UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA *ex rel.* ANDREW SHEA, *Plaintiff*, v. eHEALTH, Inc., *et al.*, *Defendants.*	**Civil Action No. 21-cv-11777-DJC**

DEFENDANTS' OPPOSITION TO THE UNITED STATES' MOTION FOR ENTRY OF PROTECTIVE AND CONFIDENTIALITY ORDER

The Parties agree there is good cause for the entry of a protective order in this action and agree in principle on most of the provisions in the proposed protective order. However, the Defendants were disappointed to learn from the Government's Motion for Entry of a Protective and Confidentiality Order, ECF No. 196 ("Government's Motion"), that the Government has backtracked on the progress made in negotiations with Defendants. The Government provided its initial draft protective order in April 2026, and the parties spent months meeting and conferring by video conference and through more than a dozen written exchanges in a good faith effort to narrow their differences—in doing so, both sides offered to make numerous compromises. *See* Defendants' Memorandum in Support of their Cross Motion for Protective Order, ECF No. 198 at n.2 ("Defendants' Cross Motion"). The Government asserted it used "its best efforts to compromise with Defendants," (Government's Motion, ECF No. 196 at 1), yet the Government largely abandoned the compromises it made and reverted to a proposed order that is very similar to the original proposal it circulated back in April 2026. In other instances, the Government introduced *new* material in its proposed order that Defendants have never seen before and on which the parties have not met and conferred.[1] Defendants' Cross Motion, on the other hand, was based on the limited points of disagreement in the latest proposal from the Government at that time—a proposal that the Government has now seemingly abandoned.

The result is a motion that mischaracterizes Defendants' reasonable, well-supported proposals as an attempt to "litigate in secret." This hyperbole is false. Each of Defendants' proposals are supported by the Federal Rules, the practice of courts in this district, and the specific circumstances of this action: an industry-wide FCA case brought against direct competitors, following a multi-year Government investigation that compelled the production of thousands of documents through civil investigative demands and subpoenas, and involving protected health information and highly sensitive competitive information. None of Defendants' proposals prejudices the Government or forecloses public access to judicial records, and the Government's assertions to the contrary are incorrect. Defendants' proposals preserve the Court's authority to adjudicate confidentiality and sealing questions on a case-by-case basis, with the burden at all times resting on the party seeking protection. The Court should deny the Government's motion and enter Defendants' Proposed Protective Order. *See* ECF No. 198, Ex. A.

I. Scope of Confidentiality

a. The Government's Objection to Paragraph 2(f) Should be Rejected Because the Language Comes Directly from Rule 26(c)(1)(G).

Defendants propose that Paragraph 2(f) of the Proposed Protective Order define "Confidential Information" to include "[t]rade secret or other confidential research, development,

[1] For example, the Government's proposed order, for the first time, redefines Confidential and Highly Confidential Information by adding a definition for "Commercially Sensitive Information" and adding a five-year age limit to a newly defined term: "Confidential Business or Operational Information." Notably, the Government's claims relate to the time period 2016-2021, *see* Government's Motion, ECF No. 196 at 7. Under the Government's new definition, there can be no such thing as "Confidential Business or Operational Information" for Defendants.

or commercial information." The Government claims this language is so "sweeping" it would cover nearly every internal communication and trigger presumptive sealing. Government's Motion, ECF No. 196 at 4. But as noted in Defendants' Cross Motion, *see* ECF No. 198 at 4, Rule 26 contains this precise language when describing what may be protected by a Court issuing a protective order. *See* Federal Rule of Civil Procedure 26(c)(1)(G). The Government fails to explain why the language appearing in Rule 26 is nonetheless uniquely improper for this case. For that reason alone, the Government's objection should fail.

As discussed more fully in Defendants' Cross Motion, the Government's hypothetical concerns are misplaced: (1) Courts have interpreted and applied the phrase "trade secret or other confidential research, development, or commercial information" for decades; (2) the Government has itself agreed to this exact language before, including in the *Regeneron* protective order the Government cited favorably elsewhere in its motion; (3) because the Defendants are direct competitors—a highly unusual circumstance owed to the Government's choice of how to litigate this case—an unduly narrow definition of confidentiality would expose a producing Defendant to the risk that its sensitive information could be made public or fall into the hands of a competitor; and (4) the Government can challenge any documents it believes are over-designated pursuant to the challenge procedure in the proposed protective order (which is not contested by the parties). *See* Defendants' Memorandum in Support of their Cross Motion for Protective Order, ECF No. 198 at 4-6. The Court should adopt Defendants' proposed Paragraph 2(f) language.

b. The Court Should Adopt Defendants' Sealing Procedure in Paragraph 11 Because it is Practical and Compliant with the Rules and Case Law.

Paragraph 11 establishes the procedure for filing Confidential or Highly Confidential information on the docket. The Parties do not disagree that such information must be protected when it is filed; they disagree on the mechanics and timing of how that protection is invoked. The two competing versions differ in two practical respects: (1) when the filing party must give pre-filing notice to a producing party that it intends to include the producing party's confidential material in a filing, and (2) when the producing party must decide whether to seek sealing of that material. The following table illustrates these practical differences:

Step	**Defendants' Proposal**	**Government's Proposal**
Notice of intent to file Confidential material	The filing party gives notice to the producing party no later than the day of filing.	The filing party must give the producing party notice at least three business days before filing.
Producing party's deadline to act	The producing party has fourteen days from the filing to move to seal under Local Rule 7.2, and if it does not move, the papers are unsealed.	The producing party has only three business days from notice to consent or move to seal, so its motion must be prepared and filed contemporaneously with the filing.
Effect	The material is filed under seal or redacted until the Court rules on any motion to seal.	The material is filed under seal or redacted until the Court rules on any motion to seal.

The first practical problem with the Government's version is its three-business-day advance notice requirement. Litigants rarely know and can commit three business days before a deadline precisely which confidential documents a brief or motion will cite or attach as exhibits. This is particularly true where there are multiple Defendants, each represented by different law firms, and filings require close coordination among those Defendants. Exhibit lists and record citations are routinely finalized in the days, and often the hours, before a filing is due. Requiring notices sent to producing parties three business days in advance would force a party to lock in its exhibit and citation decisions well before the filing itself is complete and prejudice that party from making any changes to exhibits within the 3-day deadline.

The Government's version compounds this timing problem by compressing the producing party's motion to seal into the same narrow window. Under the Government's proposal, the producing party must consent or file its motion to seal at or before the underlying filing itself. That requires the producing party—who may very well be a third party who produced documents in response to a subpoena, without counsel with an appearance entered in this matter—to research, prepare, and file a motion to seal under Local Rule 7.2, together with any supporting material such as affidavits or declarations, on the filing party's schedule. Defendants' proposal sensibly separates the two events: the material is filed provisionally under seal, and the producing party then has adequate time to prepare and file a proper motion to seal. That orderly process allows the producing party to make a considered decision and to justify any sealing on the record, rather than react on the filing party's timetable. And both Parties' approaches produce substantially the same ultimate result: the material remains protected from public disclosure while the Court decides the motion to seal. *See, e.g.*, *Isaac v. Blendtec, Inc.*, 2023 WL 3410262, at *7 (D. Mass. May 12, 2023) (entering a stipulated protective order allowing the designating party to file a statement supporting the request to seal within two weeks of the filing of the motion to seal).

Defendants' day-of-filing notice suffers from none of the same defects. It allows the filing party to ascertain whether the producing party intends to seek sealing, and it preserves the parties' ability to agree in advance to file material in the public record. At the same time, Defendants' proposal builds in a public-access backstop: if the producing party does not move to seal within fourteen days, the papers are automatically unsealed. The result is a procedure that fits the practical process by which parties finalize and file documents, maintains the burden of justifying sealing on the producing party, and does not force every sealing decision to be made and litigated before the filing is even made. As a practical matter, moreover, the Government's proposal to require parties and third parties to move to seal by the day of the filing will inevitably lead to frequent motions asking this Court on an expedited basis to extend the motion-to-seal deadline. Defendants' proposal avoids needlessly burdening the Court with such matters.

And as discussed more fully in Defendants' Cross Motion, the Government's claim that Defendants' proposal would amount to a "blanket order" prohibited by Local Rule 7.2(d) is wrong. Defendants' proposal does not authorize any party to seal material unilaterally or indefinitely. It instead requires a producing party that wishes to keep a document under seal to affirmatively move for that relief under Local Rule 7.2, without which the material is automatically unsealed in fourteen days. Defendants' proposal leaves the burden of justifying any seal on the producing party and the Court with full authority to deny the motion. As discussed, that approach differs from the Government's principally as to timing. In addition, Defendants' approach is consistent with the practice of this District. *See* Standing Orders Regarding Protective Orders of Magistrate Judge Boal and Magistrate Judge Levenson, ECF Nos. 198-10 at 4 and 198-11 at 2 (requiring conferral before filing but prescribing no multi-day advance notice period). The Government claims there is "no reasonable basis" to allow fourteen days for the producing party to provide support for sealing, yet the Model Order of Magistrate Judge Boal does exactly that. *See* Standing Order Re Protective Orders, M.J. Boal, ECF No. 198-10 at 4 ("[T]he filing party shall file a motion to seal and the designating party must file a statement supporting the request to seal *within two weeks of the filing of the motion to seal*." (emphasis added)).

Defendants' proposal protects every relevant interest: producing parties are notified prior to filing but have the necessary time to file any motion to seal; filing parties are spared multi-day pre-clearances with every producing party and an artificially early lock in of their citations and exhibits days before a filing deadline; and the public's access is safeguarded by the proposed order requiring each sealing request to be independently justified under Local Rule 7.2 and automatically unsealing any material for which no motion is filed. *See* Defendants' Memorandum in Support of their Cross Motion for Protective Order, ECF No. 198 at 13-16. The Court should adopt Defendants' proposed Paragraph 11.

II. The Protective Order Should Apply in Full to All Materials Produced in this Matter.

Defendants' proposal is straightforward: the Proposed Protective Order should apply in full to materials produced by Defendants in the investigative phase, just as it applies to documents produced in litigation discovery. Two sub-issues from Defendants' Cross Motion remain in dispute: the scope provision in Paragraph 1 and the inadvertent-production provision in Paragraph 16. But unfortunately, a new sub-issue, which the parties previously negotiated and agreed on, has been reintroduced by the Government in its motion: a requirement for Defendants and third parties to re-review everything produced in the investigation—hundreds of thousands of documents totaling several million pages—solely to reassert Confidentiality under this new protective order.

a. The Order's Scope Should Not Exclude Investigation Materials (Paragraph 1).

Defendants proposed that the protective order "shall govern all information produced, whether formally or informally, in or related to the above-captioned litigation." Defendants' Cross Motion, ECF No. 198 at § III.A. The Government would limit Paragraph 1 to materials produced "in response to a discovery request," carving the thousands of documents produced during its multi-year investigation out of the Order's core protections. As described in detail in Defendants' Cross Motion, there is no principled basis for a split regime. The same competitively sensitive business information and protected health information appears in both investigation and litigation productions, and a document is no less confidential because it was produced pursuant to a CID or subpoena rather than a Rule 34 request. Courts in government enforcement actions routinely enter protective orders covering investigation-phase materials on the same terms as litigation materials. *See* Defendants' Cross Motion, ECF No. 198 at § III.A. Indeed, uniform protection is in the Government's own interest: if parties cannot rely on the protection of confidential materials produced during an investigation, it could chill cooperation in investigations. The protective order should apply uniformly to all produced materials because it simply makes no sense to do otherwise.

b. The Inadvertent-Production Framework Should Apply Uniformly to All Materials (Paragraph 16).

The Government states in its motion the "Federal Rules of Evidence and case law should govern attempts to claw back documents produced years ago." Governments' Motion, ECF No 196 at 8. Defendants wholeheartedly agree. The dispute is simple: Defendants want Federal Rule of Evidence 502(b) to apply unfettered to all parties and productions; the Government wants to carve itself out. Absent mutual agreement to deviate from the rule, the standard Rule 502 framework governs.

The Government's position is confusing and contradictory. The Government quotes Rule 502(b) (which, again, it seeks to specifically *exclude* in its proposed protective order) for the proposition that a party must promptly rectify any inadvertent disclosure of privileged materials. Government's Motion, ECF No. 196 at 8. This is a double standard. The Government cannot simultaneously cite Rule 502(b) affirmatively against Defendants while disavowing its application for documents the Government produces in this case. Defendants made extensive productions of material during the investigation phase; the Government produced nothing. Because all the Government's productions will occur in the litigation, that asymmetry in applying Rule 502 skews entirely in the Government's favor.

To be clear, Defendants do not seek immunity from waiver. Under Defendants' proposal, any party that inadvertently produces a privileged document, whether during the investigation or in litigation, may invoke the clawback procedure, and the receiving party remains free to challenge the privilege claim on the merits, including on waiver grounds. What Defendants resist is application of an *ex ante* presumption—to Defendants' productions only—that privilege was waived before any document-specific inquiry has occurred.

The Government's position is also unsupported. Its motion identifies no authority that a party waives privilege over materials due to the passage of time alone. The Government string cites case law to support the proposition that a party must act in accord with Rule 502(b); that is, it must act promptly. But all its cited case law relates to parties that fail to act timely *after they know or should have known that privileged material was inadvertently produced*.[2] Of course Defendants do not contest this principle. It is axiomatic that a party must act promptly and diligently to claw back privileged materials *once it is on notice it produced privileged materials*. But here, Defendants produced thousands of documents in the *investigative* phase—long before the Government chose to litigate—and they cannot know what they do not know. Defendants merely contest that the Protective Order should draw an arbitrary line and impose a presumption of waiver for investigation-phase materials, while lifting the well-established requirements for the Government's productions. Moreover, even if the passage of time since production were relevant, the Government regularly attempts to claw back documents it produced years prior. *See, e.g.*, *United States v. Anthem, Inc.*, No. 20-cv-2593 (S.D.N.Y.), ECF Nos. 414, 416 (United States

[2] *United States ex rel. Omni Healthcare, Inc. v. MD Spine Sols. LLC*, 736 F. Supp. 3d 75, 83–84 (D. Mass. 2024) (defendants attempting to claw back materials "two years and seven months" after "[t]he United States first alerted the defendants that they may have produced some privileged materials"); *Kaiser v Kirchick*, No. CV 21-10590-MBB, 2022 WL 182375, at *8 (D. Mass. Jan. 20, 2022) (defendant attempting to claw back materials "more than two years after most of the documents were produced" where the complaint "referenced and attached copies of correspondence that [defendant] now alleges are privileged"); *Santullo v. City of Woburn*, No. CIV. A. 07-11478-RWZ, 2008 WL 2778819, at *1 (D. Mass. July 14, 2008) (defendant attempting to claw back materials "nearly five months later" in a production "which contained only 1,213 pages of documents").

attempting to claw back documents produced over many years in three separate lawsuits) (Exs. A, B, respectively). It cannot hold adversaries to a standard it cannot itself follow.

A single inadvertent-production framework applied to all materials and all parties is fair, administrable, and consistent with the Federal Rules. Defendants do not consent to the Government's Rule 502 carve out, and without mutual agreement to do so, Rule 502 should apply according to its terms. That, by itself, should end the inquiry, and the Court should adopt Defendants' Paragraph 16.

c. The Court Should Reject the Government's Demand That Defendants and Third Parties Re-Review and "Crosswalk" Documents Produced in the Investigation (Paragraph 4).

Separate from and in addition to the scope dispute discussed in Sections II.a. and II.b., *supra*, the Government's Proposed Order would impose on Defendants and non-parties a substantial new burden to re-review the documents they already produced during the Government's investigation. Paragraph 4.c. of the Government's Proposed Order requires Defendants (within 120 days) and third parties (within 30 days) to "affirmatively designate" each previously produced document as Confidential or Highly Confidential "by providing a crosswalk for such documents." ECF No. 196-1 at ¶ 4.c. In practice, that language would require each of the Defendants and third parties to re-review, document by document, the thousands of documents produced over a multi-year investigation—all for the sole purpose of re-asserting confidentiality under an order that did not exist when they produced the documents.

That demand should be rejected. First, the Government already conceded this point. During the meet-and-confer process, the Government itself proposed what it called "a significant concession" that "[i]nformation to be treated as Confidential under this Order includes all Previously Produced Documents labeled as 'protected,' 'confidential,' 'proprietary,' or a similar designation," which "limit[s] the burden on Defendants with no required confidentiality re-designation." Ex. C, Declaration of Patrick McMahon at ¶ 3. The Government claimed their concession was conditional on Defendants accepting the Government's definition of Confidential (which, again, was different then from what the Government now proposes in its proposed protective order) and adopting the Government's three-day sealing regime. There is no logical or proportionate connection to justify such a condition. The Government also claims it "agrees to handle previously produced documents 'under the terms of the form of process under which they were obtained,'" Government's Motion, ECF No. 196 at 6-7. But that "concession" is not meaningful. That language only applies "[i]f documents are required to be produced before the deadline for designation . . . ." ECF No. 196-1 at 4 (before the expiration of 120 days for Defendants and 30 days for non-parties).

Second, the requirement is disproportionate. The burden of forcing a linear re-review of all the documents produced in the investigative phase falls entirely on the producing parties, i.e., Defendants and third parties. By contrast, the only conceivable benefit falls to the Government, and it would be miniscule: a crosswalk *might* identify one or more documents that a producing party would downgrade to non-confidential, and any downgraded documents *might* include one or more documents that the Government one day would want to use in a public filing, at which point the Government would be relieved from having to ask a producing party whether it objects to a public filing of the document (which, assuming it is a document that would have been marked non-confidential in a secondary review, the producing party would presumably consent to upon request anyway). Defendants' proposal is far less burdensome: if the Government wants to file a document marked Confidential from the investigative phase, it can simply ask the producing party if it objects to a public filing of that document, rather than require all producing parties to re-review *every one of the hundreds of thousands of documents they produced* on the *chance* a document the

Government later wants to file was downgraded in the re-review process. The burden falls even harder on third parties, who would have only 30 days to re-review their entire productions or forfeit confidentiality protections they reasonably applied at the time of production.

Third, the demand is fundamentally unfair given how these documents came to be produced. The Government declined to put any confidentiality agreement or framework in place during the investigation, leaving Defendants and third parties to apply their own designations. The Government cannot have it both ways: it cannot decline to enter into a confidentiality agreement during the investigation and then, years later, require the producing parties to re-review every document to conform to a protective order that did not exist when the documents were originally produced. Defendants' and non-parties' existing designations should control.

III. The Court Should Adopt Defendants' Data Breach Notification Provision In Paragraph 14.

Defendants' proposed Paragraph 14 requires a party that becomes aware of a data breach or security incident involving another party's confidential information to provide written notice to the producing party. It simply ensures a producing party learns promptly when its own confidential materials have been compromised so it can assess the exposure and mitigate the harm.

The Government's principal objection, found in footnote 2 of its Motion, is that the provision is "novel." That objection fails on both the law and the facts. As a matter of principle, novelty is not a reason to reject a provision. A protective order is a flexible, case-specific instrument, and the question is whether a provision is warranted here, not whether an identical provision has been entered before. *See Gardner v. Cape Cod Healthcare, Inc.*, 344 F.R.D. 127, 132 (D. Mass. 2023) ("Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984)); *accord Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993) ("[G]reat deference is shown to the district judge in framing and administering [protective] orders." (citations omitted)). The Government cites no authority for the proposition that a protective order may contain only terms a prior court has already adopted, thereby freezing protective orders from ever evolving to account for new circumstances as litigation and technology evolve.

In any event, the provision is not novel. As detailed in Defendants' Cross Motion, courts in this District and elsewhere, including in cases where the Government itself was a party, have entered breach notification obligation provisions in protective orders. *See* Defendants' Memorandum in Support of their Cross Motion for Protective Order, ECF No. 198 at § II.

The provision is also important to protect documents produced during the investigative phase, and the *U.S. v. Anthem* example underscores why. *See id.* at 6–7. The breach in *U.S. v. Anthem* compromised documents a party produced to the Government. Defendants here likewise produced sensitive commercial and beneficiary information to the Government during a multi-year investigation, and those materials have resided in the Government's and its contractors' systems for years. *Id.* There is no principled reason to guarantee prompt notice for a compromised litigation-phase production while withholding it for the documents produced during the investigation. Paragraph 14 would therefore apply uniformly to all information governed by the Order, whenever and however it was produced.

The Government's remaining objections, also raised in footnote 2, fare no better. Its concern that a breach-notification obligation "*might* impinge upon the Department of Justice's investigative and prosecutorial functions" is speculative and unexplained. Government's Motion, ECF No. 196 at 2, n.2 (emphasis added). Defendants' provision requires only that a producing party be told promptly if its own confidential documents have been compromised. The

Government has identified no basis for the notion that such notice "might" interfere with any legitimate investigation because none exists. Nor does it matter that the parties already owe duties to protect confidential information: Defendants' provision governs only the timely notification of a breach, not the underlying duty to safeguard the information, which is not in dispute. The Court should adopt Defendants' proposed Paragraph 14.

Conclusion

For the foregoing reasons, Defendants respectfully request that the Court deny the Government's Motion and enter Defendants' Proposed Protective Order in full.

Dated: August 12, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that that the above document was filed through the CM/ECF system and will be electronically sent to the registered participants as identified on the Notice of Electronic Filing (NEF) on this 12th day of August, 2026.

/s/ Jamie A. Steven

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VIA ELECTRONIC DELIVERY AND COURT FILING

The Honorable Katharine H. Parker
Daniel Patrick Moynihan United States Courthouse
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Re: ***United States v. Anthem, Inc.*, 1:20-cv-02593-ALC-KHP**

Dear Judge Parker:

We represent Defendant Anthem, Inc. ("Anthem") in the above-referenced action. Pursuant to the Court's September 3, 2025 Order (Dkt. 403), we write in response to Plaintiff's letter of September 17, 2025 (Dkt. 405) ("Plaintiff's Letter") concerning Plaintiff's assertion of privilege over three documents that it produced to Anthem and subsequently clawed back during depositions. Plaintiff has not met its burden of showing that the documents Plaintiff has redacted for privilege reflect the provision of, or request for, legal advice.

As the Court has already explained in its order on Plaintiff's recent challenge to Anthem's privilege assertions, "attorney-client privilege protects communications between client and counsel made for the purpose of obtaining or providing legal advice that were intended to be and in fact kept confidential." 8/22/25 Opinion (Dkt. 400) (the "Opinion") at 7 (citing *In re Cty. of Erie*, 473 F.3d 413, 418-19 (2d Cir. 2007); *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996)). Communications among non-lawyers are protected by the privilege only where "the purpose of the communication was to provide information to counsel or aid counsel in providing legal advice." *Id.* at 8 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 394 (1981)). Passing references to attorneys by non-lawyers, personal views expressed by non-lawyers to other non-lawyers in response to attorney comments, or speculation by non-lawyers about how attorneys may react to certain scenarios are not protected by the privilege. *See United States ex rel. Thomas v. Duke Univ.*, 2018 WL 4211375, at *10 (M.D.N.C. Sept. 4, 2018) (holding that mere references to counsel involvement and speculative comments by non-lawyers are not privileged). Where only portions of a document reflect legal advice, only those portions may be withheld; any redactions must be surgically applied so that the redactions do not encompass communications *not* reflecting privilege. *See In re Grand Jury Proc.*, 219 F.3d 175, 182 (2d Cir. 2000) (attorney-client privilege should be "strictly confined within the narrowest possible limits consistent with the logic of its principle.").

O'Melveny

Despite this guidance from the Court, Plaintiff has clawed back and subsequently produced in redacted form three previously produced emails[1] on the grounds that they all reflect legal advice, or a request for legal advice, from attorneys within the Office of the General Counsel ("OGC") at the Centers for Medicare and Medicaid Services ("CMS"). But these three emails reflect communications among CMS staff who are neither attorneys nor employed by the OGC. Indeed, not one OGC attorney appears on any portion of any challenged email, and none of these documents bear any markings demonstrating that OGC attorneys reviewed or provided any comments on the substance of the documents. Therefore, as the Court articulated in its Opinion, such redactions are only appropriate where "the purpose of the communication was to provide information to counsel or aid counsel in providing legal advice." Opinion at 8 (citing *Upjohn*, 449 U.S. at 394). These documents demonstrably do not meet that *Upjohn* standard, nor are they consistent with how the Court has already applied that standard to Anthem's documents in this case.

The first document, US_014680774-76 (the "Reg Text Document"), is an email in which non-attorney staff at CMS discuss possible language for a new regulation that would subsequently be proposed a few months later (the "2014 Proposed Rule"). The unredacted portions of the document make abundantly clear that the "predominant purpose of the communication [wa]s [not] to render or solicit legal advice" and that the portions of the document that Plaintiff redacted do not all reflect the OGC's legal advice. *Clarke v. J.P. Morgan Chase & Co.*, 2009 WL 970940, at *4 (S.D.N.Y. Apr. 10, 2009) (citing *In re Cty. of Erie*, 473 F.3d at 420). The redacted sentence is preceded by the statement, "[t]his is ***my*** first crack at this language," and shortly after the redacted portion ends, the author then writes, ***"[d]o we ask OGC*** for their view of this approach before or after we talk to [our supervisor]?" *See* US_014680775 (emphasis added). The plain language of this document demonstrates that a CMS employee was proposing language for a new regulation and inquiring as to the timing of when this language should be shared with OGC. And the replies to that email do not even contain a response to that inquiry but rather concern the timing of when the draft regulation will be provided to policy officials at CMS. Therefore, "it could reasonably be concluded that the e-mail was distributed [] not for the purpose of conveying [or seeking] counsel's advice, but rather for the purpose of beginning an effectuation of a [] policy change. If that is the case, then it is another reason why the e-mail should not be considered privileged." *Clarke*, 2009 WL 970940, at *4.

[1] Plaintiff devotes a considerable portion of its Letter to repeating an argument it made at the July case management conference, which the Court should no more entertain now than it did in July: that Anthem is not entitled to dispute the assertion of privilege over any document that Plaintiff claws back because a document that was originally produced in *United States ex rel. Poehling v. UnitedHealth Group*, 16-cv-08697 (C.D. Cal.) ("*Poehling*") and then subsequently produced to Anthem suddenly becomes "not produced" when one of Plaintiff's attorneys here belatedly asserts privilege over the produced document. Pl.'s Letter at 1-2. Plaintiff's argument ignores the plain meaning of the word "produced," and, unsurprisingly, Plaintiff has not cited to any case in support of its novel position. The Court should reject Plaintiff's brazen effort to grant itself an unreviewable veto over a challenge to the assertion of privilege for any *Poehling* document it produced to Anthem. Basic principles of fairness require that this Court reserve the authority to resolve any privilege dispute over documents Plaintiff produced to Anthem in compliance with this Court's orders of March 13, 2024 (Dkt. 190) and April 10, 2024 (Dkt. 200).

Plaintiff's Letter, however, states that the redaction relates to a sentence which purportedly reflects OGC's views and another sentence containing the author's "reflect[ion] on the advice from legal counsel in drafting a section, and is attempting to conform her drafting with that advice." Pl.'s Letter at 2-3. Accordingly, if this Court determines that this email was distributed for the purpose of conveying counsel's advice, then only the first sentence should be redacted since a non-attorney's "further reflect[ion]" on, or strategic decision-making in reaction to, legal advice is not privileged. *See United States v. Krug*, 868 F.3d 82, 87 (2d. Cir. 2017) (finding that non-attorney communications were not protected by the attorney-client privilege "[n]otwithstanding that the lawyers for the defendants were nearby and had recently been in communication with their clients" since "the excluded statements were not made for the purpose of obtaining legal advice from a lawyer," were not intended to "share [] advice given from a lawyer," nor were they made "to facilitate a communication with a lawyer."); *Bank of New York v. Meridien Biao Bank Tanzania Ltd.*, 1996 WL 474177, at *2 (S.D.N.Y. Aug. 21, 1996) ("[T]o the extent that a document, in whole or in part, deals with the operations of [the party asserting privilege], that portion will not be covered by the attorney-client privilege even if the underlying policy is shaped by advice of counsel.").

The other two documents, US_014680924 and US_14683010 (the "OMB Documents") are two variations of the same email reflecting communications among non-attorneys at CMS discussing questions from the U.S. Office of Management and Budget ("OMB") about the 2014 Proposed Rule. The email also references a CMS subdivision called the Center for Public Integrity ("CPI"). Again, no OGC attorneys are involved in the communications, nor do the unredacted portions of the document bear any markings indicating that OGC attorneys reviewed or provided comments in the document. Like the Reg Text Document, the OMB Documents bear hallmarks of—at best—over-redaction of communications that do not meet the standard for privilege.

For example, Plaintiff has redacted a sentence drafted by CMS official Whitney Johnson in US_014680926 that purports to provide "draft responses to OMB questions," with a series of bolded and numbered questions, and listing proposed responses underneath each question. The redaction appears to be of Question 1 while the response to Question 1 is not redacted. In its Letter, Plaintiff seemingly references the redaction of Question 1 where it argues that "something under active consideration by OGC" is redacted. Pl.'s Letter at 3. But, even if that characterization were true, the substance of nonprivileged communications amongst CMS officials—like a factual question that OMB sent to CMS—does not suddenly become privileged simply because it was subsequently sent to OGC.[2] *See United States v. Walker*, 243 F. App'x 621, 623 (2d. Cir. 2007) ("The attorney-client privilege protects from disclosure the contents of confidential attorney-client communications, but does not prevent disclosure from the client's records the underlying factual information included in attorney-client communications."). This redaction is therefore inappropriate.

The context of the communication also demonstrates that Plaintiff has misread this document since it believes that it "reflects what agency lawyers were asking and how the agency

[2] At best, Plaintiff could arguably redact whichever portion of the text indicates OMB's question was being considered by OGC, though not the question itself. But Plaintiff has necessarily disclosed this fact already in order to explain and defend it, rendering any privilege assertion moot.

staffers were responding to those requests from counsel" when it is abundantly clear that agency personnel were responding to questions posed by OMB officials, not lawyers within CMS's OGC. Pl.'s Letter at 3. Indeed, as mentioned *supra*, Whitney Johnson begins the correspondence by providing draft responses to OMB's questions concerning the 2014 Proposed Rule. The second question listed is "A102: Reasonable Diligence: Is this defined somewhere?" *See* US_014680926. The remainder of the email contains a discussion between the CMS officials included on the email, none of whom are attorneys, concerning the answer to this OMB question. Plaintiff's Letter offers no explanation for why OMB's first factual question to CMS was privileged but its second factual question was not.

Plaintiff inexplicably asserts that it redacted a portion of John Scott's response in US_014680925-26 because it "reflects what agency lawyers were asking and how the agency staffers were responding to those requests from counsel." Pl.'s Letter at 3. But, as Johnson notes in US_014680925, these ***were not*** questions from agency counsel; they were instead questions from OMB officials to CMS staff. Furthermore, and like the Reg Text Document, it is clear that "the e-mail was distributed [] not for the purpose of conveying counsel's advice, but rather for the purpose of beginning an effectuation of a [] policy change"; therefore, it "should not be considered privileged." *Clarke*, 2009 WL 970940, at *4. But if this Court determines that it was distributed for the purpose of conveying counsel's advice, then only that specific advice should be withheld. Plaintiff should not be permitted to withhold non-attorney commentary concerning that advice, operational decision-making applying that advice, or any other language that is untethered to the solicitation or rendering of legal advice. *See Krug*, 868 F.3d at 87; *Bank of NY*, 1996 WL 474177, at *2. The same principles apply to the redactions in US_014683010.

Given that Plaintiff's erroneous redactions are apparent even without the benefit of reviewing the substance of the redactions, Plaintiff has failed to meet its burden of showing here that its redactions are narrowly restricted to the provision or solicitation of legal advice. Statements that refer to OMB or CPI instead of OGC bear no indicia of privilege, nor does language proposing responses to OMB's factual questions. And as with the Reg Text Document, questions speculating about *whether* to ask OGC questions, how OGC might respond to certain questions, or non-attorney work product informed by—but not describing or seeking—attorney advice would similarly not be privileged.

Just weeks ago, in its Opinion, the Court considered a very similar set of issues in connection with redactions of documents over which Anthem had asserted privilege, and concluded that Anthem could *not* maintain the privilege over those redactions. Specifically, the Court examined a series of statements in a "comment grid" by non-lawyer Anthem employees incorporating and then responding to prior comments from Anthem attorneys interpreting the as-published 2014 Proposed Rule. The Court concluded that, while documents reflecting the comments of Anthem attorneys were privileged, any subsequent comments by non-lawyers incorporating those attorney comments and providing further responses were *not* privileged and could not be redacted. *See* Opinion at 16-17.

The same reasoning applies here, except that Anthem's attorneys were indisputably involved in providing comments on the documents over which Anthem asserted privilege; by contrast, there is no evidence that any OGC attorneys actually read or commented on any of the email correspondence over which Plaintiff has belatedly asserted privilege. Consistent with how the Court ruled on Anthem's assertion of privilege over the comment grid documents, the Court should also hold that statements by non-attorneys are not privileged where they do not reveal or seek legal advice, even if the comments are informed by the prior input of an attorney.

And to the extent that Plaintiff *did* correctly assert privilege over these documents, Plaintiff's "extreme carelessness" in producing privileged communications is enough "to suggest that it [is] not concerned about the protection of privilege." *MTA v. Duffy*, 782 F. Supp. 3d 193, 200-01 (S.D.N.Y. 2025); *see also Irth Sols., LLC v. Windstream Commc'ns LLC*, 2017 WL 3276021, at *13–14 (S.D. Ohio Aug. 2, 2017) (finding waiver of privilege where counsel twice produced documents that contained privileged communications). Despite the Court's admonition at the initial case management conference in April 2023 that "I don't want to have a dispute coming up about clawbacks a week before a deposition when the parties have planned things. That, you know, can create a lot of issues in these kinds of cases," (4/11/23 Tr. 37:21-38:2), Plaintiff has relied entirely on Anthem to conduct Plaintiff's privilege review; waiting until the middle of depositions of CMS witnesses to claw back *each* of the disputed documents even though these documents have now been produced over many years in three separate lawsuits filed by the United States: *Poehling, Anthem,* and *United States ex rel. Taylor v. Kaiser Permanente, et. al*., 3:21-cv-03894 (N.D. Cal). Plaintiff apparently takes the view that it has no obligation to review its own productions in good faith to identify inadvertently produced documents over which it wishes to assert privilege—despite the ample notice these documents have given it—and instead seems content to simply wait until Anthem attorneys are in the middle of their deposition examinations of CMS witnesses to assert privilege over documents for the first time. This practice only invites more privilege disputes and the increased possibility that depositions must be held open and continued once those disputes are resolved. Such disruptive lassitude suggests Plaintiff is not concerned about protection of its privilege, and thus supports a finding of waiver. To be clear, Anthem is not arguing that Plaintiff has made a broad subject matter waiver of topics associated with CMS staff discussions with OGC. But had Plaintiff conducted even the most rudimentary privilege review upon learning that it might have disclosed privileged documents to Anthem, that review would likely have uncovered these documents well before Anthem presented them to CMS witnesses in the midst of depositions.

In light of the above, Anthem respectfully requests that the Court reject Plaintiff's baseless assertions of privilege over the three clawed back documents.

Dated: October 1, 2025

Respectfully submitted,

By: *<u>/s/ Anwar Graves</u>*

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

ANTHEM, INC.,

Defendant.

---x

20-CV-2593 (ALC) (KHP)

OPINION AND ORDER ON MOTION TO COMPEL PRODUCTION OF DOCUMENTS WITHELD AS PRIVILEGED

KATHARINE H. PARKER, United States Magistrate Judge:

This action concerns claims for violations of the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.* brought by the United States of America ("the Government") against Anthem, Inc. ("Anthem"). Anthem now challenges the Government's assertion of privilege concerning three documents which the Government produced and subsequently clawed-back. For the reasons that follow, Anthem's challenge is GRANTED in part and DENIED in part.

BACKGROUND

The facts underlying this action were previously set forth in a prior opinion by this Court. (*See* ECF No. 400). The facts relevant to the instant challenges are summarized below, and familiarity with the general background of and prior litigation in this case is assumed.

The instant challenge concerns the assertions of attorney-client privilege made in three documents that were initially produced by the Department of Justice in the *Poehling* litigation (and in this litigation), later clawed back in part in both actions, and reproduced in redacted format. (ECF No. 405, at 1). Anthem challenges the Government's assertion of privilege over the documents. (ECF No. 414, at 1-3). The documents at issue are as follows:

First, US_014680774-76 is an email thread between and among employees of Centers for Medicare and Medicaid Services ("CMS") about possible language for a regulation that was later proposed in 2014. No lawyers are included in the email communications, but the employees are drafting language for the regulation and considering whether the language should be vetted by counsel and the process for obtaining counsel's comments.

The Government has represented that one redacted sentence reflects the advice or views of counsel while another redacted portion separately restates legal advice received and attempts to align the draft with that advice. (ECF No. 405, at 2-3).

The second and third documents, US_014680924 and US_14683010, are variations of the same email exchange among non-attorney CMS personnel regarding questions from the U.S. Office of Management and Budget about a proposed rule. (ECF No. 414, at 3). The emails reference a CMS subdivision identified as the Center for Public Integrity ("CPI"). No attorneys are participants in the communications. Plaintiff produced these documents with redactions, asserting that the redacted portions reflect legal advice or requests for legal advice.

Defendant characterizes all three email threads as internal discussions among non-attorney staff regarding draft regulatory text and the timing of any potential consultation with OGC, rather than a communication conveying or reflecting OGC's legal advice. However, Defendant concedes that if any portion of the emails are deemed to convey or reflect counsel's advice, they should be narrowly redacted with the remainder produced.

LEGAL STANDARDS

Motions to compel are "entrusted to the sound discretion of the district court," *United States v. Sanders*, 211 F.3d 711, 720 (2d Cir. 2000), cert. *denied*, 531 U.S. 1015, and "[a] trial court enjoys wide discretion in its handling of pre-trial discovery," *In re Finch, Inc.*, 330 F.3d 104, 108 (2d Cir. 2003) (citations and quotations marks omitted). Although Anthem brings this motion, the party asserting the privilege—here, the Government—bears the burden of showing that a given document is privileged. *Walsh v. CSG Partners, LLC*, 544 F.Supp.3d 389, 393 (S.D.N.Y. 2021).

1. *Attorney-Client Privilege*

The attorney-client privilege protects communications between client and counsel made for the purpose of obtaining or providing legal advice that were intended to be and in fact kept confidential. *In re County of Erie*, 473 F.3d 413, 418-419 (2d Cir. 2007); *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996). As the U.S. Supreme Court explained in *Upjohn Co. v. United States*, the privilege encourages full and frank communications between a client and counsel, which in turn promotes an understanding of and compliance with the law and the administration of justice. 449 U.S. 383, 389 (1981). The privilege is narrowly construed, however, because it renders relevant information undiscoverable. *Fisher v. United States*, 425 U.S. 391, 403 (1976); *In re County of Erie*, 473 F.3d at 418.

While in-house lawyers commonly provide legal advice protected by the privilege, they also sometimes provide business advice which is unprotected. *Id.* at 418, 420; *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036-37 (2d Cir. 1984). When determining the predominant purpose of a communication between a company's employees and its in-house lawyers, a court must assess the communication "dynamically and in light of the advice being sought or rendered, as well as the relationship between advice that can be rendered only by consulting legal authorities and advice that can be given by a non-lawyer." *In re County of Erie*, 473 F.3d at 420-421; *WCA Holdings III, LLC*, 2025 WL 1434375, at *4 (S.D.N.Y. May 17, 2025). The determination "also may be informed by the overall needs and objectives that animate the client's request for advice." *In re County of Erie*, 473 F.3d at 421. The fact that a lawyer may highlight collateral non-legal risks and costs relating to "expense, politics, insurance, commerce, morals and appearances" or report "what other persons are doing or thinking about the matter" in the course of rendering legal advice does not compromise the privilege so long as the predominant purpose of the communication was to render legal advice. *Id.* at 420.

Courts also have applied the privilege to communications among non-lawyer employees of a corporation where the purpose of the communication was to provide information to counsel or aid counsel in providing legal advice. *Upjohn Co.*, 449 U.S. at 394; *People's United Bank v. PeoplesBank*, No. 08-cv-1858 (PCD), 2009 WL 10689492, at *2 (D. Conn. Dec. 28, 2009); *see also Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 203 (E.D.N.Y. 1988) (attorney-client privilege protects the giving of information from an employee to a superior for transmission to lawyer if made for the purpose of securing legal advice, requested by corporate superior, provided within the scope of the employees' corporate duties and confidentiality maintained).

Generally, attorney-client privilege is waived "if the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the mater or communication over which the privilege is claimed." *Fullerton v. Prudential Ins. Co.*, 194 F.R.D. 100, 102 (S.D.N.Y. 2000) (quoting *United States v. Int'l Bhd. of Teamsters*, 961 F. Supp. 665, 673 (S.D.N.Y. 1997)); *see also Gruss v. Zwirn*, No. 09-cv-6441 (PGG) (MHD), 2013 WL 3481350, at *11 (S.D.N.Y. July 10, 2013) (citing *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993)); *In re Visa*

Check/MasterMoney Antitrust Litig., 190 F.R.D. 309, 314 (E.D.N.Y. 2000). There is no argument here that the Government has waived privilege as to these three email threads.

DISCUSSION

With the above standard in mind, and after reviewing the documents and redactions, the Court finds that certain portions of the emails were properly redacted as follows:

As to document US_014680775, the redaction at the end of the paragraph that begins "Attached – inserted in the reg text . . . " is appropriate because the redacted portion at the end of the paragraph reflects counsel's opinion. However, the next paragraph which is redacted does not reflect counsel's opinion; rather, it concerns a proposed rule and speculation about whether the regulation would be approved by a lawyer. It does not reflect a request for or provision of legal advice. Therefore, the document should be reproduced with the narrow redaction approved above and with the paragraph beginning "But if we write this amendment . . . " unredacted.

As to the other two email threads, in the email from Whitney Johnson dated September 27, 2013 at 5:56 p.m. (US_14683010), the redaction of the sentence beginning "They did . . . " is appropriate because it reflects legal advice. Next, the redaction in the email from Jennifer Harlow dated September 27, 2013 at 1:52 p.m., the redaction of the first sentence "I like John's answer" is not appropriate because this does not reflect or convey legal advice. However, the redaction of the following two sentences, beginning "Can we also say. . ." is appropriate because the two employees are discussing an issue on which they need legal advice or to confirm legal advice. The redaction in the email from Jennifer Harlow dated September 27, 2013, at 1:23 p.m. (US_14683011) is appropriate only as to the portion of the sentence that begins “and did OGC” for the same reason. Next, the redaction in the email from Ilina Chaudhuri dated September 27, 2013 at 12:05 p.m. is properly redacted because it reflects legal advice regarding CMS/CM authority. Next, the redaction of the text in the email from Whitney Johnson dated September 27, 2013 at 10:04 a.m. is overbroad. Only the first two sentences are privileged because they reflect legal advice. The last two sentences beginning with “Plus, CPI uses the same term . . . “ should not be redacted because this does not reflect or request or convey legal advice. The redaction of the email from Johan Scott dated September 27, 2013, at 9:38 a.m. (US_14683012) is largely appropriate in part because the text relates to a definition of a term and reflects communications with/views of counsel regarding the term and sets out particular advice to be sought from counsel and any non-privileged portions are too intertwined with privileged portions to un-redact portions, except that the first sentence beginning “I don’t think our response answers . . .” can be easily unredacted and is not privileged because it merely reflect a non-legal point about a response to a question. Similarly, in the email from Whitney Johnson dated September 26, 2013 at 2:05 p.m., the redacted portion reflects a question pending with legal counsel and constitutes a request for legal advice. Thus, the redaction is proper. As to the email from John Scott on September 27, 2013, at 11:41 a.m. (US_014680925), the redaction is proper in part as to the portion of the sentence that begins “maybe say OGC told . . .” but should be unredacted beginning with “but we still expect a plan . . .” In other words, only that portion of the sentence reflecting the advice of OGC should be redacted.

As to whether the redacted portions are responsive, the Court finds that they are. While it is true that the request sought documents produced in *Poehling* and the emails were produced in the same format as they were produced in *Poehling*, this Court never intended to preclude Anthem from challenging privilege assertions in this action even if the defendant in *Poehling* did not challenge a privilege assertion.

CONCLUSION

For the reasons discussed above, the motion is GRANTED in part and DENIED in part. Upon the lifting of the stay during the government shutdown, the Government shall reproduce the documents in redacted form as specified herein.

DATED: October 15, 2025
New York, New York

Katharine H Parker
KATHARINE H. PARKER
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA *ex rel.* ANDREW SHEA, *Plaintiff*, v. eHEALTH, Inc., *et al.*, *Defendants.*	**Civil Action No. 21-cv-11777-DJC**

DECLARATION OF PATRICK MCMAHON IN SUPPORT OF DEFENDANTS' OPPOSITION TO THE UNITED STATES' MOTION FOR ENTRY OF PROTECTIVE AND CONFIDENTIALITY ORDER

I, Patrick McMahon, hereby declare as follows:

1. I am a Partner in the law firm of Foley and Lardner and am counsel for Defendant Elevance Health, Inc. in this matter. The information contained in this declaration is based on my own personal knowledge.

2. I make this declaration in support of Defendants' Motion for Protective Order.

3. On July 21, 2026, David Miller, counsel for the Government, wrote the following in email:

> So, to reiterate from below, the Government had proposed a significant concession in attempt at compromise: "Information to be treated as Confidential under this Order includes all Previously Produced Documents labeled as 'protected,' 'confidential,' 'proprietary,' or a similar designation." That is, in conjunction with our proposed "confidentiality" category and sealing procedure, we proposed limiting the burden on Defendants with no required confidentiality re-designation for the "Previously Produced Documents" (i.e., documents produced to DOJ in the investigation).

* * * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: August 12, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that that the above document was filed through the CM/ECF system and will be electronically sent to the registered participants as identified on the Notice of Electronic Filing (NEF) on this 12th day of August, 2026.

/s/ Jamie A. Steven

Jamie A. Steven