

October 25, 2016

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

Re: *Ex Parte* Presentation in CG Docket No. 02-278 – Comments of Consumers Union, regarding Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for the Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order

Dear Ms. Dortch:

Consumers Union, the policy and mobilization arm of Consumer Reports, writes to provide this late filing regarding the above-named Petition,¹ in response to the Request for Comments issued August 19, 2016,² and pursuant to 47 C.F.R. §1.1206.

We believe that, with certain important clarifications, the changes requested by the Petition³ to paragraphs 141 and 147 of the Commission's 2015 Omnibus Order⁴ can be made, in substantial part, consistent with the purposes of the Telephone Consumer Protection Act (TCPA) and the Order. But as explained below, those certain clarifications are of utmost importance, should the Commission decide to make the requested changes. We agree with the clarifications recommended in the *ex parte* submission by the National Consumer Law Center, Americans for Financial Reform, Consumer Action, Consumer Federation of America, Electronic Information Privacy Center,

¹ Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for the Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278 (July 28, 2016) [hereinafter Petition], <https://ecfsapi.fcc.gov/file/10728005201264/FCC%20TCPA%20Joint%20Petition%20FINAL.pdf>.

² Public Notice, Federal Communications Commission, Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling filed by Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Health Care Administrative Management, CG Docket No. 02-278 (Aug. 19, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DA-16-947A1.pdf.

³ Petition at 26, 27 (Exhibits A and B).

⁴ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 30 FCC Rcd. 7961 (2015) [hereinafter 2015 TCPA Declaratory Ruling and Order].

National Association of Consumer Advocates, Public Citizen, and Public Knowledge (“Consumer Ex Parte Submission”);⁵ and we also recommend several additional clarifications.

The focus of the Petition is on broadening the scope of which interactions among “covered entities” and “business associates” trigger the special treatment accorded under paragraphs 141 and 147 for certain calls subject to the Health Insurance Portability and Accountability Act (HIPAA). To the extent that Petitioners are suggesting that, as written, paragraphs 141 and 147 may inadvertently treat health care providers and their related entities differently based on how their business is structured, in ways that are not necessary for purposes of the TCPA and that may unnecessarily interfere with efficient and effective delivery of health care services to consumers, we believe improving consistency in treatment is an appropriate matter for consideration by the Commission.

In improving consistency in treatment of health care providers and related entities, however, utmost care should be taken not to inadvertently open a pathway to more unwanted robocalls. To help ensure this does not occur, we recommend a number of clarifications. The Commission’s careful consideration of the Petition may reveal other modifications and clarifications needed to ensure that the purposes of the TCPA are not undermined.

First, we agree with the Consumer Ex Parte Submission’s recommendation that telemarketing calls be explicitly excluded from the special treatment accorded under paragraph 141. This is a useful clarification regardless of the changes requested in the Petition. It is all the more important given the broader scope of interactions between HIPAA covered entities and business associates that would be included under those requested changes.

Second, we agree with the Consumer Ex Parte Submission’s recommendation that the established rules for scope of consent conferred be explicitly preserved. Because the changes requested in the Petition would introduce a broader description of purposes for which robocalls would be deemed consented to, it is important to make clear that the added purposes are clarifying only, and do not alter the basic rules that the scope of the consumer’s consent to be called is determined by the purpose for which the consumer provided the phone number in the first place.

Third, we recommend a few additional clarifications in the wording of the changes recommended in the Petition, clarifications we believe are consistent with the Petitioners’ request and will help ensure that the effect of the changes is appropriately limited and does not inadvertently open new pathways for unwanted robocalls. These clarifications – to the wording of where the HIPAA covered entity can obtain a phone number, and to the purpose for which the number can be provided – would help ensure that the special treatment for HIPAA-related calls is confined to HIPAA-related entities, interactions, and purposes.

A. Ensuring that telemarketing calls are excluded

The Petitioners are focused on *who* can make the calls. More important for the TCPA, however, is what those calls can be *about*. In particular, we are concerned that deeming the provision of a phone number to any HIPAA covered entity or business associate to constitute prior express consent for “health care operation calls,” as the Petition requests, might inadvertently permit calls that are more about marketing new health care services to the consumer than about providing health

⁵ <https://ecfsapi.fcc.gov/file/10182505922181/Anthem%20Ex%20ParteOctober%2018.pdf>.

care services the consumer has already requested. As one of the principal purposes of the TCPA is to strictly regulate telemarketing robocalls, we believe it is important to make crystal clear that the changes requested in the Petition, if agreed to, have not opened up a back door to telemarketing calls.

The Petition states unequivocally that it does not seek to include telemarketing calls. But the description in the Petition of calls envisioned to be covered in paragraph 141 as it would be changed includes activities that, if not appropriately circumscribed, could include classic varieties of telemarketing calls – defined in the Commission’s rules as calls made “for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services[.]”⁶ Even though the question of telemarketing may, as the Petition indicates, be addressed in HIPAA and its rules for HIPAA purposes, it should also be clearly addressed here, to ensure that the integrity of the TCPA’s protections is kept intact. We therefore concur in the Consumer Ex Parte Submission’s recommendation that the word “non-telemarketing” be added to section 141, as shown below.

B. Ensuring established TCPA rules for scope of consent remain intact

As the Commission stated in the 2015 Order, the requirement that the calls be “within the scope of consent given” means that “the call must be closely related to the purpose for which the telephone number was originally provided.”⁷ Without clarification, the changes to paragraph 141 requested in the Petition could unsettle this fundamental requirement in two ways. First, the requested changes would broaden significantly the kinds of interactions between the various HIPAA covered entities and business associates that would be included in paragraph 141. Second, the requested changes would deem a variety of ways that a phone number can be provided to automatically constitute prior consent to be robocalled, while stating that prior express consent is “not limited” to those ways. Each of these changes could create uncertainty regarding whether the established scope-of-consent rules might have been altered.

For that reason, it is important to explicitly reaffirm the continued operation of the scope-of-consent rules. We therefore concur in the Consumer Ex Parte Submission’s recommendation to add a sentence at the end of paragraph 141, as shown below, to make clear that, unless another type of call is specifically consented to by the consumer, the scope of consent that is inferred from the consumer providing a telephone number is limited to the subject of the transaction in which the number was provided. Importantly, the scope-of-consent rules can, and should, also have the effect of limiting the consent as to its duration as well as to its purpose.

C. Ensuring that the changes do not sweep in non-HIPAA entities, interactions, or purposes

In at least three significant respects, the text of the changes to paragraph 141 requested in the Petition is ambiguous regarding who could permissibly provide the consumer’s phone number to the HIPAA covered entity or business associate, when, and for what purpose.

⁶ 47 C.F.R. § 64.1200(f)(12).

⁷ 2015 TCPA Declaratory Ruling and Order at 8029 n.474 (emphasis added).

First, the requested text appears to permit the phone number to be provided by *any* “individual.” This is presumably intended to refer only to an individual providing his or her own number – doing so as the patient, or acting on behalf of his or her dependents who are the patients. Indeed, we believe other appropriate sources for the phone number would already be covered by the other sources listed in the requested change – a “covered entity ... or party engaged in an interaction subject to HIPAA.” We recommend making this limitation explicit in the text. If there are other individuals the Petitioners believe should be covered, the Petitioners should specify who those other individuals are, and the Commission should give additional time for broader public evaluation of whether those other individuals are appropriate to include.

Second, it is not clear whether all those who provide a phone number under paragraph 141 are required to be “engaged in an interaction subject to HIPAA,” or if that requirement applies only to the otherwise open-ended “party.” It also is not clear whether being engaged in an interaction with respect to one phone number could permit someone to provide numerous other, unrelated phone numbers. We recommend specifying that the requirement applies to all who provide the phone number, and specifying that the phone number must be being provided pursuant to that interaction.

Third, it is not clear, in the requested change deeming certain actions to constitute prior express consent, that the employer or employer-authorized party must have provided the phone number as part of an interaction subject to HIPAA that pertains to that phone number. We recommend making this clear.

We believe the additional clarifications we recommend will help ensure that the special treatment intended in paragraph 141 for HIPAA-related robocalls, with the expansion requested, will be properly confined to HIPAA-related entities, interactions, and purposes.

Proposed Revised Text for Paragraph 141

The paragraph below incorporates into the base text the changes requested by the Petition to paragraph 141. The additional clarifications shown in bold underlined italics are what we recommend in order to help ensure that the requested changes do not undermine core protections in the TCPA. They explicitly exclude telemarketing calls, reaffirm established scope-of-consent rules, and more clearly limit the coverage to phone numbers provided by HIPAA-related entities in HIPAA-related interactions for HIPAA-related purposes.

Para. 141: We clarify, therefore, that provision of a phone number to a HIPAA “covered entity” or “business associate” as defined by HIPAA’s implementing regulations, whether by an individual ***to whom the phone number belongs, by*** another covered entity, or ***by another party, while*** engaged in an interaction subject to HIPAA ***pertaining to that telephone number,*** constitutes prior express consent for ***non-telemarketing*** treatment, payment, and health care operation calls that are subject to HIPAA by a HIPAA covered entity and business associates acting on its behalf, if the covered entities and business associates are making calls within the scope of the consent given, and absent instructions to the contrary. Examples of prior express consent include, but are not limited to, the provision of a telephone number, ***as part of an interaction subject to HIPAA pertaining to that telephone number,*** by an employer, ***or by*** a party authorized to implement the

health insurance enrollment, application or renewal process on *its the employer's* behalf, *and or by* a state Medicaid agency or another governmental entity *and/or* *their its* business associate*s(s)*. *However, the interpretation of the scope of the consent provided by the consumer is still limited by either the express instructions provided by the consumer or, if none are provided, the subject of the transaction for which the consumer provided the telephone number.*

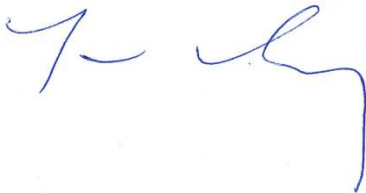
* * *

Conclusion

We believe the clarifications we recommend above are fully in keeping with the purpose of removing possible unintended limitations in the application of paragraphs 141 and 147 to healthcare entities, while ensuring that the changes requested in the Petition, if agreed to, do not undermine the protections of the TCPA. In addition to the clarifications we recommend, we encourage the Commission to also carefully consider whether other clarifications may be warranted to ensure that the TCPA's protections are preserved intact.

We appreciate your consideration of our perspective.

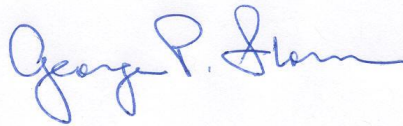
Respectfully,



Maureen Mahoney
Policy Analyst



Jonathan Schwantes
Senior Policy Counsel



George P. Slover
Senior Policy Counsel