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April 6, 2015

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

***In the Matter of Rules and Regulations Implementing the Telephone  
Consumer Protection Act of 1991, CG Docket No. 02-278;  
Petition for Rulemaking of American Association of  
Healthcare Administrative Management***

Dear Ms. Dortch:

By this letter, Anthem, Inc. (“Anthem”) respectfully submits comments to the Federal Communications Commission (“FCC” or “Commission”) in support of the American Association of Healthcare Administrative Management’s (“AAHAM”) Petition for Expedited Declaratory Ruling and Exemption regarding non-telemarketing healthcare calls (the “AAHAM Petition”).<sup>1</sup>

As we missed the deadline for submission of formal comments in this proceeding, we are filing these comments as an *ex parte* letter.

**Anthem Supports Protections for Health-Care Related Calls.**

Anthem is one of the largest health benefits companies in terms of medical membership in the United States, serving 37.5 million medical members through its affiliated health plans as of December 31, 2014.

Anthem respectfully requests that in ruling on the AAHAM Petition and related petitions<sup>2</sup>, the FCC take into consideration that non-telemarketing, health-care related outbound calls and text messages have particularly high consumer benefits in the form of better health outcomes, including preventing death.

More specifically, Anthem urges the FCC to make non-telemarketing health care calls subject to an “opt out” rather than an “opt in” prior express consent regime. This step will help consumers by encouraging health insurers and providers to make these pro-consumer calls. On the other hand, without regulatory action, insurers and providers face massive liability under the Telephone Consumer Protection Act (“TCPA”) for making these non-telemarketing, health care calls. Regardless of how hard callers try

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<sup>1</sup> See American Association of Healthcare Administrative Management, Petition for Expedited Declaratory Ruling and Exemption, CG Docket No. 02-278 (filed Oct. 21, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=60000975030>.

<sup>2</sup> E.g., United Healthcare Services, Inc., Petition for Declaratory Ruling Regarding Reassigned Wireless Telephone Number, CG Docket No. 02-278 (filed Jan. 16, 2014), available at <http://apps.fcc.gov/ecfs/document/view?id=7521066369>.

to comply, given the complexity of health care systems and the uncertainty surrounding the rules governing these calls, the upsurge of litigation will continue absent Commission intervention. Indeed, a TCPA class action against a pharmacy for prescription refill reminder calls was settled for \$11 million notwithstanding the undisputed fact in that case that every person who received the disputed calls had voluntarily provided their number to the pharmacy in connection with their prescription.<sup>3</sup> Given the enormous potential class action liability, the most demanding possible view of TCPA requirements may in effect become *de facto* health care policy – leading to fewer health-care related calls being made regardless of actual consumer preferences and regardless of the lives that could be saved.

This “opt out” regime that Anthem supports can be effected by ruling that the patient’s health-care relationship with a provider or insurer, which is already heavily regulated, constitutes consent to be called or texted with dialer technology for non-telemarketing calls germane to the relationship with the insurer or provider. Alternatively, an “opt out” regime can be implemented by an exemption for these calls from any prior express consent requirement. In either instance, however, consumers would still have a right to revoke consent and hence “opt out.” If the FCC chooses not to recognize an “opt out” regime in the non-telemarketing health care area, Anthem would request that the FCC allow providers and insurers to make an initial automatic telephone dialing system (“ATDS”) calls to existing members and patients for the purpose of enabling members and patients to provide consent to receive future health-care ATDS calls.

To be absolutely clear, these comments do not address telemarketing calls. Moreover, Anthem’s comments are focused solely on calls to consumers with whom insurers or providers have an existing health-care relationship. The unique circumstances of non-telemarketing, health-care outreach strongly suggest that the FCC create a specific, more balanced regulatory regime for these notably pro-consumer calls.

### **Anthem’s Health-Care Calls and Texts are Aimed at Helping Members.**

Examples of Anthem’s health-care related calls and text messages can help put Anthem’s position in context:

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<sup>3</sup> *Kolinek v. Walgreen Co.*, Case No. 13-cv-04806 (N.D. Ill.), Plaintiff’s Motion for Preliminary Approval of Class Action Settlement (March 26, 2015) (Dkt. No. 93-1).

<ul style="list-style-type: none"> <li>▪ <u>Breast Cancer Screening Incentive Texts</u></li> <li>○ <u>Summary:</u> Encourage members to seek breast cancer screening services.</li> <li>○ <u>Goal:</u> Education and early detection to reduce mortality.</li> </ul>	<ul style="list-style-type: none"> <li>▪ <u>Home Visit Program Calls</u></li> <li>○ <u>Summary:</u> Schedule a home visit with members from a nurse practitioner or physician to conduct a health assessment and collect blood samples, if needed.</li> <li>○ <u>Goal:</u> Closing gaps in care and disease prevention.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <u>Text4Health Texts</u></li> <li>○ <u>Summary:</u> Comprehensive health education program for adults that also contains administrative modules (renewal reminders, benefits information).</li> <li>○ <u>Goal:</u> Education and better member engagement in own health care.</li> </ul>	<ul style="list-style-type: none"> <li>▪ <u>Diabetic Screening Outreach Calls</u></li> <li>○ <u>Summary:</u> Initial call to members who have been identified by the health plan as having diabetes and who need a screening.</li> <li>○ <u>Goal:</u> To encourage member to make an appointment to have his or her yearly diabetic eye exam.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <u>Flu Outreach Vaccine Calls</u></li> <li>○ <u>Summary:</u> Remind members to get a flu shot to protect against the seasonal flu.</li> <li>○ <u>Goal:</u> Reduce death and hospitalizations associated with the flu.</li> </ul>	<ul style="list-style-type: none"> <li>▪ <u>Postpartum IVR Calls</u></li> <li>○ <u>Summary:</u> Outreach to new mothers regarding care for themselves and their babies, including issues related to breastfeeding, newborn care, and vaccination and postpartum depression.</li> <li>○ <u>Goal:</u> Outreach to new mothers and screening for postpartum depression.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <u>Medicare Part D Late Refill Depression Medication Adherence Calls</u></li> <li>○ <u>Summary:</u> Follow-up with members taking medication for anxiety and depression, including education regarding taking the medication as prescribed.</li> <li>○ <u>Goal:</u> Support for members taking medication for anxiety and depression.</li> </ul>	<ul style="list-style-type: none"> <li>○ <u>OB Screening Calls</u></li> <li>○ <u>Summary:</u> Survey for pregnant mothers to screen for various high-risk factors.</li> <li>○ <u>Goal:</u> Identify risk factors that need to be addressed during pregnancy.</li> </ul>
<ul style="list-style-type: none"> <li>▪ <u>iFOBT Kit Outreach for Seniors Calls</u></li> <li>○ <u>Summary:</u> Reminder call to seniors who are due for a colorectal cancer screening, and offer to send a home testing kit free of charge.</li> <li>○ <u>Goal:</u> Cancer prevention.</li> </ul>	<ul style="list-style-type: none"> <li>▪ <u>Child Health Clinic Calls</u></li> <li>○ <u>Summary:</u> To discuss health care benefits available for children and teenagers, including the importance of well-child checkups, immunizations and screenings.</li> <li>○ <u>Goal:</u> To ensure that children and teenagers are getting the health care they need.</li> </ul>

## **The Weight of the Evidence Shows that Health-Care Related Outreach Calls Improves Health Outcomes.**

Anthem's health-care related calling and texting programs are supported by science and best industry practices. Indeed, using telephony to enlist consumers in their own health care is emerging as a promising and rapidly developing part of efforts to reduce health care costs and improve outcomes. As noted by the Brookings Institution, connecting with consumers through their mobile devices, known as m-Health,

is poised to alter how health care is delivered, the quality of the patient experience, and the cost of health care. Mobile technology is helping with chronic disease management, empowering the elderly and expectant mothers, reminding people to take medication at the proper time, extending service to underserved areas, and improving health outcomes and medical system efficiency.<sup>4</sup>

The U.S. Department of Health and Human Services ("HHS"), looking at more than 100 studies on the use of texting, came to a similar conclusion:

The trends toward widespread ownership of cell phones and widespread text message use across virtually all segments of the U.S. population will continue to support the spread of health text messaging programs. This [review of studies] provides encouraging evidence related to the use of health text messaging to improve health promotion, disease prevention, and disease management.<sup>5</sup>

An HHS task force also noted the potential for, and promise of, use of outreach to mobile phones to improve health:

Mobile phones and other portable health information technologies offer unprecedented opportunities to improve the health of the U.S. population and reach traditionally underserved subgroups (e.g., rural communities, low-income groups, and ethnic minority populations... Ethnic minority groups are more likely to own a mobile phone and use mobile phones to access health information. . . . A growing body of empirical studies suggests that the use of mobile phone text messaging can be effective in improving health behaviors and health outcomes.<sup>6</sup>

Scores if not hundreds of studies have been conducted including those reviewed in the HHS study. Taken as a whole, these studies show that a wide variety of disease management and health behavior calls can be effective in improving health care measures.

For example, in addition to the findings of the HHS study, a 2014 review showed that 77 percent of 60 published studies on the use of text messages to deliver health-care reminders showed

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<sup>4</sup> Darrell West, *How Mobile Devices are Transforming Healthcare*, 18 Issues in Technology Innovation (Brookings Institution), (May 2012), available at <http://www.brookings.edu/~media/research/files/papers/2012/5/22-mobile-health-west/22-mobile-health-west.pdf> (last visited Apr. 1, 2015).

<sup>5</sup> U.S. Department of Health and Human Services, Health Resources and Services Administration, *Using Health Text Messages to Improve Consumer Health. Knowledge, Behaviors, and Outcomes: An Environmental Scan*, May 2014 at p. 27, available at <http://www.hrsa.gov/healthit/txt4tots/environmentalscan.pdf> (last visited Apr. 1, 2015).

<sup>6</sup> U.S. Department of Health and Human Services, Text4Health Task Force, *Health Text Messaging Recommendations to the Secretary*, available at <https://web.archive.org/web/20130425185731/http://www.hhs.gov/open/initiatives/mhealth/recommendations.html> (last visited Apr. 1, 2015).

improvements in patient compliance.<sup>7</sup> The studies reviewed focused on HIV and diabetes disease management, among others, and improvement measures included increased adherence to medication and recommended treatment, as well as attendance at health care appointments.

An earlier review of 25 studies of the use of voice messages and texts concluded that the studies showed that both texts and audio messages had benefits for chronic conditions such as asthma and diabetes, as well as smoking cessation.<sup>8</sup>

Individual studies have found benefits from calls and texts:

- A study of the effectiveness of the federal government’s Text4Health texting program (which Anthem supports and promotes, see above) concluded that “[t]ext messaging for reminder-recalls improved immunization coverage in a low-income, urban population.”<sup>9</sup>
- “[S]ignificantly more” patients who received automated telephone messages regarding hypertension treatment achieved blood pressure control than patients who received ordinary care only.<sup>10</sup>
- Diabetes patients who received an automated call were more likely to attend a chronic care health care visit and to receive relevant testing.<sup>11</sup>
- A texting program designed to assist smokers to quit showed a doubling of the quit rate.<sup>12</sup>

The federal government itself promotes use of text messaging. Federal text messaging initiatives include Text4baby, which provides information and referral times to the stage of the baby; QuitNowTXT which delivers day-specific quit messages to persons in the process of quitting smoking; and Health Alerts On-the-Go, which provides the Center of Disease Control’s health information, including seasonal flu and public health emergencies.

Because the TCPA directly regulates calls (and texts) to cell phones, in essence the FCC is being asked to make important national health care policy. Anthem submits that in making health care policy the FCC should inform itself of the extensive body of research on the use of outbound telephone contacts, including texting, in the health care context.

### **The Ability to Reach Cell Phones is Critical to the Use of Telephony to Improve Outcomes.**

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<sup>7</sup>Kati Annisto, Marita Koivunen & Maritta Valimaki, *Use of Mobile Phone Text Message Reminders in Health Care Services: A Narrative Literature Review*, 16(10) J. Med. Internet Res. e222 (2014).

<sup>8</sup> Santosh Krishna, Suzanne Austin Boren & E. Andrew Balas, *Healthcare via Cell Phones: A Systematic Review*, 15(3) Telemedicine J. and e-Health 231 (Apr. 2009).

<sup>9</sup> Melissa S. Stockwell, et al., *Text4Health: Impact of Text Message Reminder-recalls for Pediatric and Adolescent Immunizations*, 102(2) AM. J. Public Health e15 (Feb. 2012), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3483980/> (last visited Apr. 1, 2015).

<sup>10</sup> Teresa N. Harrison, *A Randomized Controlled Trial of an Automated Telephone Intervention to Improve Blood Pressure Control*, 15(9) J. Clinical Hypertension 650 (Sept. 2013), available at <http://onlinelibrary.wiley.com/doi/10.1111/jch.12162/pdf> (last visited Apr. 1, 2015).

<sup>11</sup> Ashok Rai, et al., *Using Physician-Led Automated Communications to Improve Patient Health*, 14 Population Health Management 175 (Aug. 2011).

<sup>12</sup> Lorien C. Abrams, et al., *A Randomized Trial of Text2Quit, a Text Messaging Program for Smoking Cessation*, 47(3) AM. J. Preventive Medicine 242 (Sept. 2014).

As shown above, using telephony to engage consumers in their health care is emerging as a way to improve outcomes and health care. In order to use telephony effectively, however, insurers and health care providers must dial cell phone numbers, triggering the TCPA.

As a starting point, approximately 44 percent of the population of the United States only has wireless service and do not maintain a residential landline.<sup>13</sup> More than 50 percent of all children live in wireless-only households. Wireless-only households are more likely to have certain health challenges, such as substance abuse, financial barriers to health care, lack of influenza vaccination, and untreated health conditions.

As described below, medical researchers have observed that medically challenged populations, such as urban poor mothers, are particularly prone to rely on cell phones and texting as their only or primary means of telephonic communications.

In sum, to the extent that telephony is important to health care, calls and texts to wireless numbers must be reachable lest basically half of the U.S. population, and a majority of the vulnerable populations (children, poor, persons with health challenges), be excluded from the benefits.

### **Health-Care Related Calls to Cell Phones Are Welcomed by Consumers.**

Another important theme of the available research is that consumers are open to and desire access to programs that employ telephonic contact for health care matters.

One survey of users of a “safety net” hospital’s emergency room showed that patients preferred text messaging over other forms of communication, and only 15 percent did not want appointment reminders and notifications of expiring insurance. The researchers concluded that “text messaging may be a promising method to improve healthcare provider communication with safety net populations in the US, particularly for appointment and expiring insurance reminders and among younger and Hispanic populations.”<sup>14</sup>

Another study surveying commercially-insured consumers showed the highest acceptance for health management programs when they are mobile.<sup>15</sup>

As mentioned above, a major national pharmacy, Walgreens, has agreed to settle a nationwide class action challenging its prescription refill reminder calls. In court papers, it was disclosed that

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<sup>13</sup>Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2014*, at 1, Div. of Health Interview Statistics, Nat’l Ctr. for Health Statistics, Centers for Disease Control and Prevention (Dec. 2014), available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201412.pdf> (last visited Apr. 1, 2015).

<sup>14</sup> Leah Zallman, et al., *Access to and Preferences for Text Messaging for Medical and Insurance Reminders in a Safety Net Population*, Cambridge Health Alliance, Department of Medicine ET AL., available at <http://chiamass.gov/assets/docs/r/pubs/14/text-sgim-final.pdf> (last visited Apr. 1, 2015).

<sup>15</sup> Elizabeth Boehm et al., *Mobile and Social Gain Ground in Wellness and Disease Management*, Forrester Research, available at <https://www.forrester.com/Mobile+And+Social+Gain+Ground+In+Wellness+And+Disease+Managemen/t/fulltext/-/E-res58231> (last visited Apr. 1, 2015).

Walgreens had procedures that would allow consumers to opt out of receiving calls including by a keypad entry during prerecorded calls. The overall “opt out” rate was less than 1.5 percent.

This consumer receptiveness is confirmed by Anthem’s own experiences. Anthem collects “opt out” requests by members who do not desire to receive health-care messages. Anthem is experiencing an “opt out” rate for non-telemarketing calls of approximately .35 percent.

### **Creating Consent Paperwork is Extraordinarily Complex in the Health-Care Industry.**

While the benefits of health-care calls are clear, and the consumer’s receptivity to them is also clear, how providers and insurers create a paperwork trail of consent as a practical matter is very much unclear.

For example, Anthem administers government Medicaid and Medicare programs on behalf of states. The states provide enrollment information, including telephone numbers. Anthem has no control over the processes used by states for enrollment and collection of phone numbers. Indeed, even if Anthem had a subsequent interaction with a member and obtained documented consent, states regularly provide new enrollment files that can have new telephone numbers.

Similarly, Anthem has a substantial amount of commercial insurance business sold through groups. Anthem necessarily depends on groups to supply telephone numbers.

Anthem also provides individual insurance offered through ACA-health insurance exchanges. Once again, Anthem lacks control over how such numbers are collected through the exchanges.

The lack of direct involvement with enrollment processes means that Anthem lacks the ability to control and build paperwork processes to perfect documentation of consent.

Problems exist even when numbers are provided by the consumers for health care use. One study noted that of 1,754 persons who volunteered to participate in a study, 268 provided incorrect cell phone numbers.<sup>16</sup> This study is consistent with Anthem’s experience, in that numbers provided by government health programs in particular often have defective numbers.

### **An “Opt Out” Regime for Non-telemarketing, Health Care Related Calls to Existing Patients/Subscribers Strikes the Appropriate Balance.**

The TCPA addresses in a general way the interests of consumers in avoiding unwanted calls. However, Congress also recognized the need for flexibility in application of the TCPA by granting the Commission broad authority to interpret the TCPA and create exemptions. While one touchstone of the TCPA is Congress’ decision to allow consumers to prevent dialer calls to their cell phones, that is not the only interest at issue. Another interest of consumers is at stake: the right of consumers to receive beneficial dialer calls to their cell phones. A regime that makes it too difficult, and too risky, to place calls with such a high degree of consumer benefit would be perverse. Fortunately, the FCC is able to make calibrated policy to achieve an appropriate balance, and is not required to myopically enforce the TCPA with only one type of consumer benefit in mind.

While Anthem agrees with AAHAM’s petition in general, it believes that the FCC should simplify the approach towards health care companies and non-telemarketing calls made, as described in

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<sup>16</sup> Abroms, *supra* n.12, at p. 244.

detail above. In short, the appropriate balance here is to allow insurers and providers to make calls and send texts to cell phones of consumers with whom they have an existing relationship, for non-telemarketing purposes, provided consumers' requests that caller stop sending calls and texts are respected.

In the alternative, if the FCC does not recognize an "opt out" regime in the non-telemarketing, health care area, Anthem would request that the FCC allow providers and insurers to make an initial ATDS call to existing members and patients for the purpose of enabling them to provide consent to receive future health-care ATDS calls.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth P. Hall". The signature is fluid and cursive, with a large initial "E" and "H".

Elizabeth P. Hall  
Vice President