



February 23, 2015

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

Re: Response to Petition for Expedited Declaratory Ruling and Exemption of the American Association of Healthcare Administrative Management ("AAHAM"), CG Docket No. 02-278

Dear Ms. Dortch:

These comments are submitted by the **National Consumer Law Center**,<sup>1</sup> on behalf of its low-income clients, as well as the following national advocacy organizations: Consumer Action, Consumer Federation of America, the National Association of Consumer Advocates, Public Citizen, and U.S PIRG.<sup>2</sup> On October 21, 2014, the American Association of Healthcare Administrative Management ("AAHAM") filed a Petition for Expedited Declaratory Ruling and Exemption.<sup>3</sup> The Petition seeks four items of relief, all of which are unnecessary and would be harmful to consumers. The Commission should continue to insist that industry bear the burden of ensuring that consumers have truly consented to receiving robocalls to their cell phones, absent an emergency. As for wrong number calls, the FCC can and should require a few simple measures, which we propose at the end

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<sup>1</sup> The **National Consumer Law Center (NCLC)** is a non-profit corporation founded in 1969 to assist legal services, consumer law attorneys, consumer advocates and public policy makers in using the powerful and complex tools of consumer law for just and fair treatment for all in the economic marketplace. NCLC has expertise in protecting low-income customer access to telecommunications, energy and water services in proceedings at the FCC and state utility commissions and publishes *Access to Utility Service* (5<sup>th</sup> edition, 2011) as well as NCLC's *Guide to the Rights of Utility Consumers* and *Guide to Surviving Debt*.

<sup>2</sup> At the end of this letter, we include a description of the national advocacy organizations supporting these comments.

<sup>3</sup> See *American Association of Healthcare Administrative Management*, Petition for Expedited Declaratory Ruling and Exemption, CG Docket No. 02-278 (filed Oct. 21, 2014) (Petition).

<http://apps.fcc.gov/ecfs/document/view?id=60000975030>.

of this response, that will protect industry from liability *by reducing wrong number calls* rather than by opening the floodgates to them.

### **I. The Sweeping Scope of the Exemption Requests in This Proceeding Is Reason Alone to Reject Them.**

AAHAM's Petition is sweeping in scope. First, the Petition seeks a declaratory ruling that would, in effect, give "healthcare providers"—and any of their "business associates"—free rein to place non-telemarketing robocalls about *any* "health care" topic to consumers. This would broadly expand the concept of "prior express consent," without justification. It would result in an increased barrage of the intrusive and unwanted calls about which consumers already file so many complaints with the FCC and the FTC.

Second, the petition seeks to allow robocalls to be made to "the telephone number" previously provided by an individual to the healthcare provider. This would permit numerous calls from the health care provider, or its associates, to that telephone number, even if the telephone number no longer belongs to the person who provided consent.

Third, the Petition seeks permission to allow consent for the calls to a cell phone to be provided by someone other than the owner of the cell phone, when the owner is incapacitated. This stretches the notion of express consent beyond recognition. In addition, it is completely unnecessary, as emergency calls are already exempted from the requirement for express consent.

Fourth, the Petition requests an outright exemption from the TCPA's prior express consent requirement for *any* non-telemarketing health care robocalls that are not "charged to the called party." In seeking such a broad exemption, AAHAM does not limit its request to robocalls that might serve the needs of the consumer being called. Instead, it seeks exemption from liability for conduct that Congress explicitly found to be a nuisance and invasion of privacy.<sup>4</sup>

In sum, AAHAM wants protection for virtually every non-telemarketing call that healthcare providers ordinarily make, including debt collection calls ("Account communications and payment notifications," "available payment options") and other vague subject matter ("wellness checkups"). Granting the AAHAM petition would pervert the broad consumer protections provided by HIPAA into equally broad *exemptions* to TCPA liability. We urge the Commission to continue allowing consumers to make their own decisions as to what calls they actually do or do not want to receive, and to reject AAHAM's petition outright.

The undersigned also wish to address the Comments of Rite Aid,<sup>5</sup> filed in response to the Petition, which request an even broader exemption from the TCPA's prior express consent requirement for *all* "health care" robocalls (even telemarketing calls) and *regardless* of whether they are "charged to the called party." In other words, if Rite Aid had its way, it could make robocalls to any telephone number for which a prior consent had ever been provided, about sales on toothpaste and aspirin. Such an exemption would not only be unprecedented in scope and harmful to

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<sup>4</sup> See TCPA, Pub. L. No. 102-243, § 2(10) (1991).

<sup>5</sup> Comments of Rite Aid. <http://apps.fcc.gov/ecfs/document/view?id=60001014220>.

consumers, but would exceed the commission's authority for exemptions, which is limited to calls that are not charged to the called party.

Further, Rite Aid's transparent motivation in seeking a retroactive waiver is inappropriate. Rite Aid is now defending a lawsuit alleging that it made repeated robocalls advertising flu shots, which is a big money maker for the pharmacy, after ignoring repeated requests to cease the calls.<sup>6</sup> An exemption would free it of liability for these calls even after it ignored the stop requests. We thus urge the Commission to reject both AAHAM's Petition and the additional relief requested by Rite Aid.

## **II. The Mere Provision of a Telephone Number on a Single Occasion is Not Prior Express Consent for All Conceivable Health Care Related Robocalls**

AAHAM is requesting a broad expansion of the meaning of providing "prior express consent" within the context of a transaction. AAHAM's Petition would no longer limit the concept of express consent to a particular transaction. It argues that the provision of a telephone number to a healthcare provider establishes "prior express consent" under the TCPA for *all* health care related non-telemarketing calls made by or on behalf of the "covered entity," as well as its "business associates," regardless of their subject matter.<sup>7</sup>

AAHAM proposes completely ignoring the word "express" in the phrase "prior express consent." The plain meaning of "express consent" is that it must stem from an informed consumer decision, taking reasonable consumer expectations into account. Absent a written agreement otherwise, a consumer who provided a telephone number to her ophthalmologist in order to communicate about appointments and test results would never expect to receive robocalls about the availability of a new style of eyeglasses from the doctor's eyeglass shop. Prior express consent must be limited to consent for calls in the context for which it was provided.

AAHAM's incorporation of terms defined by HIPAA in its proposal magnifies the scope of the proposed exemption. HIPAA defines terms such as "health care," "health care provider," "covered entity," and "business associates" extremely broadly.<sup>8</sup> This is appropriate for a law that provides broad consumer protections concerning one's personal health information. But HIPAA's broad definitions are not a reasonable proxy for the boundaries of consent to health care related robocalls. HIPAA's definitions are broad in order to provide comprehensive privacy protections to consumers. They bear no reasonable relation to the robocalls a consumer expects to receive as a

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<sup>6</sup> See *Zani v. Rite Aid Hdqtrs Corp.*, 14-cv-9701 (S.D.N.Y.) Rite Aid sent prerecorded messages promoting flu shots to pharmacy customers even though the customers did not consent to these calls and Mr. Zani repeatedly requested the calls to stop.

<sup>7</sup> Even now, callers often take advantage of obtaining a consumer's number in a very limited context (e.g., a single transaction filling a prescription), to then make calls outside of that context for the purposes of telemarketing. And some purported non-telemarketing "health care" calls are themselves simply a pretext for telemarketing. For example, a consumer might fill a prescription once at a particular pharmacy, but then be put on the company's list to be robocalled with "prescription refill reminders" during a particular time period (e.g., prescription allergy medication during allergy season), or for months or even years later. The automated nature of these calls makes it difficult for consumers to get them to stop.

<sup>8</sup> See 45 C.F.R. § 160.103.

result of providing her number to a hospital or pharmacy. The use of HIPAA's terms in the TCPA context would completely contradict their purpose of providing broad consumer *protections*.<sup>9</sup>

Health care providers, just like other businesses, have ample opportunity to obtain prior express consent for any non-emergency calls they want to make, and there is no justifiable reason for them to be afforded a special exception that will affirmatively deny consumers the ability, granted by Congress, to make their own decisions about what autodialed or prerecorded voice calls they do or do not want to receive. Granting AAHAM's petition will set a dangerous precedent, effectively chipping away at consumer privacy rights one industry at a time. AAHAM's petition should be denied.<sup>10</sup>

### **III. One Consumer's Express Consent for Calls Does Not Permit All Calls to That Telephone Number, Even Wrong Number Calls**

AAHAM's request in this petition mirrors the request made by the Consumer Bankers Association<sup>11</sup> (CBA) to reinterpret the meaning of "called party" as "intended recipient" under the TCPA. The undersigned responded to and strongly opposed the CBA petition<sup>12</sup> because both that petition and this one would be very damaging to consumers.

Both petitions would completely eradicate any incentive on industry to limit the number of wrong number calls made to reassigned cell phone numbers. Yet "wrong number" calls to reassigned numbers are largely the result of inadequate calling practices and a pervasive environment of industry indifference. Companies take for granted that they should be able to call consumers using an autodialer or artificial/prerecorded voice technology, whether their customers or other consumers actually want the calls or not.

A prime example of rampant non-telemarketing "wrong number" calls is in the debt collection industry. Collection agencies frequently make calls based on inaccurate skip-tracing or unverified contact information originally obtained by their creditor-clients months or even years prior.<sup>13</sup> These include calls made by debt collectors attempting to collect medical debts.

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<sup>9</sup> Further, unlike the TCPA, HIPAA itself has no statutory private right of action. *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1081 (9th Cir. 2007).

<sup>10</sup> In the unfortunate event that the Commission is inclined to find prior express consent for non-telemarketing calls upon the provision of a telephone number to a health care provider, it should be careful to clarify that such consent only extends to calls relating to the specific transaction in which the number was provided. Such a rule would track the Commission's rules regarding transaction-based consent in the context of debt collection. *See Request of ACA International for Clarification and Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 23 FCC Rcd 559 (2008).

<sup>11</sup> Petition for Declaratory Ruling of the Consumer Bankers Association (available at <http://apps.fcc.gov/ecfs/comment/view?id=6019372731>).

<sup>12</sup> Comments of Seven National Consumer Groups (available at <https://consumermediallc.files.wordpress.com/2015/01/02-278-11-17-2014-margot-saunders-60000985926.pdf>).

<sup>13</sup> *See, e.g.,* *Lowe v. Diversified Consultants, Inc.*, No. 12-2009 (N.D. Ill.) (Dkt. No. 84, Am. Consol. Compl. ¶¶ 29-45) (consumer obtained new cell phone number after receiving repeated wrong number robocalls from debt collector—despite multiple oral and written requests to stop—only to then begin receiving wrong number collection robocalls to his new number for a different debtor from the same collection agency).

Wrong number calls are a serious problem faced by consumers across the country, and consumers who receive them—even those made solely for “informational, non-telemarketing” purposes—are routinely left with no effective way to get the unwanted calls to stop. It would be a great injustice for the Commission to placate the industry at the expense of the consumers Congress has charged it to protect.

#### **IV. There is No Legal Support that Would Permit One Person to Consent to Calls to Another Person’s Cell Phone.**

The AAHAM petition seeks to allow one person to consent to robocalls to another person’s cell phone when the other person is incapacitated. This proposal has no basis in reality.

There is no need or justification for a third party to consent to robocalls to an incapacitated person’s cell phone. Any such calls would either be for an emergency or would be manually dialed. Further, we are unaware of any claim, lawsuit, or fact pattern under the TCPA for calls made to a third party while someone was incapacitated. It appears that AAHAM is hoping to create an exemption for an extreme hypothetical in order to fit other scenarios into the exemption.

Calls to the incapacitated person’s cell phone are of no use whatsoever, unless and until that person is no longer incapacitated. At that time, the person should have the ability to consent – or not – to specific types of calls from his or her health care provider. There is no need for one person to grant authority to call another’s cell phone.

#### **V. An Exemption for All Health Care Related Robocalls that Do Not Fall within the “Telemarketing” Rubrick Would Not Serve the Public Interest**

Rather than limiting its exemption request to robocalls that might serve the public interest, such as emergency notifications, AAHAM wants *carte blanche* to use robocalling equipment to make virtually all of the calls that healthcare providers ordinarily make, without having to abide by any consent requirements. Consumers would be severely harmed by such an exemption, and this would abrogate the basic protections of the TCPA.

Again relying on the broad scope of the HIPAA-defined term “health care,” AAHAM argues that even its debt collection calls are health care calls that should be exempted from the consent requirement. There is no public interest served by allowing AAHAM’s members to use a robodialer to make “payment notification” calls or calls about “available payment options.”

There are a virtually infinite number of calls a health care provider might make to promote the interests of the health care industry that would not technically fall within the strict definition of telemarketing. There should be no exemption for these calls. The requested exemption would create a scenario ripe for abuse. The fact that AAHAM argues for the inclusion of debt collection calls in its exemption is proof of this.

#### **VI. The TCPA Does Not Provide Authority to Create Content-Based Exemptions as Requested by Rite Aid.**

Rite Aid seeks to exempt even telemarketing calls from the prior express consent requirement, as long as they are related to “health care.” Rite Aid already makes robocalls (as

alleged, without consent) to promote its flu shot products for which it reaps significant profits,<sup>14</sup> and such an exemption could include anything from advertising a special on anti-dandruff shampoo to “reminders” to stop in for some over-the-counter relief during allergy season. These are exactly the type of calls that consumers do not want and that the FCC should continue to prohibit without prior express consent.

More fundamentally, Rite Aid’s request must be denied because the Commission does not have the authority to grant the requested exemption, which Rite Aid would not limit to calls for which there is no charge to the consumer. The TCPA provides the FCC authority to exempt messages on the basis of content only when there is no charge to consumer. This was the reason that the FCC was able to exempt calls made by telephone providers, as those calls are not included in any bucket of minutes. Specifically, the TCPA provides:

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission –  
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(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service *that are not charged to the called party*, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect. (Emphasis added).<sup>15</sup>

The exemption that Rite Aid seeks is not limited to such calls. Further, the exemption is intended to cover calls to cell phones, and the Commission has already found that consumers are charged for such calls.<sup>16</sup>

## **VII. Actions the FCC and Industry Can and Should Take To Reduce Wrong Number Calls**

There have been endless petitions and requests for “clarification” and other regulatory interpretations to the TCPA by various industry players, seeking to make robocalls to consumers without fear of liability if they do it wrong and call the wrong party. This turns the entire protective point of the TCPA on its head. Congress passed the TCPA to provide protections from unwanted robocalls to cell phones. Robocalls are universally hated by consumers. They were when the TCPA first passed, and they continue to be. Robocalls are particularly abhorred by consumers when they are made to their cell phones. This fact is evident in the 60,000 consumer signatures on petitions urging the FCC *not* to allow exemptions facilitating robocalls to cell phones.<sup>17</sup>

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<sup>14</sup> See <http://www.forbes.com/sites/brucejapsen/2013/02/08/how-flu-shots-became-big-sales-booster-for-walgreen-cvs/>, or <http://triblive.com/news/2728437-74/flu-percent-shots-cdc-vaccine-shot-according-boom-drug-million#axzz3RvJcLq4U>.

<sup>15</sup> 47 U.S.C. § 227(b)(2)(C)).

<sup>16</sup> The Commission has already held that consumers are charged for purposes of the TCPA when a call drains time from the bucket of minutes under their cell phone plan. See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC Report and Order, CG Docket No. 02-278 (Feb. 15, 2012) (“2012 Report and Order”) at paragraph 25.

<sup>17</sup> See Press Release from Consumer Groups: “Nearly 60,000 Consumers Tell the FCC: Don’t Allow Robocalls to My Cell Phone, Key Privacy and Consumer Rights under Siege from Industry Attempt to Evade ‘Do Not Call’ protections,”

Rather than granting exemptions, and exceptions, and interpretations that undermine the prohibitions against unconsented robocalls to cell phones, the FCC should be searching for ways to help both industry and consumers. If the FCC took certain measures and industry took other precautions, wrong number calls to reassigned numbers would be virtually eliminated. That would help both industry and consumers.

The bottom line is that the FCC efforts should be to ensure compliance with the TCPA, not to redefine the meaning of the protections provided by the TCPA or to limit liability for abridging those protections. The FCC should be ensuring that industry still has significant incentives to comply with the law, and to ensure that robocalls are not made to cell phones – whether they are charged to the consumer or not – unless there is prior express consent for the calls or the calls relate to an emergency.

The FCC should take actions along the following lines to assist the calling industry in avoiding wrong number calls to reassigned numbers:

1. Specifically articulate the minimum number of days that cell phone companies must leave an abandoned number until it is reassigned to another cell phone user.
2. Mandate that all cell phone providers operating in the United States participate in a program like Neustar's so that using this technology provides close to 100% reliable information about whether a number has been reassigned.
3. Mandate that during the period between assignments, calls to the abandoned number will meet with a particular signal or message that tells the caller that the number no longer belongs to the prior owner.

At the same time, industry can employ reasonably simple mechanisms to limit – or even completely eradicate – wrong number calls to reassigned numbers. These mechanisms would rely on the FCC's actions as described above. We are most definitely *not* proposing that the use of these measures would provide callers with a safe harbor against liability under the TCPA. Just the opposite: we are recommending meaningful steps that industry can take to avoid making the wrong number calls, which itself protects callers from liability.

4. Ensure that every contact with a customer or patient, whether in person, by email, over the internet, or even by snail mail, conspicuously requests affirmation by the consumer of her/his phone number, and specific consent for the purpose relevant to the contact (or anything else for which the business wants to robocall the consumer), and discloses that such consent is not required or mandatory.
5. Ensure that robocalls are only made to consumers within the number of days that is equivalent to the Abandoned Call Period from the last contact described in subparagraph 1. This would mean that if the consenting consumer no longer had the number, the calling business would not reach any other consumer because the call would not have been reassigned in the meantime.

6. Require that all robocalls that are met with the signal or message produced by the abandoned number between assignments result in automatically noting that the number no longer belongs to the consumer who provided consent, and should not be called again using an automatic telephone dialing system or an artificial or prerecorded voice.
7. Employ a Neustar-type technology that would provide information to the caller about reassigned numbers.

Adopting these protections may take a bit of time, and require a new approach by industry. Rather than spending millions of dollars on efforts to change the liability standard for the TCPA, the industry could instead employ a fraction of that amount to ensure that they are – in fact – complying with the TCPA.

We very much appreciate the time and attention involved in considering our comments. If you have any questions, or would like any follow-up, please do not hesitate to contact Margot Saunders, counsel at the National Consumer Law Center, at [msaunders@nclc.org](mailto:msaunders@nclc.org), or 202 452-6253, extension 104.

Sincerely,

/s/

Margot Saunders  
Counsel  
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Through multilingual financial 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 organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education.

The **National Association of Consumer Advocates (NACA)** is a nonprofit association of more than 1,500 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.

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.

**Public Citizen** is a national, nonprofit consumer advocacy organization representing consumer interests in Congress, the executive branch and the courts.

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