules. 47 C.F.R. §1.1206(b)(1). Please contact the undersigned if you have any questions or comments.

Sincerely,

/s/ S. Jenell Trigg

S. Jenell Trigg
Counsel to Eliza Corporation

cc: Mark Stone
Diane Cornell
David Grossman
Travis Litman
Jennifer Thompson
Nick Degani
Robin Colwell

¹² *Id.* (“The patients who most need healthcare calls maybe confused as a result of age or other health-related conditions, and might opt-out of the calls, thereby preventing their healthcare provider from contacting them even with a live call to check on their condition without violating the TSR.”) Eliza Corp. reiterates that healthcare-related calls are also made by health plans and health care clearinghouses, two other Covered Entities.

¹³ *2012 Report and Order*, 1853 ¶60.

¹⁴ AAHAM Petition, at 9-12.

¹⁵ *See 2015 Declaratory Order*, at 8032-33 ¶147.