

## *HIPAA and the Telephone Consumer Protection Act: What Risks Loom in Contacting Patients by Phone and Text Messages?*

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A broad group of organizations working to ensure that we as a nation find the right balance between the protection of confidential health information and the efficient and interoperable systems needed to provide the very best quality of care.

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SCAN Health Plan  
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Surescripts  
Texas Health Resources  
Teladoc  
TransUnion  
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# Key Legislation on TCPA in 115th Congress

## Key Legislation

- **S. 564 - HANGUP Act** - Introduced in Senate (03/08/2017) - Sen. Markey – Read twice and referred to Commerce, Science and Transportation Committee.
- **H.R. 290 - Federal Communications Commission Process Reform Act of 2017** – Rep. Walden - Passed House without amendment (01/23/2017) – House Energy and Commerce Committee - Received in Senate and read twice and referred to Commerce, Science and Transportation Committee.
- **H.R. 4986 - FCC Reauthorization Act of 2018** – House Energy and Commerce Committee, Transportation and Infrastructure, Oversight and Government Reform. Senate -03/07/2018 – Received in Senate and read twice and referred to Commerce, Science and Transportation Committee.

# House Energy and Commerce Committee Hearing on “Modernizing the Telephone Consumer Protection Act”

- On September 22, 2016, the House Energy and Commerce Subcommittee on Communications and Technology considered the challenges encountered by consumers and companies in a world where technology and consumer behavior have evolved faster than the legislative language of the Telephone Consumer Protection Act of 1991.
- Michelle Turano, Vice President of Government Affairs and Public Policy at WellCare, testified and expressed the need to align TCPA with HIPAA regulations.

Source: [Background memo from House Energy and Commerce Committee Hearing on “Modernizing the Telephone Consumer Protection Act”](#)

# House Judiciary Committee Hearing on Lawsuit Abuse and the “Telephone Consumer Protection Act”

- On June 13, 2017, the House Judiciary Subcommittee on the Constitution and Civil Justice held hearing on Lawsuit Abuse and TCPA.
- Becca Wahlquist, Partner at Snell & Wilmer LLP, testified and explained that FCC has not clarified healthcare exemptions to TCPA liability.
- As a result, pharmacies have been the targets of TCPA lawsuits for communications related to flu shot and pharmacy refill reminders.
- Adonis Hoffman, Founder & Chairman of Business in the Public Interest, also testified and noted how healthcare companies have petitioned the FCC to clarify its interpretation of certain TCPA provisions.

Source: [Witness testimony from Snell & Wilmer LLP, and Business in the Public Interest](#)

# TCPA Petitions

## Anthem, Inc.; Blue Cross Blue Shield Association; Wellcare Health Plans, Inc.; American Association of Healthcare Administrative Management (filed July 28, 2016)

- Sought clarification from FCC on two items:
- 1) That the provision of a phone number to a “covered entity” or “business associate” as defined under HIPAA, establishes prior express consent for non-telemarketing calls permissible under HIPAA for treatment, payment and/or healthcare operations.
- 2) That the term “healthcare provider” as stated in the 2015 Omnibus TCPA Order include “HIPAA covered entities and business associates.”
- Petitioners maintain clarifications are needed to align TCPA and HIPAA.

Source: [TCPA FCC Petitions Tracker](#)

# Pharmaceutical Company Petition

- Filed comments in support of Anthem Petition.
- Many pharmaceutical company operations may not be a “covered entity” or “business associate” under HIPAA.
- Asked FCC to extend proposed relief to pharmaceutical manufacturers who make calls as part of a patient support initiative.
- Pharmaceutical companies indicate these manufacturer patient support programs promote communications related to treatment, case management and coordination.



# Anthem, Inc. (Filed June 10, 2015)

- Anthem sought a declaratory ruling and exemption regarding non-telemarketing healthcare calls.
- Asked FCC to make non-telemarketing healthcare calls/text messages from plans/providers answer to an “opt out” consent rule.
- Anthem opines these calls provide important and relevant information to patient about their health.

Source: [TCPA FCC Petitions Tracker](#)

# Industry Reaction

- FCC's interpretation of TCPA has not recognized pre-existing regulation under HIPAA, which allows covered entities and business associates to use protected health information (PHI) for treatment, payment and healthcare operations messages.
- Ambiguity surrounding FCC's interpretation adversely affects ability of managed care plans to reach out to members.

Source: [Witness testimony from WellCare, House Energy and Commerce Committee, 9/22/16](#)

# Industry Reaction

- Misinterpretation of 2015 Declaratory Order would restrict the “scope of exempted calls or text messages made by or on behalf of provider.”
- Too limited of an interpretation and could exclude pertinent HIPAA covered entities.
- AHIP believes this unintended consequence could limit cutting edge non-marketing healthcare communications.

Source: [Document for Record- Rep. Latta on behalf of Rep. Bilirakis – AHIP Comments, House Energy and Commerce Committee, 9/22/16](#)

# TCPA Recommendations

- WellCare recommends Congress indicate the “provision of a phone number to a HIPAA covered entity or business associate establishes prior ‘express consent’ for healthcare treatment, payment and operations, and communication to that number.”
- Recommends Congress examine the intent of the caller.
- Congress should remove the FCC’s strict liability interpretation.

Source: [Witness testimony from WellCare, House Energy and Commerce Committee, 9/22/16](#)

# TCPA Recommendations

- WellCare recommends the FCC confirm the use of health plan member phone numbers under TCPA align with HIPAA regulations.
- TCPA alignment with HIPAA will allow members to receive important calls permissible under HIPAA.
- FCC should update policy related to reassigned phone numbers to ensure members are not bereft of important healthcare information.

Source: [Response to Questions for the Record, Michelle Turano, House Energy and Commerce Committee, 9/22/16](#)

# Questions?

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