



Consumer Federation of America

consumer action
Education and advocacy since 1971



epic.org | ELECTRONIC PRIVACY
INFORMATION CENTER

October 18, 2016

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

Re: Notice of *Ex Parte* Presentation: CG Docket No. 02-278, specifically 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, CG Docket No. 02-278.

Dear Ms. Dortch:

Through this *Ex Parte* Notice **the National Consumer Law Center**, on behalf of its low-income clients, and **Consumer Action, Consumer Federation of America, EPIC, National Association of Consumer Advocates, Public Citizen, and Public Knowledge**, collectively representing millions of consumers across the United States, provide comments on the proposals in the above-named Petition¹ (Anthem Petition). These comments are provided as a late filing in response to the Request for Comments issued on August 19, 2016 by the Consumer and Governmental Affairs Bureau² on the questions raised in this Petition.

¹ In the Matter of the Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc.,

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 Healthcare Administrative Management, CG Docket No. 02-278 (Aug. 19, 2016), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-16-947A1.pdf.

I. Introduction

While we do not oppose the specific requests made in the Anthem Petition³ to amend the language of paragraphs 141 and 147 of the Commission's 2015 Omnibus Order,⁴ we urge the Commission to include additional, clarifying language in the proposed amendment of paragraph 141 should the Commission feel that amendment is necessary.

First, the Anthem Petition characterizes its essential request as an amendment to clarify "that the provision of a phone number to a 'covered entity' or 'business associate' (as those terms are defined under HIPAA) constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, or health care operations."⁵ However, the proposed amendment to paragraph 141 *does not* limit its reach to non-telemarketing calls. To ensure that the amended paragraphs of the Omnibus Order cannot be read to authorize telemarketing calls, we urge the Commission to specifically exclude telemarketing calls.

Second, much of the language used in the Anthem Petition appears to request much broader relief than is included in the proposed changes to paragraphs 141 and 147. Specifically, we are concerned about the dangerous implications inherent in allowing the relief requested in the following paragraph of the Anthem Petition:

Petitioners request that the FCC make clear that the provision of a phone number to a 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 [Health Insurance Portability and Accountability Act] such as an employer or governmental entity, constitutes prior express consent for health care treatment, payment, and health care operations calls to that number.⁶

This request appears to seek a change in definition of the scope of consent. We therefore respectfully request, if the Commission sees fit to grant the Anthem Petition, that it also add a clarifying statement that the scope of consent continues as the essential test to determine the legality of health care related robocalls, just as it is with all robocalls regulated by the Telephone Consumer Protection Act (TCPA).

In contrast to the specific requests to amend the paragraphs of the Omnibus Order, many of the arguments in the Anthem Petition support the notion that if a robocall is a health-related call it should be exempted altogether from the requirements for consent imposed by the TCPA.⁷ We are

³ Anthem Petition at 27, 28 (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].

⁵ Anthem Petition at 3 (emphasis added)

⁶ Anthem Petition at 17 (emphasis added).

⁷ For example, the Anthem Petition states: "By contrast, the 2015 Declaratory Order could erroneously be interpreted to provide that a Covered Entity or Business Associate cannot use 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 Privacy Rule expressly does *not* require." Anthem Petition at 15 (emphasis in original).

concerned about the extent to which granting this petition will lead to more unwanted, and unstoppable, robocalls to consumers. The Anthem Petition states:

For example, if a telephone number is regulated by HIPAA as PHI [protected health information], and the recipient is regulated by HIPAA as a Covered Entity or Business Associate, and therefore the use of the number is subject to HIPAA, then the TCPA should be interpreted consistent with HIPAA and allow use of the number to contact the patient/member with a non-telemarketing HIPAA message.⁸

Whether a telephone number provided by a consumer-patient to a health care provider or an insurance company is considered to be protected health information (PHI) under HIPAA⁹ has no bearing on the Federal Communications Commission's interpretation of the appropriate application of the TCPA. And sharing a telephone number is a different act from that of allowing robocalls to that telephone number. If HIPAA permits one health care entity to share a patient's telephone number with a related health care entity, that is irrelevant to the question of whether the second provider can place a robocall to the patient. Only the TCPA, not HIPAA, regulates the legality of robocalls to cell phones. If HIPAA permits the sharing of telephone numbers, but the scope of consent for purposes of the TCPA does not authorize robocalls from the second provider, then the second provider can make the calls manually.

The Anthem Petition ostensibly requests that the consent provided to one health care entity be considered applicable to another health care entity as long as the two are related based on the applicability of the HIPAA. Framing the issue in this way, however, misses the critical question of what type of calls were within the scope of the consent provided by the consumer. HIPAA may or may not apply to the relationship between the parties, but that is irrelevant to the issue of whether the call is legal under the TCPA.

The Commission has already permitted one party to make calls to consumers after consent was provided to another party as long as the subject of the call was within the scope of the consent provided to the original party.¹⁰ The analysis should be exactly the same in this context. However, the petitioners appear to have conflated the question of *who* can make the call with *the subject of the call*. The first issue is more clearly articulated, but the second issue is more important to consumers.

Therefore, we request that if the Commission sees fit to grant the requests made in the Anthem Petition by amending the two paragraphs of the 2015 Omnibus Order, then it should add the following language at the end of paragraph 141:

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

⁸ Anthem Petition at 18.

⁹ Pub. L. No. 104-191 (1996), codified at 42 U.S.C. §§ 1320d *et seq.*

¹⁰ In the ACA Declaratory Ruling, the Commission clarified that a party who provides his wireless number to a creditor as part of a credit application “reasonably evidences prior express consent by the cell phone subscriber to be contacted at the number regarding the debt.” In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling, CG Docket No. 02-278, 23 FCC Rcd. 559, 564 ¶ 9 (Rel. Jan. 4, 2008) [hereinafter ACA Declaratory Ruling].

are provided, the subject of the transaction for which the consumer provided a telephone number.

II. Who Can Make the Calls

The Commission has already indicated several times, as is clearly stated in paragraph 141 of the 2015 Omnibus Order, that consent provided to one party can be the basis for calls made by another party as long as the consent provided to the first party covered the content of the calls made by the second party:

1. “The Commission reiterated in the *GroupMe Declaratory Ruling* that, while the scope of consent must be determined upon the facts of each situation, it was reasonable to interpret the TCPA to permit a texter such as GroupMe to send texts based on the consent obtained by and conveyed through an intermediary (the group organizer),”¹¹
2. “We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”¹²
3. “[T]he scope of consent includes communications from the school closely related to the educational mission of the school or to official school activities absent instructions to the contrary from the party who provides the phone number.”¹³
4. “This evidence supports our conclusion that these communications are among those to which consumers have consented.”¹⁴
5. “In this regard, we strongly encourage utility companies, and all robocallers, to inform customers during the service initiation process or when updating contact information on the account as an additional safeguard that, by providing a wireless telephone number to them, the customer consents to receiving autodialed and prerecorded message calls at that number, to the extent such calls are closely r[el]ated to the service purchased by the customer.”¹⁵

As is evident from the various statements from the Commission that are quoted above, the issue is *not just* the relationship between the party to whom the consent was provided and the party who makes the call. The issue is whether the consent provided to the first party covers the content

¹¹ 2015 TCPA Declaratory Ruling and Order at 7990 ¶ 49 (emphasis added).

¹² ACA Declaratory Ruling at 564 ¶ 9 (emphasis added).

¹³ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling, Edison Electric Institute and American Gas Association Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, Declaratory Ruling, at 11 ¶ 23 (Rel. Aug. 4, 2016) (emphasis added) [hereinafter Blackboard and Edison Declaratory Ruling], *available at* <https://ecfsapi.fcc.gov/file/0804720522141/FCC-16-88A1.pdf>.

¹⁴ Blackboard and Edison Declaratory Ruling at 14 ¶ 30 (emphasis added).

¹⁵ Blackboard and Edison Declaratory Ruling at 14 ¶ 31 (emphasis added).

of the call made by the second party. In the Anthem Petition, there is a lot of discussion about insurance providers and doctors and different types of calls to be made by different parties.¹⁶ This discussion shows that the petitioners miss the most important point of the directives on consent in the Commission's orders and rulings, all of which specifically repeat the rule that the calls must be within the "scope of the consent" provided.¹⁷

The fact that HIPAA may also cover these calls and the relationship between the parties is not relevant to the question of whether consent has been provided for the calls to be made. The primary determining factor is whether the consumer has consented to the content of the calls.

It is also important for the Commission to reiterate that the caller is always liable under the TCPA for calls to wrong numbers.¹⁸ Because of the potential length of time between when consent was provided and when a call is made by a related entity, it is especially important for the caller to check and make sure that the consumer who provided the consent is the person called. The reassigned numbers rule articulated in the 2015 Omnibus Order clearly applies to these calls.¹⁹

III. The Subject of the Calls

The range of the types of calls that the petitioners want to make pursuant to the Anthem Petition is very broad, including:

1. case management;
2. the recommendation of alternative treatments, therapies, health care providers, or settings of care;
3. the description of a health-related product or service;
4. payment for such product or service;
5. replacement of, or enhancements to, a health plan;
6. health-related products; and
7. communications for case management or care coordination for the individual.²⁰

¹⁶ See, e.g., Anthem Petition at 13.

¹⁷ In the Matter of GroupMe, Inc./Skype Communications S.A.R.L. Petition for Expedited Declaratory Ruling, Declaratory Ruling, CG Docket No. 02-278, FCC Rcd. 3442, 3443, 3446 ¶¶ 4, 11 (Rel. Mar. 27, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-33A1_Rcd.pdf.

¹⁸ See *id.* at 3446 ¶ 11 ("GroupMe [can] send [] autodialed text messages based on the consent obtained and conveyed by an intermediary [the group organizer], with the caveat that if consent was not, in fact, obtained, the sender, such as GroupMe, remains liable.") (emphasis added). See also 2015 TCPA Declaratory Ruling and Order at 7990 ¶ 49 ("The Commission reiterated in the GroupMe Declaratory Ruling that, while the scope of consent must be determined upon the facts of each situation, it was reasonable to interpret the TCPA to permit a texter such as GroupMe to send texts based on the consent obtained by and conveyed through an intermediary (the group organizer), with the caveat that if consent was not actually obtained, GroupMe remained liable for initiating or making autodialed text messages to wireless numbers.").

¹⁹ See 2015 TCPA Declaratory Ruling and Order at 8006-8012 ¶¶ 85-96.

²⁰ Anthem Petition at 13.

This list runs the gamut from applying for insurance, or medical coverage, to advertising and promoting services and products (which sounds a lot like telemarketing), to actual medical treatment communications ranging from appointments to medications to facility choice and nursing care. The scope of these calls is simply too broad to be categorically considered as “non-telemarketing calls” or reasonably subsumed within the “scope of consent” inferred from the consumer’s provision of a telephone number in response to a request.

A. The Amendment to Paragraph 141 Should Be Permitted Only if Its Scope is Limited to Non-Telemarketing Calls

The petitioners’ proposed amendment to Paragraph 141 consists of the bolded language in the following:

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, another covered entity, or a party engaged in an interaction subject to HIPAA,** ~~healthcare provider~~ constitutes prior express consent for **treatment, payment, and health care operation** ~~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.” **Examples of Prior Express Consent include, but are not limited to, the provision of a telephone number by an employer or a party authorized to implement the health insurance enrollment, application or renewal process on its behalf, and a state Medicaid agency or another governmental entity and/or their business associate(s) as part of an interaction subject to HIPAA.**²¹

The language of this proposed amendment does not match the scope of the petitioner’s request for a “prior express consent clarification for non-telemarketing calls,”²² but instead broadens its scope to *all* “treatment, payment, and health care operation calls subject to HIPAA.” It is particularly unclear what the petitioners mean by “health care operation calls.”

The Commission has clearly articulated what constitutes a telemarketing call in its rules. Whether or not a particular call is a “telemarketing call” under the Commission’s rules depends on whether it was initiated “for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services....”²³ Some of the calls that callers might consider to be “health care operation calls” might, in fact, qualify as blatant telemarketing under the Commission’s rules, such as “communications made to describe a health-related product or service” described by the petitioners.²⁴

²¹ *Id.* at 27.

²² *Id.*

²³ 47 C.F.R. § 64.1200(f)(12).

²⁴ *See* Anthem Petition at 13.

We therefore urge the Commission to insert the following qualifying *italicized and underlined* language if it believes the amendment is necessary:

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, another covered entity, or a party engaged in an interaction subject to HIPAA, healthcare provider** constitutes prior express consent for ***non-telemarketing treatment, payment, and health care operation*** ~~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.” **Examples of Prior Express Consent include, but are not limited to, the provision of a telephone number by an employer or a party authorized to implement the health insurance enrollment, application or renewal process on its behalf, and a state Medicaid agency or another governmental entity and/or their business associate(s) as part of an interaction subject to HIPAA.**

B. The Amendment to Paragraph 141 Should Also Clarify the Scope of Consent

We are also concerned that many of the calls discussed in the petitioners’ complaint cannot reasonably be subsumed within the “scope of consent” inferred from the consumer’s provision of a telephone number in response to a request.

For example, if an insurance provider asks for the consumer’s telephone number, without specifying the potential broad range of issues that might be the subject of robocalls to that number, the only reasonable way to interpret the scope of that consent would be that the calls would have to be limited to those relating directly to the insurance, *i.e.*, qualifying for the insurance, paying for it, renewing it, the terms of the insurance, the coverage of the insurance, etc. But calls relating to the medical care that would be paid for by the insurance fall far outside the scope of that consent.

Given the TCPA’s requirement that consent to receive robocalls be express, we urge the Commission to clarify that a consumer’s provision of a cell phone number to a business is, at most, consent to receive autodialed or prerecorded calls regarding the specific (and often time-limited) matter for which the telephone number was requested. We are asking the Commission to clarify that, unless the types of calls are specifically consented to by the consumer, the scope of consent that is inferred from a consumer’s provision of a telephone number is limited *to the transaction* in for which the number was provided.

In the 2015 Omnibus Order, the Commission clarified:

By “within the scope of consent given, and absent instructions to the contrary,” we mean that the call must be closely related to the purpose for which the telephone number was originally provided. For example, if a patient provided his phone number upon admission to a hospital for scheduled surgery, then calls pertaining to that surgery or follow-up procedures for that surgery would be closely related to the

purpose for which the telephone number was originally provided.²⁵

The Commission's statement thus clearly limits the consent created when a patient provides his or her number to a medical facility to the specific circumstances for which the number was requested. In the Commission's example, the phone number is provided in relation to a specific surgery, so the consumer has consented to calls related to that specific surgery.²⁶ A necessary corollary is that providing the phone number before a surgery is not consent to receive robocalls on issues that are not "closely related to the purpose for which the telephone number was originally provided."

The Commission reiterated this position this year in the Blackboard and Edison Declaratory Ruling:

The clearest way to obtain consent is for a caller to be explicit about the types of calls he or she wishes to have consent for, and the Commission has acknowledged that in limited cases, the mere giving of a telephone number as a contact number satisfies the consent requirement as long as the call or text is closely related to the purpose for which the consumer gave the number consistent with the point that "Congress did not expect the TCPA to be a barrier to normal, expected and desired business communications." The "scope of consent must be determined upon the facts of each situation."²⁷

IV. Our Request

We urge the Commission to 1) eliminate telemarketing calls from the provision; and 2) state that the subject of the transaction controls the scope of consent unless the consumer specifically indicates the subject matter of the robocalls that is included in the consent. For purposes of the requests made in the Anthem Petition, we suggest the following *italicized and underlined* changes should be added to the proposed amendment of paragraph 141 of the 2015 Omnibus Order:

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, another covered entity, or a party engaged in an interaction subject to HIPAA,** ~~healthcare provider~~ constitutes prior express consent for ***non-telemarketing* treatment, payment, and health care operation** ~~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." **Examples of Prior Express Consent include, but are not limited to, the provision of a telephone number by an employer or a party authorized to implement the health insurance enrollment, application or renewal process on its behalf, and a state Medicaid**

²⁵ 2015 TCPA Declaratory Ruling and Order at 8029 n.474 (emphasis added).

²⁶ *See id.*

²⁷ Blackboard and Edison Declaratory Ruling at 9 ¶ 19 (emphasis added).

agency or another governmental entity and/or their business associate(s) as part of an interaction subject to HIPAA. *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 a telephone number.*

If there are any questions, please contact Margot Saunders at the National Consumer Law Center (NCLC), msaunders@nclc.org (202 452 6252, extension 104).

This disclosure is made pursuant to 47 C.F.R. §1.1206.

Thank you very much.

Sincerely,

/s/
Margot Saunders
Of Counsel
National Consumer Law Center
1001 Connecticut Ave, NW
Washington, D.C. 20036
202 452 6252
msaunders@nclc.org
www.nclc.org

List of Organizations On Whose Behalf this Letter is Provided

Through multilingual consumer education materials, community outreach and issue-focused advocacy, **Consumer Action** empowers underrepresented consumers nationwide to assert their rights in the marketplace and financially prosper.

The **Consumer Federation of America** is an association of nearly 300 nonprofit consumer groups that was established in 1968 to advance the consumer interest through research, advocacy and education.

EPIC is a public interest research center in Washington, DC. EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age.

Since 1969, the nonprofit **National Consumer Law Center®** (NCLC®) has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training.

The [National Association of Consumer Advocates](#) (NACA) is a nonprofit association of consumer advocates and attorney members who represent hundreds of thousands of consumers victimized by fraudulent, abusive and predatory business practices. As an organization fully committed to promoting justice for consumers, NACA's members and their clients are actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means.

[Public Citizen](#) is a national nonprofit organization with more than 225,000 members and supporters. We represent consumer interests through lobbying, litigation, administrative advocacy, research, and public education on a broad range of issues including consumer rights in the marketplace, product safety, financial regulation, safe and affordable health care, campaign finance reform and government ethics, fair trade, climate change, and corporate and government accountability.

[Public Knowledge](#) is a nonprofit policy and public interest organization that promotes competition and consumer protection on technology, telecommunications, and intellectual property issues.