

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION**

In the Matter of Anthem, Inc. Petition for)	
Declaratory Ruling and Exemption)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of)	
1991)	

COMMENTS OF WELLCARE HEALTH PLANS, INC.

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Pursuant to the Federal Communications Commission’s (“Commission”) Notice dated August 31, 2015, DA 15-979, WellCare Health Plans, Inc. (“WellCare”) submits these comments in support of the petition filed by Anthem, Inc. (“Anthem”) addressing the need for an exception from the current prior express consent requirements of the Telephone Consumer Protection Act (“TCPA”) for healthcare-related calls.¹

INTRODUCTION AND SUMMARY

WellCare supports Anthem’s request for an exemption from the TCPA’s prior express consent requirements for certain non-telemarketing healthcare-related calls and text messages to cell phones. The use of autodialers, pre-recorded messages and text messages are critical to provide essential and meaningful healthcare outreach to WellCare’s members. These technologies enable real-time access to healthcare information that encourages WellCare’s members to make informed decisions that improve their lives and reduce the cost of healthcare.

¹ Anthem, Inc., *Petition for Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls* (June 10, 2015) (“Anthem Petition”).

WellCare coordinates healthcare services for people eligible for government-sponsored coverage, such as Medicare and Medicaid. Headquartered in Tampa, Fla., WellCare focuses exclusively on providing government-sponsored managed healthcare services, primarily through Medicaid, Medicare Advantage and Medicare Prescription Drug Plans, to families, children, seniors and individuals with complex medical needs, many of whom are often “dually eligible,” those who qualify for Medicare and Medicaid. WellCare’s members are frequently impoverished, disabled or elderly. WellCare has statutory and contractual mandates from federal and state government partners to deliver fully integrated managed health care services to its members. In delivering these services, WellCare is required to contact its members and, in some circumstances, must do so within the first 30 days of enrollment.² Such connections are not merely program and statutory requirements; they are necessary to achieve better health outcomes for our members. Managed healthcare plans create an integrated healthcare delivery system, allowing for the coordination of care between the members’ doctors and specialists, hospitals and other healthcare service providers, as well as working with the local community and social service agencies to meet members’ need for support. Managed healthcare plans’ communications to their members are vital to this integration, just as hospital and primary care physicians’ communications are to their patients.

Government-sponsored managed healthcare plans are active participants in their members’ healthcare, not only in the traditional role of providing insurance coverage, but also actively assisting the member in improving and maintaining their individual health outcomes. This is no mere administrative role in support of physicians, hospitals and other health care

² For example, in Florida, pursuant to Fla. Stat. § 409.973(4)(b), the managed healthcare plan must assist each enrollee scheduling the enrollee’s initial appointment with his or her primary care physician within the first 30 days after enrollment.

providers. The activities that managed healthcare plans undertake to meet these statutory and contractual obligations are every bit as vital to improving health outcomes to the nation's most at-risk population as the traditional "healthcare provider." Indeed, recognition of these similar functions is reflected in the fact that managed healthcare plans and traditional healthcare providers (when electronically transmitting healthcare information for certain transactions) are both considered covered entities under the Health Insurance Portability and Accountability Act ("HIPAA"), along with healthcare clearinghouses.³ Much the same as doctors and nurses, managed healthcare plans assess the health risks of their members, provide counseling and outreach to at-risk members, and deliver essential appointment reminders, prescription drug notices, and wellness assessments. Indeed, managed healthcare plans employ healthcare professionals to provide these important services.

Members of WellCare are frequently provided with care managers, who are charged with assisting that member and their family to address the member's specific healthcare needs. These care managers, often a registered nurse, certified nurse's assistant, social worker or behavioral health specialist, rely on data received from health risk assessments conducted on a yearly basis to identify specific areas of needs to the members. WellCare assists its members by locating a primary care physician or a specialist within their plan, obtaining their prescribed medication or durable medical equipment or helping members obtain transportation to their next doctor's visit. Autodialing technology is utilized in order to ensure that appointment and prescription reminders occur, transportation updates are received, vaccination and flu-shot reminders are sent and other vital messages are received on an effective and timely basis.

³ Under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), a "covered entity" is (1) a health plan; (2) a health care clearinghouse; or (3) a health care provider who transmits any health information in electronic form in connection with a transaction covered by 45 CFR Subtitle A, Subchapter C – Administrative Data Standards and Related Requirements. 45 C.F.R. § 160.103.

The TCPA's prior express consent requirements inhibit the ability of WellCare and other managed healthcare plans to conduct this vital outreach. And it jeopardizes the fulfillment of statutory, contractual and clinical objectives by needlessly adding costs while reducing efficiency and, more importantly, effectiveness. The imposition of the prior express consent requirement to place healthcare calls negatively impacts members' health and well-being by inhibiting the free flow of important life-improving and sometimes life-saving information.

While the TCPA serves an important privacy-enhancing purpose, the FCC should acknowledge that a member's request for coverage by a managed healthcare plan creates an expectation that the plan will help the member manage healthcare needs. The context and circumstances of enrollment express a member's clear desire and express consent to receive outreach from their managed healthcare plan. If members desire not to be contacted by their managed healthcare plan, the TCPA's public policy goals can be fully met by providing an opt out from the receipt of exempted healthcare calls.

Since Anthem filed its petition, the Commission has moved part of the way towards this view by releasing a declaratory ruling and order on July 10, 2015 that recognized that individuals expect certain healthcare-related calls to be placed by or on behalf of healthcare providers.⁴ The Commission recognized many of the same public policy concerns raised by Anthem in its petition. However, without consideration of the constitutionality of this choice, the Commission's decision seems to allow only certain HIPAA-covered entities to use certain technologies to deliver certain healthcare messages while at the same time not allowing other HIPAA-covered entities⁵ to use these same technologies to deliver the same messages. The

⁴ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order (Jul. 10, 2015) ("2015 Order").

⁵ *See supra* n. 3.

Commission should clarify that other HIPAA-covered entities, such as managed healthcare plans, have the same rights as their fellow covered entity healthcare providers to contact their members to provide the same types of important healthcare information consistent with the exemptions specified in the 2015 Order.⁶

I. WELLCARE’S ABILITY TO CONDUCT AND PROVIDE HEALTHCARE-RELATED OUTREACH IS IMPERATIVE TO IMPROVING THE LIVES AND HEALTHCARE OUTCOMES OF ITS MEMBERS.

WellCare places many of the same types of calls identified by Anthem in its petition.⁷ Specifically, WellCare makes calls to its members relating to appointment and exam confirmations and reminders, wellness checkups, hospital preregistration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications and home healthcare instructions. In addition to those communications explicitly identified by Anthem, WellCare also conducts care management outreach, which surveys its members to proactively identify health ailments and ensure that its members’ evolving medical needs are met. By placing these phone calls and text messages, WellCare fulfills a vital public policy goal of ensuring that at-risk populations are receiving sufficient medical care.

WellCare needs to be able to utilize efficient calling solutions to reach its members. Automated calling technologies provide the best solution to ensure a consistent, reliable and

⁶ WellCare further requests that the Commission eliminate this restriction of the exemption to healthcare providers because the Commission cannot, consistent with the First Amendment, choose which speakers can and cannot deliver the same messages. An exemption that permits urgent healthcare calls only by healthcare providers, and not managed healthcare plans, would raise First Amendment concerns regarding viewpoint discrimination. *See, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015); *cf. Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (holding that “[a]s a content-based regulation of speech, the [state] anti-robocall[ing] statute is subject to strict scrutiny”).

⁷ *See* Anthem Petition, at 14-18.

accurate method of staying in contact with WellCare's members regarding vital health issues. Other calling solutions involving hand dialing are enormously time intensive, costly and prone to error. The exemption that Anthem has requested for non-telemarketing healthcare-related calls is especially critical for managed healthcare plans' ability to fulfill their statutory, contractual and clinical objectives. It is necessary to fulfill the public policy objective of providing efficient and cost effective use of healthcare resources.

The inability to use these calling solutions jeopardizes WellCare's ability to meet the healthcare needs of its members. Other consequences include WellCare being assessed fines and sanctions for failure to comply with statutory and contractual obligations imposed by its state and federal government partners.

II. THE COMMISSION SHOULD ADOPT ANTHEM'S REQUEST FOR AN EXEMPTION FOR NON-TELEMARKETING HEALTHCARE CALLS AND CLARIFY THAT THE JULY 2015 ORDER COVERS CALLS PLACED BY MANAGED HEALTHCARE PLANS AND OTHER COVERED ENTITIES TO THEIR MEMBERS.

Anthem requests that the Commission interpret the meaning of "consent" and the emergency purpose exception under 47 U.S.C. § 227(b)(1)(A) to permit non-telemarketing healthcare calls by managed healthcare plans to its members.⁸ Anthem correctly notes that communications between managed healthcare plans and their members are already highly regulated,⁹ and as part of the enrollment process, members commonly provide their telephone numbers with the expectation that they will be contacted at that number by their managed healthcare plans in order to obtain healthcare information, care management and counseling.

⁸ Anthem Petition at 12-14.

⁹ *Id.*

Given this regulatory context and the preexisting relationship between members and managed healthcare plans, WellCare encourages the Commission to grant an exemption for non-telemarketing healthcare calls by managed healthcare plans to their members in this context. WellCare also supports Anthem's position that the provision of an opt out from such calls would be sufficient to protect the privacy interests of consumers and would strike the appropriate balance between the privacy objectives of the TCPA and the public policy objectives of providing essential healthcare information to consumers.

The FCC's 2015 Order acknowledges the economic imperative to use modern technologies for urgent healthcare messages, the policy considerations relating to these calls and the importance of healthcare calls to the American public.¹⁰ Responding to these considerations, the Commission issued certain clarifications and exemptions relating to urgent healthcare calls, but apparently only when placed by, or on behalf of, one type of speaker in the healthcare arena.¹¹ Because the clarifications and exemptions in the 2015 Order implicate many of the same concerns raised by the Anthem Petition, we request that, in its decision on the Anthem Petition, the Commission specifically address the application of the 2015 Order to managed healthcare plans.

Specifically, the 2015 Order (1) clarified that the "provision of phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA by a HIPAA-covered entity . . . if the covered entities . . . are making calls within the scope of the consent given, and absent instructions to the contrary," 2015 Order ¶ 141; (2) clarified that a "caller may make healthcare calls subject to HIPAA during [the] period of incapacity, based on

¹⁰ 2015 Order ¶¶ 140-48.

¹¹ 2015 Order ¶ 147.

the third party's prior express consent," *id.* ¶ 142; and (3) created an exemption from the TCPA's prior express consent requirement for certain calls made by or on behalf of a healthcare provider so long as 7 conditions are met, *id.* ¶ 147.

The Commission's action is an important step to harmonizing the approaches articulated in HIPAA and the TCPA. Although both statutes are relevant, Congress did not specify how the two were meant to interact. The Commission's approach of reading the TCPA's generally-applicable restrictions in light of the more specific HIPAA restrictions reflects the appropriate approach to recognizing that Congress intended HIPAA to be the controlling framework for the privacy of healthcare-related communications. Congress included robust privacy protections in HIPAA that reflect a balancing of the privacy needs of patients versus the need to coordinate the provision of care, billing, and healthcare operations — all of which are intertwined given the complex methods by which healthcare is delivered in our system. Managed healthcare plans, like healthcare providers, have a contractual bond with their members — the strength of which is expressly recognized by federal and state medical privacy protections that cover all communications with HIPAA-covered entities equally. The application of this exemption to HIPAA-covered entities would be consistent with sound public policy and ease practical conflict with HIPAA. Further, defining the scope of the exception to correspond with HIPAA reflects appropriate deference to the Department of Health and Human Services' special regard for the privacy of health-related communications from entities covered by HIPAA.

In response to the Anthem Petition, WellCare requests that the Commission extend its approach and clarify that these three clarifications and exemptions also apply to managed healthcare plans. The Anthem Petition stresses the need for managed healthcare plans to be able

to provide efficient and high-quality healthcare services to members.¹² WellCare also highlights that the calls WellCare places often relate to the care of at-risk populations such as dual-eligible members and that such calls fulfill a need for timely receipt of important healthcare information.

First, like other healthcare providers, managed healthcare plans place HIPAA-defined “healthcare” calls to members that are exempt from TCPA’s prior written consent requirements.¹³ It is important that the Commission clarify that the provision of a phone number to a managed healthcare plan constitutes prior express consent for that managed healthcare plan to place healthcare-related calls to that member. In its 1992 Order, the Commission stated that “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”¹⁴ The Commission should clarify that, when members knowingly release their phone numbers via an application for purposes of enrollment with a managed healthcare plan, they have, in effect, given their consent to be contacted by the managed healthcare plan at the number provided, absent instructions to the contrary.

The need to recognize that consent is inherent in the context of the process is particularly important in light of the auto-assignment used by governmental entities to assign eligible enrollees to appropriate managed healthcare plans. Under this process, the enrollee provides information on an application submitted to the relevant governmental entity and that entity verifies eligibility and passes that data to the managed healthcare plan in order to contact the enrollee. In this context, it is vital for the managed healthcare plan to be able to use modern telecommunications equipment to help maintain connections with the new member and alert

¹² Anthem Petition, at 2-8, 10-12.

¹³ 47 C.F.R. § 64.1200(a)(2).

¹⁴ 1992 TCPA Order, 7 Rcd 8752, 8769, ¶ 31.

them to the need to make appointments, refill prescriptions and the other sorts of healthcare communications discussed above.

Second, the 2015 Order clarified that consent may be obtained from third parties when a patient is incapacitated.¹⁵ The Commission found that “[a] caller may make healthcare calls subject to HIPAA during that period of incapacity, based on the third party’s prior express consent.”¹⁶ The Commission should clarify that managed healthcare providers may receive consent from third parties and place healthcare calls to their members when they are incapacitated. These types of outreach often involve a situation wherein a physician or medical provider gives the member’s contact number to a pharmacy because the member may be too ill to call or contact. Consent on a member’s behalf is also sometimes necessary for certain behavioral health situations, such as where a third party has been assigned power of attorney, or for individuals considered legally incompetent, such as children or members for whom a guardianship or conservatorship has been established.

Third, the Commission created an exemption from the TCPA’s prior express consent requirement for certain “calls for which there is exigency and that have a healthcare treatment purpose.”¹⁷ These calls include “[1] appointment and exam confirmation and reminders, [2] wellness checkups, [3] hospital pre-registration instructions, [4] pre-operative instructions, [5] lab results, [6] post-discharge follow-up intended to prevent readmission, [7] prescription notifications, and [8] home healthcare instructions.”¹⁸ In addition to imposing stringent conditions on such calls, the 2015 Order also limited the exemption to calls placed “by or on

¹⁵ 2015 Order, ¶ 142.

¹⁶ *Id.*

¹⁷ *Id.* at ¶ 146.

¹⁸ *Id.*

behalf of a healthcare provider.”¹⁹ The Commission should clarify that this exemption also applies to calls placed by or on behalf of managed healthcare plans. Managed healthcare plans place these same types of calls and fulfill the same policy objectives. Moreover, managed healthcare plans are often contractually required by state and local governments to place these types of calls.

WellCare also respectfully requests that, consistent with the Anthem Petition, the Commission clarify that all non-telemarketing healthcare calls from all HIPAA-covered entities such as managed healthcare plans to their members should be permitted under this exemption. WellCare supports Anthem’s request that the Commission clarify that the following calls be covered by the exemption:

- targeted outreach to certain at-risk members that suffer from chronic conditions;
- notices to members that are pregnant, or have recently been discharged;
- outreach to encourage members to obtain appropriate health screenings;
- educational outreach to members about available health services and benefits;
- outreach to encourage vaccinations;
- educational outreach to members about comprehensive healthcare treatment;
- reminders to members to renew their health plans;
- outreach to ensure that members know of their primary care physicians, their benefits, and other essential components of their plans;
- informational outreach to members to inform of changes to their plans and benefits;
- notifications to members of weather emergencies affecting their healthcare; and

¹⁹ *Id.* at ¶ 147.

- outreach intended to provide general diagnosis and wellness checkups.²⁰

In addition, the Commission should recognize the need for healthcare outreach that proactively identifies healthcare ailments to encourage proactive treatment and management. Calls about healthcare coverage are just as significant as calls relating to physical conditions because a lack or lapse of insurance — particularly for the population that WellCare predominantly serves — can be essentially the same as denying a person any ability to address their healthcare needs. Each of these calls provides access to essential healthcare information for managed healthcare plan members. Further, managed healthcare plans are statutorily or contractually required to place many of these types of calls. Given the clear benefit and healthcare purpose for each of these calls, WellCare respectfully requests that the Commission clarify that the exemption from the prior express consent requirement covers these types of calls.

III. THE COMMISSION SHOULD TREAT ALL ENTITIES MAKING HEALTHCARE CALLS THE SAME WAY.

Extending the healthcare provider clarifications and exemptions to all HIPAA-covered entities, including managed healthcare plans, also helps to protect the constitutionality of the Commission's approach. In order to be fully consistent with the Constitution, it is important for the Commission's exceptions to treat all speech about a given topic in the same way and not to distinguish between speakers. An exemption that permits calls only by healthcare providers, and not managed healthcare plans or others, could be vulnerable to First Amendment challenges regarding viewpoint discrimination. The Commission can avoid these constitutional concerns by

²⁰ Anthem Petition at 15-17.

adopting the Anthem Petition’s request for a speaker-neutral exemption for urgent non-telemarketing healthcare calls.

The Supreme Court has recently and repeatedly held that the government violates the First Amendment when it seeks to restrict some speech based on its content or the speaker but allows other such speech by similar entities, unless the government can satisfy strict scrutiny. *See, e.g., Reed*, 135 S. Ct. at 2231. Regulations that cannot meet this rigorous standard can be deemed to constitute impermissible “viewpoint discrimination.”²¹ This concern can be avoided by adopting the Anthem Petition’s request. An overly restrictive exemption would not be sufficiently narrowly tailored to avoid running afoul of the Constitution.²² In contrast, a uniform exemption, such as that requested in the Anthem Petition, could help accomplish the Commission’s dual goals of promoting urgent healthcare communications and protecting privacy within constitutional bounds.

²¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (holding that heightened judicial scrutiny is warranted for privacy regulations covering about prescriber information because they impose “specific, content-based burden on protected expression.”).

²² *See Cahaly v. Larosa*, 796 F.3d 399, 406-07 (4th Cir. 2015) (concluding that a content-based statute that prohibited politically-related unsolicited calls made by autodialers was unconstitutional where it failed to “pass muster under strict scrutiny”); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232-33 (10th Cir. 1999); *see also Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015) (“[U]nderinclusiveness can raise ‘doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.’” (citation omitted)).

CONCLUSION

For the foregoing reasons, WellCare requests that the Commission exempt non-telemarketing healthcare calls by HIPAA-covered entities, including managed healthcare plans, from the TCPA's prior express consent requirement. The provision of an opt out from such calls is sufficient to satisfy the privacy interests protected by the TCPA given the context in which individuals have chosen to join managed healthcare plans.

Respectfully submitted,

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