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Division of Law
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FILED

OCT 10 2018

Division of Consumer Affairs

By: Elliott M. Siebers
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STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS

In the Matter of

AETNA, INC.,

Respondent.

Administrative Action

**ASSURANCE OF
VOLUNTARY COMPLIANCE**

WHEREAS this matter having been opened by the New Jersey Division of Consumer Affairs (“Division”), as an investigation to ascertain whether Aetna, Inc. (“Aetna” or “Respondent”) engaged in violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. (“CFA”), and 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”) (hereinafter referred to as the “Investigation”);

WHEREAS the Division and Aetna (collectively, “Parties”) have reached an amicable agreement resolving the issues in controversy and concluding the Investigation without the need for further action, and Aetna has voluntarily consented to the entry of this Assurance of

Voluntary Compliance (“AVC”) without having admitted any of the facts alleged herein or any violation of law, and for good cause shown:

IT IS AGREED as follows:

I. EFFECTIVE DATE

1. This AVC is effective on the date that it is filed with the Division (“Effective Date”).

II. THE PARTIES

2. The Attorney General is charged with the responsibility of enforcing the CFA. The Director of the New Jersey Division of Consumer Affairs is charged with the responsibility of administering the CFA on behalf of the Attorney General. The Attorney General as parens patriae for the State of New Jersey (“New Jersey” or “State”) and on behalf of the State in its sovereign capacity, may, pursuant to 42 U.S.C. §1320d-5(d), enforce the provisions of HIPAA.

3. 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 New Jersey.

III. BACKGROUND

4. 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.

5. 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 or AIDS, the painful stigma and discrimination continue to permeate their daily lives.

6. To ensure that its consumers feel safe to come forward to be tested and treated for HIV, New Jersey 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.

7. Congress recognized the importance of protecting the privacy of all individually identifiable Protected Health Information ("Protected Health Information" or "PHI") when it enacted HIPAA, which established a federal floor of safeguards to protect the confidentiality of medical information.

IV. INVESTIGATION AND FINDINGS

As a result of its Investigation, the Division alleges and/or has made the following findings:

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

8. 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 PHI.

9. 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) and 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 Doe 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.

10. The Doe lawsuits were ultimately resolved in 2017. As required under the settlement agreement, the parties agreed that a 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 (the “Notice”).

11. 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.

12. 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 Doe lawsuits, however, entered into any Business Associate Agreement or sub-Business Associate Agreement with the Settlement Administrator.

13. On or about July 28, 2017, the Notices were mailed to certain members of Aetna and Aetna-related health plans. The Notices contained the names and addresses of approximately 647 New Jersey residents.

14. The Notices were mailed in envelopes with large transparent glassine windows that, under some 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.

15. 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 recipient's 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 AVC.

b. Aetna's September 2017 AFib Mailing

16. As part of a research study intended to improve anti-coagulant medication usage, Aetna identified 186 of its members residing in New Jersey 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.

17. 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

18. On Aetna’s website that is accessible to the public, the company acknowledges, among other things, 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

[Id.]

19. 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.” See Personal Health Record (PHR) FAQs, Aetna, <https://www.aetna.com/faqs-health-insurance/personal-health-record-faqs.html>.

20. Plan documents that describe the Aetna health plans of which New Jersey 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.

21. 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.”

V. ALLEGED VIOLATIONS

22. In addition to the general privacy protections medical information enjoys under New Jersey law, records related to a case of HIV infection or AIDS enjoy special protection. The New Jersey AIDS Assistance Act, N.J.S.A. 26:5C-1 et seq. (“AIDS Assistance Act”) prohibits disclosing any record that contains identifying information about a person who has or is suspected of having AIDS or HIV infection without the person’s written consent or without statutorily enumerated authorization. N.J.S.A. 26:5C-8.

23. The Division alleges that Aetna’s HIV Mailing and AFib Mailing violated New Jersey law and HIPAA by disclosing consumers’ Protected Health Information without authorization or legal justification.

24. The Division further alleges that Aetna’s representations regarding the privacy of its members’ Protected Health Information constituted a misrepresentation that had the capacity

to mislead consumers, in violation of the CFA, N.J.S.A. 56:8-2.

25. Aetna neither admits nor denies the Division's assertions, allegations and findings set forth herein, including those set forth in paragraphs 8 through 24.

VI. RELIEF

Required and Prohibited Business Practices

26. Aetna shall not misrepresent to consumers its policies and procedures concerning the collection, storage and dissemination of Personally Identifiable Information ("PII") and PHI, in accordance with the CFA.

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

Privacy Practices

28. 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 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 and/or 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 information is positioned anywhere near an envelope's window and requires a cover sheet, in certain situations, 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.
- j. 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 protective order.

- k. Such changes shall be complete within 120 days of the Effective Date of this AVC. 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 AVC, Aetna shall notify the Division of any material changes to its Standard Operating Procedure # PRINT MAILING or Standard Operating Procedure # LITIGATION at least 30 days in advance of implementing proposed changes.

Monitoring

29. Aetna shall provide to the Division a copy of all audit reports produced pursuant to this AVC within thirty (30) days of their completion.

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

31. Within sixty (60) days of the Effective Date of this AVC, 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 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 all the federal and State laws referenced in Paragraphs 22 to 24 (and any other applicable federal or State law or regulation governing the collection, storage and dissemination of PII and PHI that may be enacted or adopted after the Effective Date of this AVC) and shall monitor Aetna's compliance with its obligations under this AVC. 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 Division 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 AVC, submit additional reports on the status of Aetna's compliance with the federal and State laws referenced in paragraphs 22 to 24 (and any other applicable federal or State law or regulation governing the collection, storage and dissemination of PII and PHI that may be enacted or adopted after the Effective Date of this AVC). 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 Division, the Consultant shall be extended for a one (1) year period if Aetna is not in substantial compliance with this AVC or if the Consultant identifies significant material recommendations for enhancement of privacy policies in his or her final report.

32. Aetna shall provide the Division with a report detailing its compliance with the requirements set forth in this AVC, to be submitted to the Division within one hundred eighty (180) days of the Effective Date. This report shall be in writing and shall set forth in detail the manner and form of compliance with this AVC, and shall be signed by Aetna. Thereafter, a

report of compliance shall be submitted to the Division on an annual basis for the following two (2) years. In any case where the circumstances warrant, the Division may require Aetna to file an interim report of compliance upon thirty (30) days' notice.

33. 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 years from the Effective Date of this AVC. During that time, Aetna shall, upon thirty (30) days written notice from the Division, provide all documentation and information necessary for the Division to verify compliance with this AVC.

34. A default in the performance of any obligation under this assurance, after written notice of the default is provided to Aetna by the Division 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 Division, which agreement shall not be unreasonably withheld), is a violation of this Assurance.

VII. SETTLEMENT PAYMENT

35. The Parties have agreed to a settlement of the Investigation in the amount of Three Hundred Sixty Five Thousand Two Hundred Eleven and 59/100 Dollars (\$365,211.59) ("Settlement Payment"), which consists of a civil penalty pursuant to N.J.S.A. 56:8-13.

36. Within ten (10) days of the Effective Date, Aetna shall make the Settlement Payment by certified check, cashier's check, money order, credit card or wire transfer payable to the "New Jersey Division of Consumer Affairs" and forwarded to:

Elliott M. Siebers, Deputy Attorney General
State of New Jersey, Office of the Attorney General
Department of Law and Public Safety
Division of Law
124 Halsey Street - 5th Floor
P.O. Box 45029

Newark, New Jersey 07101

VIII. GENERAL PROVISIONS

37. This AVC 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 AVC 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.

38. All terms and conditions of this AVC 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, regardless of how such applicable business operations are structured within the successor, assignee or transferee. For an avoidance of doubt, this AVC 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 AVC to any acquiring entity of Aetna's applicable business operations during the term of this AVC.

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

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

41. All notices under this AVC 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 Division:

Elliott M. Siebers, Deputy Attorney General
State of New Jersey, Office of the Attorney General
Department of Law and Public Safety
Division of Law
124 Halsey Street - 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Elliott.Siebers@law.njoag.gov

For Aetna:

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

42. The Division has agreed to the terms of this AVC based on, among other things, the representations made by Aetna and its counsel and the Division's Investigation as set forth herein. Aetna represents and warrants that neither it nor its counsel has made any material representations to the Division that are inaccurate or misleading. If any material representations by Aetna or its counsel are later found to be inaccurate or misleading, this AVC is voidable by the Division in its sole discretion.

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

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

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

46. Nothing contained herein shall be construed to limit the remedies available to the Division in the event that Aetna violates the AVC after the Effective Date.

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

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

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

50. This AVC shall be governed by the laws of New Jersey without regard to any conflict of laws principles.

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

52. This AVC 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.

IX. RELEASE

53. In consideration of the undertakings, mutual promises and obligations provided for in this AVC and conditioned on Aetna making the Settlement Payment required by Paragraphs 34 and 35, the Division hereby agrees to release Aetna from any and all civil claims and/or consumer-related administrative claims, to the extent permitted by State law, which the Division could have brought against Aetna for violations of the CFA, 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 Investigation as well as the conduct alleged herein (the "Released Claims").

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

IT IS ON THE 10th DAY OF OCTOBER, 2018 SO ORDERED.

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

BY: Paul Rodriguez
PAUL R. RODRIGUEZ, ACTING DIRECTOR
DIVISION OF CONSUMER AFFAIRS

THE PARTIES CONSENT TO THE FORM, CONTENT AND ENTRY OF THIS AVC ON THE DATES ADJACENT TO THEIR RESPECTIVE SIGNATURES.

FOR THE DIVISION

GURBIR S. GREWAL
ATTORNEY GENERAL OF NEW JERSEY

By: Elliott M. Siebers
Elliott M. Siebers
Deputy Attorney General

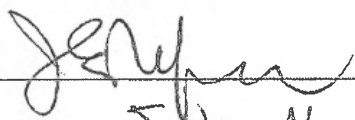
Dated: 10 / 10, 2018

124 Halsey Street - 5th Floor
P.O. Box 45029

124 Halsey Street - 5th Floor
P.O. Box 45029
Newark, New Jersey 07101

FOR AETNA, INC.

By:



Dated: 10/8/18, 2018

Print Name: John Neugebauer

Print Title: Chief Litigation Officer

Print Address: 1425 Union Meeting Rd.
Blue Bell PA 19422