Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF CVS AND RITE AID

CVS Health Corporation (“CVS”) and Rite Aid Hdqtrs. Corp. (“Rite Aid”) respectfully submit these comments to the Federal Communications Commission (“FCC” or “Commission”) in support of Anthem, Inc.’s (“Anthem”) Petition for Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls (“Anthem’s Petition”).¹

In its petition, Anthem seeks a declaratory ruling from the Commission expressly exempting from the restrictions that otherwise apply under the Telephone Consumer Protection Act (“TCPA”) those non-telemarketing health care-related calls and texts aimed at improving health outcomes from healthcare plans or providers to existing patients. Anthem asks the Commission to immediately begin identifying the exceptions for these important health care-related calls and text messages subject to their proposed “opt-out” regime rather than an “opt-in” prior consent regime. CVS and Rite Aid submit these comments in support of Anthem’s petition.

I. INTRODUCTION.

CVS$^2$ and Rite Aid$^3$ are among the largest retail drugstore chains in the U.S., offering an assortment of health care and wellness products and services through stores across the country. From dispensing prescriptions and over-the-counter drugs to offering immunizations and healthcare screenings, CVS and Rite Aid offer comprehensive healthcare solutions to their patients.

Further aiding the effectiveness of these critical services relating to individual health outcomes and overall public health, CVS and Rite Aid patients can elect to be contacted with important information, notifications, and updates via phone. This allows CVS and Rite Aid to quickly and efficiently communicate specific pharmacy and wellness alerts directly to the patient. For example, rather than requiring a patient to call a local CVS or Rite Aid store location and sort through a pre-recorded menu of options in order to determine if a prescription has been filled and is ready for pick-up or is due to be re-filled, or if a specific vaccination is available, CVS and Rite Aid give patients the option to be contacted by phone with a reminder as soon as the prescription or service is available. In general, CVS and Rite Aid contact patients by phone with information that constitutes a “health care” related message under the Health Insurance Portability and Accountability Act (“HIPAA”), and their patients rely upon and appreciate these proactive efforts to keep their health a top priority.

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$^2$ CVS, together with its subsidiaries, operates as an integrated pharmacy health care provider. CVS/pharmacy, is the retail pharmacy segment with more than 7,800 retail drug stores; CVS/caremark is a leading pharmacy benefit manager and mail service pharmacy serving more than 2,000 clients and more than 65 million plan members; CVS/minuteclinic is the nation’s largest walk-in medical clinic provider with nearly 1,000 clinics located in the CVS/pharmacy retail drug stores and CVS/specialty includes specialty pharmacy management services, including Accordant, NovoLogix and Coram.

$^3$ Rite Aid, as one of the nation’s leading drugstore chains with 4,561 stores in 31 states and the District of Columbia, offers health and wellness services through its various affiliate entities including a national, full-service pharmacy benefit manager that has fully integrated mail-order and specialty pharmacy services, as well as a national chain of convenient care clinics that provide a wide range of medical and preventive services.
Notwithstanding these efforts to provide essential service to patients, pharmacy providers like CVS and Rite Aid now find themselves defending multiple TCPA lawsuits seeking statutory damages. In light of the increase in litigation, CVS and Rite Aid have a direct and immediate interest in the Commission quickly resolving the issues presented by the Anthem Petition.

II. HEALTH CARE-RELATED CALLS CONSTITUTE CALLS MADE FOR EMERGENCY PURPOSES.

As Anthem points out, the Commission has the discretion to clearly confirm that health care-related calls fall within the definition of “emergency purposes.” Indeed, although the TCPA exempts “call[s] made for emergency purposes” both to wireline and wireless numbers, no court has interpreted the scope of the term “emergency purposes” as it applies to health care-related calls. In light of the legislative history to the TCPA and the Commission’s precedent, there can be no doubt that health care-related calls constitute calls made for emergency purposes.

The Commission has long held that “[t]he legislative history of the TCPA indicates a congressional intent to interpret the term ‘emergency’ broadly rather than narrowly.” Indeed, Congress left the phrase “emergency purposes” intentionally vague, noting that “[t]he FCC must determine what constitutes an emergency purpose.” In so determining, the Commission found “emergency purposes” to include situations where information is conveyed to consumers regarding “public health and safety” and “other potentially hazardous conditions to the public.” The Commission subsequently adopted the definition of “emergency purposes” as “calls made

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4 Anthem Petition at 13-15.
5 See 47 U.S.C. §§ 227(b)(1)(A)-(B); see also 47 C.F.R. §§ 64.1200(a)(1)-(3).
8 In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 7 F.C.C. Rcd. 8752, 8778 (1992); see also In the Matter of the Tel. Consumer Prot. Act of 1991, 7 F.C.C. Rcd. 2736 (1992) (“In keeping with the legislative history and the intent of the TCPA, the Commission proposes to interpret ‘emergency’ to include situations in which it is in the public interest to convey information to consumers concerning health or safety….”).
necessary in any situation affecting the health and safety of consumers.”⁹

Looking first to the TCPA’s legislative history, it is abundantly clear that the breadth of the term “emergency purposes” encompasses health care-related calls. In enacting the TCPA, Congress indicated that the term “emergency purposes” encompasses situations such as calls that “notif[y] consumers of impending or current power outages,”¹⁰ including outages relating to (i) maintenance, (ii) weather and (iii) late payment of utility bills.¹¹ If calls related to late payment of utility bills fall squarely within Congress’s interpretation of the term “emergency purposes,” it is implausible, if not impossible, that health care-related calls (i.e., calls relating to medications and the treatment of medical conditions) would not similarly fall within the broad emergency exception. In fact, this past July, the Commission found that most types of health care-related calls (including “appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions”) pertain to matters of “exigency” and are in the “public interest.”¹² Accordingly, the Commission’s own characterization of health care-related calls as “critical to a called party’s healthcare”¹³ falls well-within the Commission’s very own definition of “emergency purposes” as calls “affecting the health and safety of consumers.”¹⁴

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⁹ 47 C.F.R. § 64.1200(f)(4).
¹³ July Declaratory Ruling at ¶ 146.
¹⁴ 47 C.F.R. § 64.1200(f)(4).
In light of the legislative history and the Commission’s prior analysis, CVS and Rite Aid urge the Commission to grant Anthem’s Petition and find non-telemarketing, health care-related calls to a HIPAA covered entity’s existing customers fall within the definition of emergency purposes.\(^\text{15}\) Such calls pertain to information that affects the health and safety of consumers.\(^\text{16}\)

III. NON-TELEMARKETING HEALTH CARE-RELATED CALLS AND TEXT MESSAGES PROVIDE IMMENSE PUBLIC BENEFITS.

Medication non-adherence affects individual health outcomes as well as overall costs. Twenty to thirty percent of prescription medications are never retrieved and up to 50\% of medications are not taken as prescribed.\(^\text{17}\) This non-adherence costs between $100 billion to nearly $300 billion of avoidable health care costs per year.\(^\text{18}\) As Anthem noted in its petition, numerous empirical studies have demonstrated the benefit of health care-related calls and text messages to improve compliance and behaviors and in turn improve clinical outcomes and public health.\(^\text{19}\) Outreach through mobile phones offers opportunities to reach traditionally underserved populations, including rural communities, low-income groups, and minorities.\(^\text{20}\) Text messages have proven effective in delivering health-care reminders, increasing adherence to recommended

\(^\text{15}\) To the extent the Commission finds certain non-telemarketing health care-related calls placed by HIPAA covered entities to fall under the emergency purposes exception, Rite Aid and CVS respectfully disagree with Anthem that such calls should be subject to an opt-out regime. See Anthem Petition at 14-15. As a preliminary matter, the Commission’s recent pronouncement in the July Declaratory Ruling on opting out via any reasonable means puts in-store staff and health care professionals in the untenable position of having to be ready at literally any moment to take down customer opt out information (whether they have access to a customer database or not). In any event, imposing an opt-out regime on emergency calls would be imposing a requirement found nowhere in the TCPA, which exempts emergency calls entirely.

\(^\text{16}\) The current TCPA landscape makes clarification on this issue is essential. Each of the major US pharmacies has faced TCPA class actions stemming from prescription refill and pickup reminder calls and the like. Indeed, in March of 2015, Walgreens settled a prescription refill reminder class action for $11 million, despite the fact that the plaintiff’s counsel admitted the calls “provid[ed] time-sensitive medical notifications.” Kolinek v. Walgreen Co., Case No. 13-cv-4806, DE 93-1 at 3 (N.D. Ill., March 26, 2015).


\(^\text{18}\) Id.

\(^\text{19}\) Anthem Petition at 4-8.

\(^\text{20}\) Id.
treatment, and attendance at health care appointments. By way of example, text reminders to get periodic vaccinations have been shown to significantly increase the number of people getting vaccinations. In studies among urban low-income populations, researchers found that almost three-quarters of parents who received text reminders brought their children in for a recommended second dose. With some 20,000 children hospitalized each year from the flu alone, any increase in inoculation rates is directly associated with improving public health.

A majority of consumers desire – and expect to get – vaccination notifications and refill reminders. Parents involved in flu vaccination studies reported they appreciated receiving the texts. This is not surprising as Americans have become increasingly reliant upon cell phones.

Government agencies have recognized the benefit of call and text health care messages, sponsoring and requiring health plans and providers to conduct more outreach through call and text. As Anthem noted, federal agencies have developed several messaging initiatives like Text4baby (providing information about prenatal and infant care), QuitNowTXT (helpful messages for those ready to quit smoking), and Health Alerts On-the-Go (providing information about viruses and public health emergencies). Providing care management services and prevention information over telephone is encouraged, and even required, by some state Medicaid

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IV. THE COMMISSION SHOULD NOT ALLOW THE TCPA TO UNDERMINE THE PUBLIC BENEFITS CONGRESS SAW FIT TO ENACT IN HIPAA.

Outreach to consumers through health care-related messages is already subject to a broad regulatory regime under HIPAA. After providing required notices, HIPAA covered entities may communicate with individuals via wireless and wireline (cell and residential) phones. HIPAA rules do not distinguish between the type of phone, but rather, the type of information conveyed on the call. The Commission should tailor its rules to provide for the same results. As discussed above, the Commission has discretion to clearly interpret that health-care related calls fall within the “emergency purposes” exception to the TCPA for both wireline and wireless numbers. Non-telemarketing, health care-related calls concerning exigent prescription refills and vaccinations, and similar health care messages, unquestionably affect the health and safety of consumers and therefore should be exempt from the TCPA’s onerous restrictions.

As Anthem explains, other means of outreach, such as mailings and calls to residential phones, are not as effective at reaching consumers. According to a 2010 study, 92% of low-income families have cell phones, and of those 96% are able to receive text messages, and 81% have unlimited plans. Moreover, cell numbers tend to be more stable than home addresses or residential numbers, and text messages usually reach the intended recipient (and can be visibly

27 Anthem Petition at 7.
28 42 C.F.R. § 438.104(b)(1)(i) & (v); see also In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. at 1856 (“In sum, based on the record and the HIPAA requirements, we agree with the FTC approach under the TSR and are persuaded that the HIPAA privacy regulations are rigorous and reflect a statutory mission to protect privacy rights. HHS enforcement measures of HIPAA discourage abuse because these measures include civil and criminal penalties. We therefore adopt an exemption from our TCPA rules for prerecorded health care-related calls to residential lines that are subject to HIPAA.”).
29 See 47 U.S.C. §§ 227(b)(1)(A)-(B); see also 47 C.F.R. §§ 64.1200(a)(1)-(3).
30 Anthem Petition at 9-10.
saved for future use). Distinguishing between wireless and wireline phones results in a disproportionate impact upon young people, minorities, and low-income groups, and would be a disservice to public health. The only appropriate solution is to unequivocally confirm that non-telemarketing health care-related calls and texts are exempt from TCPA restrictions.

V. THE ANTHEM PETITION HIGHLIGHTS THE AMBIGUITY IN THE MARKETPLACE CONCERNING THE CONSENT REQUIREMENTS FOR HIPAA-RELATED CALLS TO WIRELESS PHONES.

As Rite Aid pointed out previously in its comments on the Petition for Expedited Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls filed by the American Association of Healthcare Administrative Management, substantial confusion exists in the marketplace concerning the requirement for prior express consent to place non-telemarketing autodialed and prerecorded health care-related calls to wireless phones where the called party is charged for the call. In short, the Commission’s regulations as presently drafted expressly allow health care-related calls to wireless numbers without consent even where the called party is charged for the call, while the Commission in other contexts has indicated

34 At the least, the Commission should interpret “health care” in a uniform manner as between wireless and wireline calls. The Commission appears to have adopted a broad view of “health care” as it pertains to residential calls and a narrow view of “health care” as it pertains to wireless calls. Compare In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C. Rcd. at 1856 (broadly exempting health care-related calls subject to HIPAA to residential lines) with July Declaratory Ruling at ¶ 147 (adopting an extraordinarily narrow exception for specified health care-related calls).
36 See Rite Aid Comments to AAHAM Petition, CG Docket No. 02-278 (filed January 16, 2015).
Moreover, even a casual survey of the available literature shows a remarkable confusion on this issue. In light of this confusion in the marketplace caused by the ambiguity created by the Commission in its drafting of 47 C.F.R. § 64.1200(a)(2), CVS and Rite Aid join in calling for the Commission to grant a retroactive waiver to CVS and Rite Aid and similarly situated parties who have been subjected to TCPA-related litigation involving alleged violations of the prior express consent requirement for health care-related calls to wireless numbers.

While the Commission expressly declined to address Rite Aid’s previous request for clarification on this issue, it did so without addressing the ambiguity inherent in its very own regulations. Specifically, 47 C.F.R. § 64.1200(a)(2) states that

No person or entity may . . . [i]nitiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system . . . to [wireless numbers], other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a ‘health care’ message . . . .

As drafted, the regulation requires (1) prior express written consent for telemarketing calls, (2) prior express consent for calls made by tax-exempt entities and (3) no consent for health care-related calls. While the Commission may have indicated elsewhere that subsection (a)(2) does not mean what it says, it is axiomatic that the plain language of the regulation controls. And HIPAA covered entities cannot be expected to read subsection (a)(2) in a manner contrary to its plain language unless and until that language is clarified.

The Commission notes in the public notice calling for comment on the Anthem Petition that the agency had recently granted an exemption for certain non-telemarketing calls made for

37 Compare 47 C.F.R. § 64.1200(a)(2) with the July Declaratory Ruling at n. 471.
38 See July Declaratory Ruling at n. 471.
39 See, e.g., Dickenson-Russell Coal Co., LLC v. Sec’y of Labor, 747 F.3d 251, 257 (4th Cir. 2014)
healthcare treatment purposes and that are not charged to the called party. The Commission further notes the Anthem Petition is requesting relief that differs from the relief granted by the Commission in the July Declaratory Ruling because Anthem’s proposed exemption would allow calls to wireless numbers for health care-related calls even where the called party is charged. In other words, Anthem bases its petition on the notion that some form of consent is currently required for health care-related calls. CVS and Rite Aid submit that this is further evidence of the (entirely justified) confusion in the marketplace about the scope of the Commission’s regulation and provides additional evidence supporting a grant of a limited waiver.

VI. CONCLUSION

For the foregoing reasons, CVS and Rite Aid respectfully request that the Commission grant the Anthem Petition to the extent described herein and exempt non-telemarketing health care-related calls from the restrictions that otherwise apply under the TCPA.

September 30, 2015

Respectfully Submitted,

CVS and RITE AID

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