

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**COMMENTS OF UNITED HEALTHCARE SERVICES, INC.**

United Healthcare Services, Inc. (“United”),<sup>1</sup> through its counsel, respectfully submits these comments in response to the August 31, 2015 Public Notice released by the Federal Communications Commission (“FCC” or “Commission”) Consumer and Governmental Affairs Bureau (“Bureau”) in the above-captioned proceeding.<sup>2</sup> The Public Notice seeks comment on Anthem, Inc.’s (“Anthem”) Petition for Declaratory Ruling and Exemption (“Anthem Petition”), which asks the Commission to exempt certain non-telemarketing, healthcare-related calls and text messages from the Telephone Consumer Protection Act’s (“TCPA”) “prior-express consent” requirement.<sup>3</sup> The relief sought by Anthem is similar to the relief for healthcare calls provided

---

<sup>1</sup> Recognized as America’s most innovative healthcare company by Fortune magazine, United provides a diversified and comprehensive array of health and well-being products and services to more than 75 million individuals.

<sup>2</sup> See *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling by Anthem, Inc.*, Public Notice, DA 15-979 (CGB, rel. Aug. 31, 2015).

<sup>3</sup> See Anthem, Inc., Petition for Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls, CG Docket No. 02-278, at 1 (filed June 10, 2015) (“Anthem Petition”).

by the Commission in the recent *Omnibus TCPA Order*.<sup>4</sup> However, it would supplement the existing healthcare exemption to apply to non-telemarketing, healthcare-related calls and text messages that promote individuals' healthcare outcomes but were not expressly recognized in the *Omnibus TCPA Order*.<sup>5</sup> For the reasons described below, there is good cause to grant the Anthem Petition and supplement the existing exemption for non-telemarketing, healthcare-related calls.

**I. Non-Telemarketing, Healthcare-Related Calls Are Desired by Consumers, Improve Health Outcomes, and are an Increasingly Important Part of National Health Policy.**

The record in the Commission's TCPA docket is clear: non-telemarketing, healthcare-related calls and text messages are desired by consumers, help improve health outcomes, and have been embraced both by other federal agencies and the nation's health policy experts. Based on this record, the Commission noted that consumers welcome, expect, and rely on such calls,<sup>6</sup> reinforcing earlier Federal Trade Commission ("FTC") findings.<sup>7</sup> For example, the FTC concluded back in 2008 that prerecorded healthcare calls "generat[e] demonstrable improvements in patient outcomes" and play "an important cost-containment role in the provision of medical services."<sup>8</sup>

Anthem's experiences illustrate consumers' desire to receive these calls, as do Walgreens' experiences.<sup>9</sup> They have found that the opt-out rate for prerecorded calls to wireless

---

<sup>4</sup> See *id.* at 1-3; 14-18; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961 ¶¶ 140-48 (2015) ("*Omnibus TCPA Order*").

<sup>5</sup> See *Omnibus TCPA Order* ¶¶ 140-48; Anthem Petition.

<sup>6</sup> See *Omnibus TCPA Order* ¶¶ 145-46.

<sup>7</sup> See *Telemarketing Sales Rule*, Final Rule Amendments, 73 Fed. Reg. 51171, 51176, 51191 (2008).

<sup>8</sup> *Id.* at 51191.

<sup>9</sup> Anthem Petition at 9.

numbers is dramatically low, ranging from just 0.35 percent to 1.5 percent.<sup>10</sup> Meanwhile, as United pointed out in prior submissions to the Commission, many studies show that calls and text messages to wireless telephones can help improve health outcomes.<sup>11</sup> The Department of Health and Human Services (“HHS”) reviewed more than 100 of these studies and concluded that “text messaging improves treatment compliance . . . [and] can improve immunization rates, increase sexual health knowledge, and reduce risky behaviors.”<sup>12</sup> It should thus come as no surprise that, as Anthem reports, many federal and state agencies have adopted policies that encourage the use of autodialed and prerecorded calls to improve healthcare outcomes.<sup>13</sup> Examples include the federally-supported Text4baby and QuitNowTXT, which provide day-specific messages to expectant mothers and to individuals who are trying to quit smoking, respectively.<sup>14</sup>

In fact, the FCC and the FTC have both long-recognized that healthcare-related calls are of unique benefit and importance to consumers and warrant special treatment under the TCPA and the FTC’s Telemarketing Sales Rule (“TSR”). For example, in 2012, the Commission exempted from its consent, identification, time-of-day, opt-out, and abandoned call requirements all prerecorded healthcare-related calls to residential lines that are subject to the Health Insurance

---

<sup>10</sup> *Id.*; see also *Kolinek v. Walgreen Co.*, Case No. 13-cv-04806 (N.D. Ill.), Plaintiff’s Motion for Preliminary Approval of Class Action Settlement, at 5 (filed Mar. 26, 2015) (Docket No. 98).

<sup>11</sup> Reply Comments of United Healthcare Services, Inc., CG Docket No. 02-278, at 6 (filed Mar. 24, 2014) Examples of such communications include those that remind individuals with hypertension to control their blood pressure and prompt women to participate in follow-up treatment following irregular pap smears. *Id.*

<sup>12</sup> U.S. Dept. of Health and Human Services, *Using Health Text Messages to Improve Consumer Health Knowledge, Behaviors, and Outcomes* (2014), available at <http://1.usa.gov/1hMKa2e> (“HHS Report”); see also Anthem Petition at 4-5.

<sup>13</sup> See Anthem Petition at 5-6.

<sup>14</sup> See *id.*

Portability and Accountability Act (“HIPAA”).<sup>15</sup> The FTC had previously adopted a similar exemption from the TSR prerecorded telemarketing call rules in 2008, noting that prerecorded healthcare-related calls “generat[e] demonstrable improvements in patient outcomes” and that “consumers are willing to receive [such calls].”<sup>16</sup> More recently, the FCC emphasized this importance with the grant of the American Association of Healthcare Administrative Management’s (“AAHAM”) petition in the *Omnibus TCPA Order*, which sought an exemption for non-telemarketing, healthcare-related calls and text messages similar to the ones at issue in Anthem’s Petition.<sup>17</sup> In so doing, the Commission expressly recognized the continuing public interest in receiving non-telemarketing, healthcare-related calls.<sup>18</sup>

## **II. The Commission’s Existing TCPA Healthcare Exemption Should Be Supplemented to Include Similarly Beneficial Non-Telemarketing, Healthcare-Related Calls.**

In the *Omnibus TCPA Order*, the Commission exempted from the TCPA’s “prior express consent” requirement certain free, pro-consumer healthcare-related calls and text messages, such as those delivering appointment reminders, lab results, or prescription notifications.<sup>19</sup> Specifically, this exemption covers calls such as: appointment and exam confirmations and reminders; wellness checkups; hospital pre-registration instructions; pre-

---

<sup>15</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 ¶¶ 57-65 (2012) (“2012 Robocall Order”). In addition, the Commission adopted special rule provisions for calls to wireless lines that are subject to HIPAA. See 47 C.F.R. § 64.1200(a)(2).

<sup>16</sup> *Telemarketing Sales Rule*, Final Rule Amendments, 73 Fed. Reg. 51171, 51176, 51191 (2008).

<sup>17</sup> *Omnibus TCPA Order* ¶¶ 140-48; see also American Association of Healthcare Administrative Management, Petition for Expedited Declaratory Ruling and Exemption, CG Docket No. 02-278 (filed Oct. 21, 2014) (“AAHAM Petition”).

<sup>18</sup> *Omnibus TCPA Order* ¶ 146.

<sup>19</sup> *Id.* ¶ 2.

operative instructions; lab results; post-discharge follow-up intended to prevent readmission; prescription notifications; and home healthcare instructions.<sup>20</sup>

A grant of the Anthem Petition would supplement the relief that the *Omnibus TCPA Order* granted for non-telemarketing, healthcare-related calls.<sup>21</sup> In particular, it would extend the existing TCPA healthcare exemption to include three categories of calls that were not expressly recognized by the *Omnibus TCPA Order*:

- **Case management calls** related to: chronic conditions; pregnancy; post-discharge follow up; and prescription adherence;
- **Preventative medicine calls** related to: screenings; vaccinations; available services; and Text4Health texts; and
- **Medical benefit calls** such as: enrollment reminders; provider information; provider and benefit changes; and weather emergencies.<sup>22</sup>

In addition, the Anthem Petition would supplement the existing exemption to the extent that it does not already cover non-telemarketing, healthcare-related calls placed by or on behalf of certain callers.<sup>23</sup> Some confusion surrounds this point because the *Omnibus TCPA Order* can be read to limit the existing exemption to calls “made by or on behalf of a healthcare *provider*,” which suggests, without explanation from the Commission, that the same calls from other similarly situated entities would not be covered.<sup>24</sup> However, it is not clear that the Commission intended such a narrow interpretation of the exemption. Although the Commission adopted conditions “for each exempted call . . . made by or on behalf of a healthcare provider,” it did not

---

<sup>20</sup> *Id.* ¶ 146.

<sup>21</sup> *See id.* ¶¶ 140-48; Anthem Petition. The Anthem Petition does not reference the *Omnibus TCPA Order* or the existing TCPA healthcare exemption because it was filed before the *Omnibus TCPA Order*’s release. *See id.*

<sup>22</sup> *See* Anthem Petition at 14-18.

<sup>23</sup> *See id.* at 1.

<sup>24</sup> *Omnibus TCPA Order* ¶ 147 (emphasis added).

expressly state the healthcare exemption could apply only to such entities or expressly define “healthcare provider.”<sup>25</sup> In fact, elsewhere the Commission describes the exemption as simply applying to calls “that have a healthcare treatment purpose,” which suggests, appropriately, that whether the exemption applies to a call turns on the call’s purpose rather than the type of entity that is making it.<sup>26</sup> Additionally, as noted above, the Commission did not define the term “healthcare provider,” which it could have been expected to do if the exemption was intended to turn on this term.<sup>27</sup>

**There is good cause to grant the Anthem Petition.** Doing so would help ensure that consumers are able to receive the non-marketing, often time-sensitive healthcare communications that they desire and from which they benefit.<sup>28</sup> It would also be consistent with the actions taken in the *Omnibus TCPA Order* and the *2012 Robocall Order*.<sup>29</sup> Like the non-telemarketing, healthcare-related calls already exempted, the calls identified in the Anthem Petition relate directly to patients’ treatment and have been shown to help improve health outcomes. For example, as HHS observes, calls that help individuals quit smoking or manage diabetes can play a vital role in health management.<sup>30</sup> Yet, under the exemption adopted in the *Omnibus TCPA Order*, these and other important healthcare-related calls would seemingly remain unprotected by the exemption.

---

<sup>25</sup> See *id.* ¶¶ 140-48.

<sup>26</sup> *Id.* ¶ 146.

<sup>27</sup> In a footnote, the Commission explained how AAHAM defines “healthcare provider.” See *id.* ¶ 140 n.465. However, the Commission did not adopt this definition or otherwise indicate that it is relevant to the exemption. See *id.*

<sup>28</sup> See Section I, *supra*.

<sup>29</sup> See *Omnibus TCPA Order* ¶¶ 140-48; *2012 Robocall Order* ¶¶ 57-65.

<sup>30</sup> See HHS Report; Anthem Petition at 4-5.

Similarly, non-telemarketing, healthcare-related calls and text messages from health insurance plans and other entities that are not expressly listed as examples of “healthcare providers” in the *Omnibus TCPA Order* can play a pivotal role in patients’ treatment and improve their health outcomes. For example, America’s Health Insurance Plans (“AHIP”) reports that many health insurance plans use autodialed and prerecorded calls to help improve and manage their enrollees’ healthcare.<sup>31</sup> In fact, as AHIP and Anthem point out, healthcare plans are increasingly part of federal and state efforts to improve healthcare quality, which has caused them to take a more active role in their enrollees’ healthcare management.<sup>32</sup> For example, United’s “HouseCalls,” smoking cessation, and prenatal care calling programs each support federal and state efforts to improve healthcare quality. Similarly, Anthem promotes Text4baby for the State of Louisiana and provides care management services by telephone for the State of Indiana.<sup>33</sup> Moreover, such communications from health plans are normally subject to HIPAA’s protections, which “safeguard privacy concerns.”<sup>34</sup> Accordingly, communications from entities like healthcare plans should also be included in the exemption for non-telemarketing, healthcare-related calls.

### **III. Granting the Anthem Petition Will Continue to Protect Consumers’ TCPA Privacy Expectations.**

In the *Omnibus TCPA Order*, the Commission indicated that any exemption for non-telemarketing, healthcare-related calls and text messages must balance the benefits of such

---

<sup>31</sup> See Comments of America’s Health Insurance Plans, CG Docket No. 02-278, at 5 (filed Mar. 10, 2015).

<sup>32</sup> *Id.* at 5-6.

<sup>33</sup> *Id.*

<sup>34</sup> 2012 *Robocall Order* ¶ 63.

communications with its duty to protect individuals' privacy interests.<sup>35</sup> Granting the Anthem Petition is consistent with this approach. For example, the calls and text messages in question are ones that consumers want and from which they benefit.<sup>36</sup> In fact, the Commission itself recognizes that the "timely delivery" of non-telemarketing, healthcare-related calls is desired by consumers and can be "critical to a called party's healthcare."<sup>37</sup>

However, to ensure that the Commission continues to strike an appropriate balance, any supplementing of the exemption for non-telemarketing, healthcare-related calls could remain subject to the same limitations that were adopted in the *Omnibus TCPA Order*. For example, calls that include marketing messages could continue to be excluded, as could calls to wireless subscribers to the extent that they cause those subscribers to incur charges.<sup>38</sup> Each of the seven conditions articulated in the *Omnibus TCPA Order* could also continue to apply.<sup>39</sup> That is, callers could be required to comply with the following conditions:

- Voice calls and text messages must be sent only to the wireless telephone number provided by the patient;
- Voice calls and text messages must state the entity's name and contact information;
- Voice calls and text messages must be strictly limited to purposes that have been identified by the Commission to promote healthcare outcomes; may not include accounting, debt-collection, or other financial content; and must comply with HIPAA privacy rules;
- Voice calls and text messages must be concise: generally one minute or less in length for voice calls, and 160 characters or less in length for text messages;

---

<sup>35</sup> See *Omnibus TCPA Order* ¶¶ 145-46.

<sup>36</sup> See, e.g., *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* ¶¶ 146-148.

<sup>39</sup> See *id.* ¶ 147.

- An entity may initiate only one message (whether by voice call or text message) per day, up to a maximum of three voice calls or text messages combined per week from a specific entity;
- An entity must offer recipients within each message an easy means to opt-out of future such messages, voice calls that could be answered by a live person must include an automated, interactive voice- and/or key press-activated opt-out mechanism that enables the call recipient to make an opt-out request prior to terminating the call, voice calls that could be answered by an answering machine or voice mail service must include a toll-free number that the consumer can call to opt out of future healthcare calls, text messages must inform recipients of the ability to opt out by replying “STOP,” which will be the exclusive means by which consumers may opt out of such messages; and
- An entity must honor the opt-out requests immediately.

Accordingly, the Commission can grant the Anthem Petition and supplement the healthcare exemption to cover additional types of non-telemarketing, healthcare-related calls – including those from entities not expressly recognized as example “healthcare providers” in the *Omnibus TCPA Order* – while continuing to protect individuals’ privacy rights.

For the foregoing reasons, the Commission should grant the Anthem Petition and confirm that the non-telemarketing, healthcare-related calls described therein are exempt from the TCPA and the Commission’s TCPA rules, subject to the conditions proposed.

Respectfully submitted,

/s/ Mark W. Brennan

Mark W. Brennan  
Wesley B. Platt  
Hogan Lovells US LLP  
555 Thirteenth Street, NW  
Washington, DC 20004  
Phone: (202) 637-6409  
Fax: (202) 637-5910  
Mark.Brennan@hoganlovells.com

Counsel to United Healthcare Services, Inc.

September 30, 2010