

OFFICE OF THE ATTORNEY GENERAL
FOR THE DISTRICT OF COLUMBIA
441 4th Street, N.W.
Washington, D.C. 20001,

Petitioner,

v.

AETNA INC.
151 Farmington Avenue
Hartford, CT 06156

Respondents.

ASSURANCE OF VOLUNTARY COMPLIANCE

Petitioner the Attorney General for the District of Columbia, on behalf of the District of Columbia (“District”), and Respondent Aetna Inc. (“Aetna”) (and with the District, the “Parties”), hereby enter into this Assurance of Voluntary Compliance (“Assurance”), pursuant to D.C. Code § 28-3909(c)(6). This Assurance shall be effective on the date it is executed by both Parties (hereafter the “Effective Date”).

I. THE PARTIES

1. Petitioner the Attorney General for the District of Columbia is the chief legal officer for the District of Columbia. Pursuant to D.C. Code § 28-3909(a)-(b), the Attorney General is authorized to bring legal actions seeking injunctive relief, consumer restitution, civil penalties, costs, and attorneys’ fees for violations of the District’s Consumer Protection Procedures Act (“CPPA”), D.C. Code §§ 28-3901, *et seq.* Pursuant to D.C. Code § 28-3909(c), the Attorney General is authorized to negotiate and enter into agreements for compliance by merchants with the provisions of the CPPA. The Office of the Attorney General for the District of Columbia, acting on behalf of its consumers also may, pursuant to 42 U.S.C. § 1320d-5(d),

enforce the provisions of HIPAA and its enabling regulations, which establish national standards to safeguard individuals' medical records and other Protected Health Information.

2. Respondent Aetna is a managed health care company that administers consumer directed health care insurance plans and related services. Aetna is headquartered in Hartford, Connecticut, and has engaged in the business of providing health insurance to consumers residing in the District of Columbia.

II. BACKGROUND

3. The human immunodeficiency virus ("HIV") is a lentivirus (a subgroup of retrovirus) that causes HIV infection and over time acquired immunodeficiency syndrome ("AIDS"). HIV-related stigma continues to be a barrier that must be overcome in supporting those living with HIV and stopping the spread of HIV and AIDS. In fact, 90% of Americans recognize that people living with HIV and AIDS face prejudice and discrimination. Roughly one in eight people living with HIV is denied health services because of such stigma and experiences discrimination associated with HIV and AIDS.

4. An unauthorized or otherwise improper disclosure of a person's HIV or AIDS status can often result in the denial of proper health care, poor treatment in educational and work settings, and many other collateral consequences. Moreover, for the roughly one million Americans living with HIV/AIDS, the painful stigma and discrimination continue to permeate their daily lives.

5. To ensure that its consumers feel safe to come forward to be tested and treated for HIV, the District of Columbia has laws that both generally protect the confidentiality of consumers' medical records, as well as HIV-specific privacy provisions designed to protect the confidentiality of health information.

6. Congress recognized the importance of protecting the privacy of all individually identifiable protected health information when it enacted the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, as amended by the Health Information Technology for Economic and Clinical Health Act, Pub. L. No. 111-5, 123 Stat. 226, and the Department of Health and Human Services Regulations, 45 C.F.R. § 160, *et seq.* (collectively, “HIPAA”), which established a Federal floor of safeguards to protect the confidentiality of medical information.

III. INVESTIGATION AND FINDINGS

The District alleges and/or has made the following findings:

a. Aetna’s July 2017 Breach of Its Members’ Privacy Rights

7. Aetna is a covered entity within the meaning of HIPAA, and thus is required to comply with the HIPAA federal standards that govern the privacy of individually identifiable protected health information (“protected health information” or “PHI”).

8. Prior to January 1, 2016, because some health plans administered by Aetna placed HIV Medications on the Specialty Drug List, some members were designated to obtain these medicines only through mail order (and not a brick and mortar retail pharmacy) unless they were able to opt-out. Additionally, Aetna had alerted other members that there would be a 2015 plan change implementing the use of mail order for such medicines, although Aetna ultimately decided not to implement the change. Two separate class action lawsuits (*see Doe v. Aetna, Inc.*, No. 14-cv-2986 (S.D. Cal); *Doe v. Coventry Health Care, Inc.*, No 15-cv-62685 (S.D. Fla.) (collectively, the “Doe lawsuits”)) were filed regarding the use of mail order to obtain HIV Medications. The lawsuits claimed, among other things, that members were harmed by possible

increased out-of-pocket financial responsibility and potential privacy concerns related to receiving medications by mail order.

9. The *Doe* lawsuits were ultimately resolved in 2017. As required as part of the settlement, the parties agreed that a notice (the “Notice”) would be sent to certain members advising them of their options for obtaining HIV Medications at brick and mortar retail pharmacies or by mail order.

10. Aetna then provided the protected health information of such members to its Outside Counsel, who in turn gave the information to a third-party settlement administrator (“Settlement Administrator”), who then processed and carried out the mailing of the Notice required by the settlement agreement.

11. At all times relevant, Outside Counsel was acting as Aetna’s business associate under a Business Associate Agreement, performing services on Aetna’s behalf. Neither Aetna nor counsel in the case, however, entered into any Business Associate Agreement or sub-Business Associate Agreement with the Settlement Administrator.

12. On or about July 28, 2017, the Notices were mailed to certain members of certain Aetna and Aetna-related health plans. The Notices contained the names and addresses of approximately 388 District residents.

13. The Notices were mailed in envelopes with large transparent glassine windows that, under certain circumstances, allowed both the consumers’ names and addresses to be seen, along with the words “HIV Medications,” in whole or in part, through the envelope’s window.

14. On August 28, 2017, Plaintiff Andrew Beckett filed a putative class action complaint in the Eastern District of Pennsylvania, *Beckett v. Aetna, Inc. et al.* (Case No. 2:17-cv-03864 (JS)), which alleged that Aetna violated privacy laws as a result of the mailing of the

Notices and the potential revelation of a recipients' HIV-related information. That class action has now been settled, pending approval of the U.S. District Court, requiring Aetna to adopt best practices with regard to the mailing of information that contains PHI in litigation matters, and to pay in excess of \$17 million to the class members. Aetna, prior to the settlement, had already set up an immediate relief program designed to address the emergency needs of members who claim to have been harmed by the mailing and had engaged in making many of the changes to its privacy practices now required by that settlement, as well as the relief provisions contained in this Assurance.

b. Aetna's September 2017 AFib Mailing

15. As part of a research study intended to improve anti-coagulant medication usage, Aetna identified 10 of its members residing in the District of Columbia to receive educational materials based on their Atrial Fibrillation ("AFib") diagnosis with the intent to improve their medication adherence. On September 25, 2017, Aetna sent each of these members a mailing containing such educational materials.

16. Displayed on each envelope was the logo of the research study, "IMPACT-AFIB," which could have been interpreted as indicating that the recipient member had an AFib diagnosis. No additional information about the member other than his/her name and address was included on the envelope. Aetna reported the mailing (hereafter "AFib Mailing") to the United States Department of Health and Human Services' Office of Civil Rights.

c. Aetna's Representations with Regard to Member Privacy

17. On Aetna's website that is accessible to the public, the company acknowledges, *inter alia*, that HIPAA (in addition to other federal and state privacy laws) requires health care companies like Aetna to keep patient information confidential. *See Privacy FAQs*, Aetna,

<https://www.aetna.com/faqs-health-insurance/about-us-privacy-faqs.html>. The confidential information would include “[a]nything your doctors, nurses, and others put in your medical record.” *Id.* The website asserts that an Aetna member could “[d]ecide if you want to give your permission before your information can be used or shared,” as well as “[g]et a report on when and why your information was shared for certain purposes[.]” Aetna assures members that in service of privacy it would:

- Put safeguards in place to protect [such] information
- Limit the use and disclosure of your information to the minimum needed to accomplish our goals
- Enter into agreements with [Aetna’s] contractors and others to make sure they use and disclose your information properly and safeguard it appropriately
- Have procedures in place to limit who can see your information
- Hold training programs for employees to learn how to protect your information.

18. Indeed, Aetna also claims that it has “extensive operational and technical protections in place” to protect its members’ protected health information, and that it was “continually improving and updating as part of [Aetna’s] existing commitment to information privacy and compliance with legislation such as HIPAA and state privacy laws.” *Personal Health Record (PHR) FAQs*, Aetna, <https://www.aetna.com/faqs-health-insurance/personal-health-record-faqs.html>.

19. Plan documents that describe Aetna health plans of which District residents are members represent that information contained in the medical records of Members and information received from any Provider incident to the provider-patient relationship shall be kept confidential in accordance with applicable law. Information may be used or disclosed by a

Health Maintenance Organization (“HMO”) when necessary for a Member’s care or treatment, the operation of HMO and administration of an Explanation of Coverage, or other activities, as permitted by applicable law.

20. Aetna’s own policy, “Use and Disclosure of Member Protected Health Information (“PHI”),” states that Aetna “will safeguard member PHI from impermissible and unauthorized use and disclosure in accordance with federal and state law, the Company’s Code of Conduct, and industry standards.”

IV. ALLEGED VIOLATIONS

21. In addition to the general privacy protections medical information enjoys under District of Columbia law, records related to a case of HIV infection or AIDS enjoy special protection. Records revealing an individual’s HIV infection or diagnosis of AIDS cannot contain personal identifying information unless such disclosure is essential to safeguard the physical health of others, is ordered by a court, or such information would provide evidence probative of guilt or innocence in a criminal prosecution. D.C. Code, § 7-1605.

22. The District of Columbia alleges that Aetna’s HIV Mailing and AFib Mailing violated District of Columbia law and HIPAA by disclosing consumer’s protected health information without authorization or legal justification.

23. The District of Columbia further alleges that Aetna’s representations regarding the privacy of its members protected health information constituted a misrepresentation that had the capacity of misleading consumers, in violation of the District of Columbia’s Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq.*

24. Aetna neither admits nor denies the District’s assertions, allegations and findings set forth herein, including those set forth in paragraphs 7 through 23.

V. RELIEF

Required and Prohibited Business Practices

25. Aetna shall not misrepresent to consumers its policies and procedures concerning the collection, storage and dissemination of PII and PHI, in accordance with the CPPA.

26. Aetna shall implement policies and procedures to safeguard PHI sent through the mail, in accordance with HIPAA's privacy and security rules.

Privacy Practices

27. Aetna shall, to the extent it has not already done so, modify its Standard Operating Procedure for Print/Mailing Quality-Prevention of PHI/unwanted disclosure(s) ("Standard Operating Procedure # PRINT MAILING") and Use of Protected Health Information in Litigation - Best Practices Policy ("Standard Operating Procedure # LITIGATION"), in the following manner:

- a. Aetna shall apply Standard Operating Procedure # PRINT MAILING to all Aetna business units.
- b. Aetna shall use only the minimum necessary member PHI or personally identifiable information ("PII") when sending mailings to its members.
- c. Aetna shall require that a production attestation be used throughout all Aetna business areas to document instances in which use of Aetna member PHI or PII is contemplated in a member-facing mailing. This procedure shall require each business area and the privacy office approve whether including PHI or PII is necessary in any new or changed printed member mailing. This procedure shall also require approval of anything printed on the envelope itself. In addition, this procedure prohibits print vendors from processing any new or changed member-facing print material containing PHI/PII without an attestation form.

- d. When, as a result of their review of the production attestation a business area representative and the privacy office determine that the use of PHI and/or PII is necessary, the new Standard Operating Procedure # PRINT MAILING shall require that:
- i. all print projects be performed through Aetna's print procurement team for print sourcing; and
 - ii. the print procurement team maintain a procedure to ensure that no PHI is positioned anywhere near an envelope's window and, in certain circumstances, requires a cover sheet, such that only the member's name and address will appear on the first page of any mailing.
- e. Aetna shall require employees to be trained on Standard Operating Procedure # PRINT MAILING as part of Aetna's annual training process, and no less frequently than annually thereafter. Aetna shall also require new Aetna employees to be trained on Standard Operating Procedure # PRINT MAILING within thirty days of his or her date of hire, and no less frequently than annually thereafter.
- f. In 2018, Aetna shall conduct an internal audit of the process and controls implemented in Standard Operating Procedure # PRINT MAILING.
- g. Aetna shall apply its Standard Operating Procedure # LITIGATION to the litigation business area.
- h. As part of its Standard Operating Procedure # LITIGATION, Aetna shall adopt comprehensive, best practices policies and procedures for the use of PHI in

litigation in which Aetna is a party, and shall establish specialized processes for litigation involving heightened privacy concerns, including health plan members' HIV-related and behavioral health and substance use disorder information. Aetna shall, as part of its Standard Operating Procedure # LITIGATION, set forth policies and procedures for the disclosure of PHI when Aetna is not a party to an action. Aetna shall ensure that its Standard Operating Procedure # LITIGATION is designed to provide best practices in addition to satisfying any existing legal requirements.

- i. As part of its Standard Operating Procedure # LITIGATION, Aetna shall implement initial and annual training of the best practices in handling PHI in litigation for Aetna's relevant litigation staff and retained litigation counsel on Aetna matters. Relevant litigation staff for purposes of this subparagraph includes all personnel who may receive or transmit PHI, or who are responsible for the maintenance of records containing PHI, and may include non-lawyers.

Aetna shall ensure that vendors that it engages, or that are engaged by third-parties on its behalf (e.g., outside litigation counsel), enter into appropriate Business Associate Agreements or are covered under an appropriate Qualified Protective Order.
- j. Such changes shall be complete within 120 days of the Effective Date of this Assurance. Aetna may revise, alter or modify the changes described in this paragraph based on changes in the law or to enhance, streamline or improve its practices and policies, in Aetna's sole discretion. For a period of two (2) years following the Effective Date of this Assurance, Aetna shall notify the District of

any material changes to its New Operating Procedures at least 30 days in advance of implementing proposed changes.

Monitoring

28. Aetna shall provide to the District a copy of all audit reports produced pursuant to this Assurance within thirty (30) days of their completion.

29. In the event that Aetna reasonably believes that the performance of its obligations under any provision of this Assurance would conflict with any federal or state law or regulation that may be enacted or adopted after the Effective Date of this Assurance such that compliance with both this Assurance and such provision of law or regulation is not possible, Aetna shall notify the District promptly and the Parties shall meet and confer at their earliest convenience to attempt to resolve such conflict.

30. Within sixty (60) days of the Effective Date of this Assurance, Aetna shall appoint an independent consultant with appropriate experience and expertise in privacy matters in the healthcare industry to conduct the monitoring and reporting set forth in this paragraph (the "Consultant"). The Consultant shall review all of Aetna's policies and standard operating procedures related to member privacy, confidential information, PHI and/or PII, including plans to disseminate the policies and employee training on the privacy policies, to ensure compliance with the federal and District laws referenced in paragraphs 21 to 23 (and any other applicable federal or state law or regulation that may be enacted or adopted after the Effective Date of this Assurance governing the collection, storage and dissemination of PII and PHI) and shall monitor Aetna's compliance with its obligations under this Assurance. In furtherance of the requirements of this paragraph Aetna shall:

- a. Within sixty (60) days of engagement of the Consultant, provide an initial report to the Office of Attorney General regarding his/her findings.
- b. Following the initial report, at twelve (12) months and again at twenty-four (24) months from the Effective Date of this Assurance, submit additional reports on the status of Aetna's compliance with this Assurance and on its compliance with the federal and District laws referenced in paragraphs 21 to 23 (and any other applicable federal or state law or regulation that may be enacted or adopted after the Effective Date of this Assurance governing the collection, storage and dissemination of PII and PHI). The reports shall include recommendations for enhancement of privacy policies in an effort to maintain best practices in the privacy area.
- c. At the discretion of the District, the Consultant shall be extended for a one (1) year period if Aetna is not in substantial compliance with this Assurance or if the Consultant identifies significant material recommendations for enhancement of privacy policies in his/her final report.

31. Aetna shall provide the District with a report detailing its compliance with the requirements set forth in this Assurance, to be submitted to the District within one hundred eighty (180) days of the Effective Date of this Assurance. This report shall be in writing and shall set forth in detail the manner and form of compliance with this Assurance, and shall be signed by Aetna. Thereafter, a report of compliance shall be submitted to the District on an annual basis for the following two (2) years. In any case where the circumstances warrant, the District may require Aetna to file an interim report of compliance upon thirty (30) days notice.

32. Aetna shall retain all records relating to its obligations hereunder, including outreach, training, special programs, and other activities as set forth herein, until at least three (3) years from the Effective Date of this Assurance. During that time, Aetna shall, upon thirty (30) days written notice from the OAG, provide all documentation and information necessary for the OAG to verify compliance with this Assurance.

33. A default in the performance of any obligation under this assurance, after written notice of the default is provided to Aetna by the District and Aetna does not cure such default within ten (10) days of receipt of such notice (or such longer time as necessary to remedy the default as agreed by the District, which agreement shall not be unreasonably withheld), is a violation of this Assurance.

Penalty

34. Aetna shall pay to the District \$175,000.00 in penalties. Payment shall be made in full within ten (10) business days of the Effective Date of this Assurance and receipt of wiring instructions, whichever is later.

Miscellaneous

35. This Assurance is not intended for use by any third party in any other proceeding and is not intended, and should not be construed as an admission of wrongdoing or liability by Aetna. Nothing in this Assurance affects Aetna's (i) testimonial obligation or (ii) right to take legal or factual positions in defense of litigation or other proceedings involving any third party.

36. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of Aetna's applicable business operations with respect to such operations as of the Effective Date of this Assurance, regardless of how such applicable business operations are structured within the successor, assignee or transferee. For an avoidance

of doubt, this Assurance shall not apply to any pre-existing business operations of any successor, assignee or transferee of Aetna's applicable business operations. Aetna will provide notice of the obligations under this Assurance to any acquiring entity of Aetna's applicable business operations during the term of this Assurance.

37. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

38. Any failure by the District to insist upon the strict performance by Aetna of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof, and the District, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Assurance to be performed by Aetna.

39. All notices under this Assurance shall be provided to the following address via first class and electronic mail, unless a different address is specified in writing by the party changing such address:

For the District:

Benjamin Wiseman
Director, Office of Consumer Protection
Public Advocacy Division
441 4th Street, N.W., Suite 600-South
Washington, D.C. 20001
(202) 741-5226
Bejamin.Wiseman@dc.gov

For Aetna:

Ed Neugebauer
Aetna, Inc.
151 Farmington Avenue
Hartford, CT 06156

40. The District has agreed to the terms of this Assurance based on, among other things, the representations made to the District by Aetna and its counsel and the District's own

factual investigation as set forth herein. Aetna represents and warrants that neither it nor its counsel has made any material representations to the District that are inaccurate or misleading. If any material representations by Aetna or its counsel are later found to be inaccurate or misleading, this Assurance is voidable by the District in its sole discretion.

41. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by Aetna in agreeing to this Assurance.

42. Aetna represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized.

43. Unless a term limit for compliance is otherwise specified within this Assurance, Aetna's obligations under this Assurance are enduring. Nothing in this Agreement shall relieve Aetna of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

44. Nothing contained herein shall be construed to limit the remedies available to the OAG in the event that Aetna violates the Assurance after its Effective Date.

45. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties to this Assurance.

46. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the District, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

47. Aetna acknowledges that it has entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel as a compromise of disputed claims.

48. This Assurance shall be governed by the laws of the District of Columbia without regard to any conflict of law's principles.

49. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.

50. This Assurance may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

VI. RELEASE

51. In consideration of the undertakings, mutual promises and obligations provided for in this Assurance and conditioned on Aetna making the payment required by paragraph 33, the Office of the Attorney General for the District of Columbia hereby agrees to release Aetna from any and all civil claims and/or consumer-related administrative claims, to the extent permitted by District law, which the Attorney General had, has, or could have brought against Aetna for violations of the CPPA, HIPAA and/or other applicable laws governing the collection, storage, dissemination and/or disclosure of PII and PHI, including laws governing the disclosure of an individual's HIV infection or diagnosis of AIDS, prior to the Effective Date arising out of the conduct alleged herein (the "Released Claims").

52. Notwithstanding any term of this Consent Order, the following do not comprise Released Claims: (a) private rights of action; (b) actions to enforce this Consent Order; and (c) any claims against Aetna by any other agency or subdivision of the State.

FOR THE DISTRICT OF COLUMBIA:

KARL A. RACINE
Attorney General for the District of Columbia



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Public Advocacy Division
441 4th Street, N.W., Suite 600 South
Washington, D.C. 20001
(202) 741-5226
Benjamin.Wiseman@dc.gov

Dated: 10/9/18

FOR AETNA, INC.

By: 

Dated: 10/10/18