

July 25, 2018

The Honorable Marsha Blackburn
Chairwoman
Communications and Technology
Subcommittee
2125 Rayburn House Office Building
Washington, DC 20515

The Honorable Mike Doyle
Ranking Member
Communications and Technology
Subcommittee
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Blackburn and Ranking Member Doyle:

Thank you for holding a Federal Communications Commission (“FCC”) Oversight Hearing on Wednesday, July 25th and for the opportunity to submit this letter for the record on behalf of Anthem, Inc. and its affiliated health plans, Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management (collectively, the “Healthcare Petitioners”).

We respectfully request your assistance with urging the FCC to act quickly and favorably to clarify its earlier guidance addressing whether patients may receive health care related communications in accordance with the Telephone Consumer Protection Act (“TCPA”). In particular, we ask you to encourage the FCC to grant without further delay the pending Petition for Expedited Declaratory Ruling and/or Clarification (“Joint Petition”) filed twenty-three months ago by the Healthcare Petitioners.¹ The Joint Petition asks the FCC to clarify certain aspects of the FCC’s *2015 Declaratory Order*² and to confirm the FCC’s longstanding policy of harmonizing its interpretations of the TCPA with the regulation of the use of telephone numbers under the Health Insurance Portability and Accountability Act (“HIPAA”).

The *2015 Declaratory Order* provided, in relevant part, that the “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.”³ The Healthcare Petitioners have sought clarification of two related aspects of the *2015 Declaratory Order*: (1) *who* may receive the number; and (2) *what* the call must be about. Regarding the “who” question, the Healthcare Petitioners asked the FCC to clarify that the provision of a phone number to a HIPAA “covered entity” or “business associate,” whether by an individual, another covered entity, or a party engaged in an interaction subject to HIPAA, constitutes prior express consent calls to the HIPAA-covered entity and business associates acting on its behalf. A critical limitation is that covered entities and business associates must make calls within the scope of the

¹ See Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278 (filed July 28, 2016) (“Joint Petition”).

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“*2015 Declaratory Order*”).

³ *Id.* ¶ 141 (emphasis added).

consent given, and absent instructions to the contrary. Regarding the “what” question, the Healthcare Petitioners asked the FCC to clarify that a HIPAA-regulated entity may place “treatment, payment, and operations” calls otherwise allowed under HIPAA. In short, the Joint Petition requested narrow clarifications to bring the FCC’s TCPA rules for healthcare-related calls more in line with patient expectations and HIPAA.

The Joint Petition has received strong, bipartisan support in the FCC record and among members of Congress. On October 13, 2017, a bipartisan group of members of the House of Representatives led by Representatives Bilirakis and Cardenas sent a letter asking Chairman Pai to act promptly to “afford clarity to covered entities and business associates making non-marketing communications that benefit patients.”⁴ As this bipartisan coalition observed, “helpful, important non-marketing communications can be critical safeguards to reaching underserved populations and supporting more effective, efficient health care.”⁵ Senators Booker and Nelson also sent a bipartisan letter to Chairman Pai on November 3, 2017 noting that calls and text messages subject to the Joint Petition convey “important medical and treatment information” and “improve patient outcomes.”⁶ They also stated that “time is of the essence to ensure that consumers’ access to health care is not jeopardized” and asked the FCC to “resolve these issues as soon as possible (preferably within the next 90 days) and to protect communications allowed under HIPAA in light of their unique value to consumers and their positive impact on Americans’ health and well-being.”⁷ Further, in September of 2016, WellCare was invited to testify before the Energy and Commerce Committee and received strong bipartisan support for its position supporting these reasonable and measured changes that would have a positive impact on their beneficiaries health outcomes by allowing the company to communicate in the most effective and efficient manner possible.

The breadth and depth of support for the Joint Petition is hardly surprising. The communications at stake include onboarding, wellness, informational, and follow-up and calls and texts that, for example: (i) explain coverage and how to get needed care, including providing updates about benefits and/or network changes; (ii) perform health screenings and identify at-risk members; (iii) facilitate selection of primary care provider and schedule appointments; (iv) remind members to get preventive care, such as shots and help ensure medication adherence; (v) notify patients of changes in enrollment or disruptions in coverage due to non-payment and remind members about renewing their benefits; and (vi) solicit member feedback on healthcare quality and other issues and ensure satisfaction.

Patients need and expect these and other non-marketing treatment, payment, and operations calls and texts, irrespective of which party in the HIPAA ecosystem—physicians, health plans, clearinghouses, or business associates—places the communication or initially obtains the patient’s telephone number. Nevertheless, the FCC has not yet issued a decision on the Joint Petition. In the meantime, the threat of abusive class-wide litigation has chilled

⁴ See Letter from Rep. Gus Bilirakis, *et al.* to FCC Chairman Ajit Pai, at 1 (Oct. 13, 2017).

⁵ *Id.* at 2.

⁶ See Letter from Sens. Corey Booker and Bill Nelson to FCC Chairman Ajit Pai, at 1 (Nov. 3, 2017).

⁷ *Id.*

HIPAA-regulated entities from placing non-marketing calls about treatment, payment, or operations that patients want and expect.

Given the fact that the D.C. Circuit's decision was now released several months ago, we ask you to urge the FCC to grant the Joint Petition without delay. Thank you very much for your consideration of this request, and we are available to answer any questions that you or your staff may have about this important issue.

Respectfully submitted,

/s/ Adam Goldberg

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