

Written Testimony of Michelle Turano
Vice President, Public Policy and Government Affairs, WellCare Health Plans

Before the House Committee on Energy and Commerce
“Modernizing the Telephone Consumer Protection Act”
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Mr. Chairman, Representative Pallone, members of the Committee, I am Michelle Turano, Vice President, Public Policy and Government Affairs for WellCare Health Plans. I want to thank you for your invitation to appear today to share our experiences regarding the impact the Telephone Consumer Protection Act (TCPA) has on health care consumers and the health care providers trying to contact them.

We fundamentally agree with the premise of this hearing that the TCPA is in need of modernization in light of the broad policy goals of the TCPA of eliminating unwanted calls from unwanted callers. It must be updated to ensure that the public benefits from evolutions in telecommunications technology and accounts for the way Americans interact and consume information in the modern world. We also share the goals of maintaining privacy consistent with strict, federal standards, such as the Health Insurance and Portability and Accountability Act (HIPAA), and minimizing nuisance from unwanted communications to individuals’ home or cell phones.

We would like to use this opportunity to illustrate the positive way modern technologies can improve individuals’ health and wellness and create efficiencies in health care treatment, payment, and operations that benefit consumers through lower premiums and earlier treatment and prevention. We also would like to address how the privacy of our members is well guarded through the careful structure of HIPAA, which overlays such communications outreach.

Background on WellCare

Headquartered in Tampa, Florida, WellCare focuses exclusively on providing government-sponsored managed healthcare services, primarily through Medicaid, Medicare Advantage and Medicare Prescription Drug Plans, to families, children, seniors, the dually-eligible (those who qualify for both Medicare and Medicaid) and individuals with complex medical needs. WellCare has statutory and contractual mandates from federal and state government partners to serve its members and ensure that they not fall outside of the healthcare protections that Congress has created. Our main goal is to ensure beneficiaries receive the right care, at the right time, in the most appropriate environment – in many cases this means providing education and care to manage chronic conditions. This proactive and preventative care not only improves the health of our members, but also reduces costs in the healthcare system. Managed health care plans create an integrated healthcare delivery system, allowing for the coordination of care between the member’s doctors and specialists, hospitals and other healthcare service providers, as well as working with the local community and social service agencies to meet our members’ need for support.

Managed health care companies like WellCare administer Medicaid and Medicare benefits under contract with state and federal agencies and many contracts require telephonic contact with members for many health-related purposes. Our state and federal partners have realized the more interaction a member has with their health plan, the more likely the member is to enjoy better health outcomes and lower healthcare costs. For example, Florida requires outreach to new enrollees within 30 days to complete a health risk assessment and Georgia requires outreach to parents with newborns within 7 days to inform them of health check services.

TCPA Effect on Health Care Policy Initiatives

While the TCPA serves an important privacy-enhancing purpose, the FCC's interpretation of this purpose has failed to acknowledge that there is a pre-existing and comprehensive regulation of the use of protected health information by HIPAA Covered Entities and their business associates that governs not only treatment, payment and health care operations messages, but severely restricts marketing communications. The uncertainty surrounding the Federal Communications Commission's (FCC) interpretation of the TCPA has had a chilling effect on the ability of WellCare and other managed health care plans that are extensively regulated in these communications by HIPAA to conduct outreach to their members and otherwise fulfill the public policy objectives specified by states and the federal government.

Empirical studies demonstrate that health care related texts and calls lead to more engaged patients, better patient outcomes, and lower health care costs for consumers, which are critical public health goals. Many Americans are not receiving recommended health tests and screenings. For example, among adults in the age groups recommended for cancer screenings, about two in five were not up to date with colon cancer screenings, one in four women were not up to date with breast cancer screenings, and one in five women were not up to date with cervical cancer screening.¹ Text messages in particular have proven effective in delivering health care reminders and increasing adherence to treatment attendance at health care appointments.² In studies among low-income urban populations, researchers found that 72.7% of parents who received text reminders brought their children in for recommended follow-up vaccination

¹ *Many Americans Not Getting Routine Cancer Screenings: CDC*, HealthDay News, May 7, 2015, available at <https://consumer.healthday.com/cancer-information-5/breast-cancer-news-94/many-americans-not-getting-routine-cancer-screenings-cdc-699217.html> (last visited July 20, 2016) (citing to Stephanie Bernik, M.D., chief, surgical oncology, Lenox Hill Hospital, New York City; Louis Potters, M.D., chief, radiation medicine, North Shore-LIJ Cancer Institute, New Hyde Park, N.Y.; U.S. Centers for Disease Control and Prevention, news release, May 7, 2015.)

² Kati Annisto, Marita Koivunen & Maritta Valimaki, *Use of Mobile Phone Text Message Reminders in Health Care Services: A Narrative Literature Review*, 16(10) J. Med. Internet Res. e222 (2014).

appointments.³ With some 20,000 children hospitalized annually for influenza, any increase in inoculation rates directly improves public health.⁴

Additionally, 20% to 30% of prescriptions are never retrieved by patients and up to 50% of medications are not taken as prescribed.⁵ This non-adherence produces between \$100 billion and \$289 billion of avoidable costs annually.⁶ Telephone outreach, to be effective, needs to use technology that is (or is at risk of being deemed, given the FCC's overbroad interpretation) an automatic telephone dialing system (ATDS). Automated technology saves enormous time and money by using technology to take over expensive, time intensive manual processes. These time and cost savings enable communications that are important for public health goals, which is why the use of automated technologies in the health care industry have historically been and should continue to be treated very differently from other contexts. Those cost savings directly benefit patients in lowered overall health care costs. Further, when attempting to contact thousands, if not millions of members, compliance with outreach requirements is practically impossible without automated systems. Critical outreach on a large scale simply cannot occur without these technologies.

In order to modernize the TCPA, we must start at the heart of the issue. Today's reality is much different than that of 1991 when the TCPA was first introduced. In 1991, it was never envisioned that by 2015, 47.4% of American households relied exclusively on wireless devices for telephone service, and "more than two-thirds of all adults aged 25–34 and of adults renting their homes" live in wireless-only households.⁷

For automated telephonic outreach to be effective, it must reach consumers' residential and mobile phones. Wireless-only households are more likely to have numerous health challenges, such as financial barriers, substance abuse, and lack of influenza vaccinations.⁸ Hard-to-reach

³ Melissa S. Stockwell, MD, MPH, et al., *Text Message Reminders for Second Dose of Influenza Vaccine: a Randomized Controlled Trial*, 135(1) *Pediatrics* e83-e91 (2015), available at <http://pediatrics.aappublications.org/content/135/1/e83>.

⁴ See Stockwell et al., *Effect of a Text Messaging Intervention on Influenza Vaccination in an Urban, Low-Income Pediatric and Adolescent Population*, 307(16) *JAMA* 1702–08 (2012); Maanvi Singh, *Texted Reminders Help Parents Get Kids In For Flu Shots*, <http://www.npr.org/sections/health-shots/2014/12/29/373767691/texted-reminders-help-parents-get-kidsin-for-flu-shots> (last visited June 3, 2016).

⁵ Brian Fung, *The \$289 Billion Cost of Medication Noncompliance, and What to Do About It*, *THE ATLANTIC*, Sept. 11, 2012, available at <http://www.theatlantic.com/health/archive/2012/09/the-289-billioncost-of-medication-noncompliance-and-what-to-do-about-it/262222/> (last visited June 3, 2016).

⁶ *Id.*

⁷ Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2015*, Div. of Health Interview Statistics, Nat'l Ctr. for Health Statistics, Centers for Disease Control and Prevention (Dec. 2015), available at

<http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201512.pdf> (last visited June 3, 2016), at 1.

⁸ *Id.* at 3.

populations are especially prone to use cell phones as their primary means of telephonic communication.⁹ Other means of outreach, such as mailings and calls to landlines, are not effective in reaching many consumers, especially young people and low-income groups.

Available data shows that a large majority of consumers desire access to programs that use telephonic contact for health care, recognizing there are concrete health benefits. A survey of commercially insured consumers found the highest acceptance for health management programs when they are mobile contacts.¹⁰ Additionally, telephonic outreach using automated technologies can save lives. For example, colon cancer is the number two cancer killer in the United States, with 52,000 fatalities annually.¹¹ In one patient health engagement outreach program, a telephonic campaign to a group of 400,000 Medicare beneficiaries encouraging recommended colorectal cancer screening resulted in identification of 299 cases, about half of which were in a stage of early detection.¹² This outreach saved lives through early detection – and in the process saved \$24,000 to \$34,000 per early cancer stage detected – resulting in significant avoidance of pain and suffering, as well as approximately \$9 million in monetary savings.¹³

Telephonic outreach via automated technology also has been shown to be successful in encouraging consumers to receive other important physician-recommended screenings, with improved rates found for diabetic glaucoma screenings (with 51.6% compliance among those receiving intervention versus 42.5% for those who do not), mammography (20.6% versus 10.7%), and cervical cancer screening (15% versus 8.9%).¹⁴ Telephonic outreach has been shown to reduce post-discharge hospital readmission rates, with a study showing that discharged patients receiving follow-up outreach had a readmission rate of 9%, as compared to 15% for patients not receiving outreach.¹⁵

⁹ Stockwell et al., *Text4Health: Impact of Text Message Reminder–Recalls for Pediatric and Adolescent Immunizations*, available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3483980/>

¹⁰ Elizabeth Boehm, et al., *Mobile and Social Gain Ground in Wellness and Disease Management*, Forrester Research, available at

<https://www.forrester.com/Mobile+And+Social+Gain+Ground+In+Wellness+And+Disease+Management/fulltext/-/E-res58231>

¹¹ www.cdc.gov/cancer/colorectal/statistics.

¹² Ex parte Letter from S. Jenell Trigg, Counsel to Eliza Corp., to Marlene H. Dortch, Esq., Secretary, FCC (March 31, 2016) re: written ex parte presentation to Consumer Protection and Governmental Affairs Bureau on *Health Information Technology and Patient Health Engagement* (“PHE Ex Parte Presentation”), slide 8.

¹³ *See id.*

¹⁴ PHE Ex Parte Presentation, slide 16. *See also* Rebecca R. Ruiz, *F.C.C. Chief Seeks Broadband Plan to Aid the Poor*, N.Y. TIMES, May 28, 2015, at A1, available at <http://www.nytimes.com/2015/05/28/business/fcc-chief-seeks-broadband-plan-to-aid-the-poor.html>.

¹⁵ PHE Ex Parte Presentation, slide 15.

In addition the TCPA increases costs by focusing on the capability of the equipment used to deliver these healthcare messages rather than the actual use. The July 2015 Order clarifies the term “automatic telephone dialing system” includes equipment with the “capacity” to dial random and sequential numbers, which means the “potential ability” to perform these functions rather than the “present ability” to do so. Order at ¶¶ 15, 19; *see also* ¶ 16. This means whether the equipment is utilized as an autodialer or it is used in its normal manual-dial method is of no consequence. A health plan would need to purchase a separate dialer that is incapable of autodialing in order to comply with the current construct of TCPA. Nuances in the TCPA such as this unnecessarily drive up costs.

As I mentioned earlier, non-compliance with the TCPA carries the potential for large penalties. These penalties also drive concern and the need for reform. In addition to the regulations surrounding the capabilities of the equipment, the TCPA also permits one call to be made without liability after a telephone number is reassigned from the person who gave consent to another person who has not given consent. *Id.* at ¶ 72. Even if this call does not yield actual knowledge of the reassignment, the caller is deemed to have constructive knowledge, and will be liable for all calls placed thereafter. *Id.* at ¶¶ 72, 85. These penalties may have once been effective in deterring unwanted callers, but now may actually penalize those who desire the information the calls contain.

Providing health benefits to the most medically complex individuals is wrought with challenges, least of which is actually making contact with the member. Frequently, our members struggle with permanent housing and other financial challenges. It is not uncommon to have multiple phone numbers for a single member; often times an unintended recipient answers and informs us that either a wrong number has been dialed or the member no longer utilizes the phone number. Sometimes, however, the call goes unanswered. To import knowledge of a “reassigned phone number” based off one-unanswered phone call is to penalize the caller for attempting to comply with the mandate of providing information and education to its members in an efficient and cost effective manner.

Harmony between HIPAA and the TCPA

The FCC’s interpretations of the TCPA, including that of the *2015 Declaratory Order*, could erroneously be interpreted to provide that a Covered Entity, like WellCare, or a business associate cannot use protected health information (PHI) for automated outreach to a cell phone to deliver a health care message unless the calling party can also prove prior express consent – a requirement that the HIPAA Privacy Rule expressly does not require for good reason. These are the exact same calls that health care providers can make today, but the FCC is silent as to whether managed health care companies can make these same sorts of calls.

Congress passed HIPAA in 1996 to enhance health insurance portability, reduce waste in healthcare spending, and improve administrative efficiency.¹⁶ At the same time, Congress recognized that the expansion of electronic transactions required greater privacy and security protections for individuals’ health information. In passing HIPAA, Congress recognized the vital role that effective communication plays in ensuring effective, efficient, and personalized

¹⁶ Pub. L. No. 104-191, 110 Stat. 1936, pmb1 (1996).

healthcare, and Congress sought to ensure the promise of improving healthcare while decreasing its costs and preserving privacy. Consistent with this balancing, HIPAA comprehensively regulates insurance providers and managed health plans such as WellCare, including their relationships with and communications to members and patients.

HIPAA, and the Privacy Rule issued pursuant to HIPAA, authorize and regulate the use of PHI.¹⁷ Courts have held that PHI regulated by HIPAA includes telephone numbers.¹⁸ The 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.”¹⁹ HIPAA applies to all Covered Entities, which includes not only health care providers, but also health plans, health care clearinghouses, and their business associates which are service providers to the Covered Entities that need access to PHI to perform their services.²⁰

The Privacy Rule draws careful distinctions between using and disclosing PHI for permissible health care related communications, which do not require specific prior authorization, and communications that do require prior written authorization. Covered Entities are permitted to make health care-related communications *without prior authorization* (or, in TCPA terms, prior express consent), for the purposes of treatment, payment, and health care operations under the Privacy Rule’s general rules.²¹ The Department of Health and Human Services (HHS) acknowledged the importance of “facilitat[ing] those communications that enhance the individual’s access to quality health care,”²² and “that some of these communications are required by State or other law.”²³ HIPAA requires Covered Entities to obtain a valid authorization before using an individual’s PHI for marketing purposes. The Privacy Rule authorizes non-marketing communications between Covered Entities, their business associates and their patients or members without prior authorization “[t]o avoid interfering with, or

¹⁷ PHI is “individually identifiable health information” that is “(i) Transmitted by electronic media; (ii) Maintained in electronic media; or (iii) Transmitted or maintained in any other form or medium.” See definition of “protected health information” at 45 C.F.R. § 160.103. “Individually identifiable health information” consists of health information, including demographic information, that identifies an individual or could be used to identify an individual, and includes information which “[r]elates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.” See *id.*

¹⁸ See *Baisden v. Credit Adjustments, Inc.*, 813 F. 3d 338, 346–47 (6th Cir. 2016); *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F. 3d 1110, 1125–26 (6th Cir. 2014).

¹⁹ HHS Use and Disclosure Guidance at 1.

²⁰ 45 C.F.R. § 160.103.

²¹ 45 C.F.R. § 164.502 (“Uses and disclosures of protected health information: General rules). And each Covered Entity is allowed to use and disclose PHI without prior authorization for its own treatment, payment and health care operations. 45 C.F.R. § 164.506(b)(1).

²² *Standards for Privacy and Individually Identifiable Health Information; Final Rule*, 67 Fed. Reg. at 53186.

²³ *Id.*

unnecessarily burdening communications about, treatment or about the benefits and services of health plans and health care providers,”²⁴ while restricting the ability to use PHI for true marketing purposes.

HIPAA already provides for steep penalties, including criminal and civil penalties and robust enforcement by the Office of Civil Rights within HHS for privacy violations by HIPAA-covered entities and their business associates. State Attorneys General also are authorized to bring civil actions in Federal Court for HIPAA violations on behalf of harmed residents.²⁵ Civil penalties range from \$100 to \$50,000, with a cap of \$1.5 million for violations of the same provision.²⁶

I. Recommendations

The TCPA was intended to protect consumers from annoying and harassing phone calls never consented to by the recipient. In 1991, when the TCPA was first introduced, the consumer did not envision how information would be disseminated in 2016. Today, the consumer is more likely to receive an important health message via cellular phone call, text message and/or email as they would be by regular mail. As detailed, these health messages can mean the difference between obtaining a flu shot before one of the worst flu seasons, reminding a recently discharged hospital patient to change the dressing on a wound to avoid infection and readmission or even life or death. As part of any attempts to modernize TCPA, Congress should clarify that the provision of a phone number to a HIPAA-Covered Entity or business associate (as those terms are defined under HIPAA), whether by an individual, another Covered Entity, or a party engaged in an interaction subject to HIPAA, such as an employer or governmental entity, constitutes prior express consent for health care treatment, payment, and health care operations communications to that number. This clarification is necessary, consistent with court precedent,²⁷ and provides deference to the already-stringent HIPAA framework. The TCPA’s protection of a consumer’s

²⁴ *Standards for Privacy and Individually Identifiable Health Information; Final Rule*, 67 Fed. Reg. 53182, 53183 (Aug. 14, 2002).

²⁵ 42 U.S.C. § 1320d-5(d)(2).

²⁶ 45 C.F.R. § 160.401.

²⁷ See, e.g., *Baisden v. Credit Adjustments, Inc.*, 813 F.3d 338, 345-46 (6th Cir. 2016) (adopting the holding of *Mais* and finding that “consumers may give ‘prior express consent’ under the FCC’s interpretations of the TCPA when they provide a cell phone number to one entity as part of a commercial transaction, which then provides the number to another related entity from which the consumer incurs a debt that is part and parcel of the reason they gave the number in the first place”); *Penn v. NRA Grp., LLC*, No. CIV. JKB-13-0785, 2014 WL 2986787, at *3 (D. Md. July 1, 2014) (finding “prior express consent” where plaintiff provided cell phone number to hospital in relation to medical services and received calls in reference to an unpaid debt from those services); *Hudson v. Sharp Healthcare*, No. 13-cv-1807-MMA, 2014 WL 2892290, at *6 (S.D. Cal. June 25, 2014) (finding plaintiff consented to receive calls when she orally provided her number and then signed an attestation form with the number); *Elkins v. Medco Health Sols., Inc.*, No. 4:12CV2141 TIA, 2014 WL 1663406, at *7 (E.D. Mo. Apr. 25, 2014) (finding plaintiff consented to receive calls from a pharmacy benefits specialist when she gave her cell phone number at the time of enrollment in a group health plan).

right to control unwanted calls would still be respected by allowing the consumer to revoke the consent.

Additionally, in modernizing the TCPA, Congress should look to the intent of the caller to impose liability. A HIPAA Covered Entity or their business associate calling to offer a flu shot or a reminder of an upcoming doctor's appointment should be afforded the ability to contact their members and offer their services without the creation of legal liability when the intended recipient has abandoned use of the called phone number. Similarly, if the goal is to provide cost effective health care to consumers, Congress should look to clarify the definition of autodialer, so as not to include devices with the capability to autodial. Finally, Congress should eliminate the FCC's strict liability interpretation (e.g., reassigned cell phone numbers) and clarify the prohibition relates to calls placed to the intended recipient. Companies should be held to having a reasonable compliance program in place consistent with best practices.

Thank you for your invitation to testify today, and I look forward to answering your questions.