

Before the
Federal Communications Commission
Washington, D.C. 20554

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

DECLARATORY RULING AND ORDER

Adopted: June 25, 2020

Released: June 25, 2020

By the Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. The Telephone Consumer Protection Act (TCPA) prohibits calls to wireless numbers made using an autodialer or an artificial or prerecorded voice unless the calls are "made for an emergency purpose or [are] made with the prior express consent of the called party." In 2015, health benefit company Anthem, Inc. (Anthem) filed a Petition for Declaratory Ruling and Exemption asking the Commission to exempt health plans and providers from the need to obtain prior express consent before making health care-related calls and text messages to wireless telephone numbers so long as they allow consumers to opt out of such messages after the fact. In other words, such health plan providers could enroll their customers in message programs without "prior express consent" and instead require consumers to take affirmative action to prevent such calls and text messages. Anthem also asks that the Commission exempt certain non-emergency, urgent health care-related calls from the requirements of the TCPA.

2. In this Declaratory Ruling and Order, we affirm that callers must get consumers' prior express consent before making autodialed calls or robocalls, and thus deny Anthem's requests.

II. BACKGROUND

3. In relevant part, the TCPA prohibits calls made using an autodialer or an artificial or prerecorded voice to wireless telephone numbers except when made: (1) for an emergency purpose; (2) with the prior express consent of the called party; (3) pursuant to a Commission-granted exemption; or (4) solely for the collection of a debt owed to or guaranteed by the United States. For the third of these exceptions, the TCPA gives the Commission the authority to exempt from the prior-express-consent

1 Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, § 2(9) (1991), codified at 47 U.S.C. § 227(b)(1)(A); see also 47 CFR § 64.1200(a)(1).

2 See Petition of Anthem, Inc. for Declaratory Ruling and Exemption Regarding Non-Telemarketing Healthcare Calls, CG Docket No. 02-278, 1 (filed June 10, 2015) (Anthem Petition).

3 See id. at 3.

4 See 47 U.S.C. §§ 227(b)(1), (b)(2)(C); 47 CFR § 64.1200(a)(1). The Commission has concluded that the TCPA's protections apply to text messages as well as voice calls. See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003).

requirement only calls to wireless telephone numbers “that are not charged to the called party,” subject to conditions the Commission may prescribe “as necessary in the interest of the privacy rights [the TCPA] is intended to protect.”<sup>5</sup>

4. On June 10, 2015, Anthem filed a petition asking the Commission to clarify that the TCPA’s prior-express-consent requirement does not apply to its calls. Anthem asks us to exempt health care plans and providers from the need to obtain prior express consent before making health care-related calls and text messages to wireless telephone numbers so long as they allow consumers to opt out after the fact.<sup>6</sup> Anthem also asks us to exempt certain non-emergency, health care-related calls that are purportedly “urgent” from the requirements of the TCPA.<sup>7</sup> Anthem characterizes these “specific calls and texts” as case management calls, preventative medicine calls, and calls regarding the use and maintenance of medical benefits.<sup>8</sup> Anthem makes several policy arguments as well, including that the calls benefit consumers, are welcomed by consumers, and are otherwise regulated, which it asserts should allay any TCPA-related concerns.<sup>9</sup>

5. The Consumer and Governmental Affairs Bureau (Bureau) sought comment on the Anthem Petition.<sup>10</sup> Four commenters, including health care providers, national retail drug store chains, and a health benefits coordinator, filed comments supporting Anthem.<sup>11</sup> These commenters argue that the Commission should exempt from the TCPA’s prior-express-consent requirement the calls Anthem identifies because they have the potential to “improve medical treatment compliance, medication adherence and appointment attendance.”<sup>12</sup> One consumer filed an *ex parte* comment opposing the petition, asserting that Anthem’s calls are not “emergency” calls and that content-based exemptions to the TCPA are not appropriate.<sup>13</sup>

6. On March 20, 2020, the Bureau, in response to the COVID-19 pandemic, issued a declaratory ruling offering clarification regarding “emergency purposes” calls and the TCPA.<sup>14</sup> The Bureau clarified that government officials and public health care authorities, as well as a person under the

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<sup>5</sup> 47 U.S.C. § 227(b)(2)(C). We note that Anthem’s petition neglects to cite this statutory basis for the requested Commission action.

<sup>6</sup> See Anthem Petition at 12-14.

<sup>7</sup> See *id.* at 14-17.

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* at 3-12.

<sup>10</sup> *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling Filed by Anthem, Inc.*, CG Docket No. 02-278, Public Notice, 30 FCC Rcd 9774 (2015).

<sup>11</sup> Adventist Health System Comments (rec. Sept. 30, 2015) (Adventist Comments); WellCare Health Plans, Inc. Comments (rec. Sept. 30, 2015) (WellCare Comments); CVS Health Corporation and Rite Aid Hdqtrs. Corp. Comments (rec. Sept. 30, 2015) (CVS Comments); United Healthcare Services, Inc. Comments (rec. Sept. 30, 2015) (UHS Comments).

<sup>12</sup> Adventist Comments at 2; see also CVS Comments at 7; UHS Comments at 5.

<sup>13</sup> See Letter from Roger Biggerstaff to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 3 (filed Oct. 16, 2015).

<sup>14</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling, 35 FCC Rcd 2840 (CGB 2020) (*COVID-19 Declaratory Ruling*); see also Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (Mar. 13, 2020), <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>; 47 CFR § 64.1200(f)(4) (defining “emergency purposes” as “calls made necessary in any situation affecting the health and safety of consumers”).

express direction of such an organization and acting on its behalf, can make automated calls directly related to the health or safety risks arising out of the COVID-19 outbreak pursuant to the TCPA's "emergency purpose" exception.<sup>15</sup> Such emergency calls are permissible under the TCPA and the Commission's implementing rules even without the prior express consent of the called party.

### III. DISCUSSION

7. In this Order, we affirm that makers of robocalls generally must obtain a consumer's prior express consent *before* making calls to the consumer's wireless phone number.<sup>16</sup> And we note that, to the extent that calls are welcomed by consumers, callers should be able to easily obtain prior express consent for them.

8. Congress was clear in enacting the TCPA that consumers should be protected from unwanted robocalls.<sup>17</sup> Consumers consistently tell the Commission that unwanted calls are their top concern, a fact that prompted recent enactment of the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED) Act.<sup>18</sup> For wireless calls, the TCPA contains clear, specific exceptions for the narrow set of calls consumers are likely to want to receive—such as emergency calls—but does not authorize a broad exception for health care-related calls. We therefore reiterate the statutory requirement that callers must obtain consumers' *prior* express consent for such calls and may not instead require consumers to affirmatively opt out of them after the fact.<sup>19</sup>

9. In reaching our conclusion, we reject Anthem's various arguments. We disagree that health care-related wireless calls should be exempt from the prior-express-consent requirement so long as consumers are allowed to opt out because there is a pre-existing relationship between the consumer and the caller (the consumer's health care provider or health care plan) that constitutes consent.<sup>20</sup> The mere existence of a caller-consumer relationship does not satisfy the prior-express-consent requirement for

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<sup>15</sup> See *COVID-19 Declaratory Ruling*, 35 FCC Rcd at 2841-42, paras. 6-8.

<sup>16</sup> We reiterate that there is no general exception to the prior-express-consent requirement for health care-related calls but note that in 2015 the Commission adopted a limited exemption to the requirement for certain health care-related calls when they are, among other things, free to the end user. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8031-32, paras. 147-48 (2015) (*2015 TCPA Declaratory Ruling and Order*).

<sup>17</sup> See Pub. L. No. 102-243, § 2(9) (1991).

<sup>18</sup> See Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116-105 (2019).

<sup>19</sup> The Commission has clarified that "persons who knowingly release their phone numbers" for a particular purpose "have in effect given their invitation or permission to be called at the number" for that purpose "absent instructions to the contrary." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, 8769, para. 31 (1992) (*1992 TCPA Order*). The Commission has examined the issue of prior express consent in the context of health care-related calls: "[T]he provision of a phone number to a healthcare provider constitutes prior express consent for healthcare calls subject to HIPAA . . . if the covered entities and business associates are making calls within the scope of consent given, and absent instructions to the contrary." *2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd 8020, para. 141. The Commission further clarified that "within the scope of consent given" means "the call must be closely related to the purpose for which the telephone number was originally provided." *Id.* at 8020 n.474.

<sup>20</sup> See Anthem Petition at 2, 13.

calls to wireless numbers, nor does it create an exception to this requirement.<sup>21</sup>

10. We also reject Anthem's request that we exempt certain non-emergency, health care-related calls that it claims are "urgent" from the requirements of the TCPA. Anthem cites no statutory authority to support its request that we create an "urgent circumstances" exemption.<sup>22</sup> Further, we are skeptical that the types of calls Anthem would make under such an exception would reasonably be considered "urgent" by consumers. For example, calls to "educate members about available services and benefits" are not likely to be so time-sensitive and critical to justify bypassing consumer consent.<sup>23</sup> And unlike the automated calls concerning the COVID-19 pandemic we addressed in our recent *COVID-19 Declaratory Ruling*, the calls Anthem describes do not appear to be "made necessary by incidents of imminent danger including 'health risks' affecting health and safety."<sup>24</sup> Such calls therefore are not made for an "emergency purpose" as defined by the Commission's rules.<sup>25</sup> We note, however, that to the extent any calls covered by Anthem's petition would meet the criteria set forth in the recent *COVID-19 Declaratory Ruling*, such calls would be governed by that Declaratory Ruling and hence would not require prior express consent.

11. We also reject Anthem's suggestion that health care-related calls from health plans and providers to wireless telephones should be exempt from the TCPA's prior-express-consent requirement because such calls are welcomed by consumers. The TCPA gives the Commission authority to only exempt specific, limited types of calls to wireless phone numbers from the prior-express-consent requirement; even in those narrow circumstances, whether those calls are welcomed by consumers has not

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<sup>21</sup> To the extent Anthem is asking us to find an established business relationship exception applies to its calls, we do not find reason to do so. Congress could have included an explicit established business relationship exception for calls to wireless numbers in the TCPA (as it did in the case of faxes) but it did not, nor did Congress give the Commission the authority to adopt an established business relationship exception for *wireless* calls on the grounds that such calls do not "adversely affect [consumer] privacy rights," which the TCPA does provide for calls to *residential* lines. 47 U.S.C. 227(b)(2)(B)(ii)(I); *see also* 1992 TCPA Order, 7 FCC Rcd at 8770, para. 34; *Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1845, para. 35 n.102 (2012) (*2012 TCPA Order*); 47 CFR § 64.1200(a)(4)(i).

<sup>22</sup> To the extent Anthem's "urgent circumstances" request is grounded in the Commission's authority to "by rule or order, exempt from the [TCPA's restrictions on calls to wireless numbers made using an autodialer or a prerecorded or artificial voice] calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect," it also fails. 47 U.S.C. § 227(b)(2)(C). For example, Anthem has not argued it could satisfy the provision's minimal factual requirements, including that the calls would be free to the end user. *See id.* ("calls to a telephone number assigned to a cellular telephone service that are not charged to a called party"). To the extent that the calls Anthem wishes to make fall within the parameters set forth in the *2015 TCPA Declaratory Ruling and Order*, the exemption granted therein for certain health care-related calls could apply. *See 2015 TCPA Declaratory Ruling and Order*, 30 FCC Rcd at 8030-32, paras. 143-48.

<sup>23</sup> *See* Anthem Petition at 16.

<sup>24</sup> *COVID-19 Declaratory Ruling*, 35 FCC Rcd at 2841-42, paras. 6-8 (citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Blackboard, Inc. Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd 9054, 9063, para. 21 (2016) (concluding that calls or messages relating to weather closures, incidents of threats and/or imminent danger to the school due to fire, dangerous persons, health risks, and unexcused absences constitute calls made for an emergency purpose because they potentially affect the health and safety of students and faculty)).

<sup>25</sup> *See* 47 CFR § 64.1200(f)(4) (defining "emergency purposes" to mean "calls made necessary in any situation affecting the health and safety of consumers").

previously been part of our inquiry.<sup>26</sup> Moreover, if these calls are in fact popular with consumers, as Anthem argues, consumers should be willing to give their prior express consent for them.<sup>27</sup> The ways Anthem can obtain prior express consent for these calls are numerous and not particularly arduous, especially where there already is a relationship with the consumer.

12. Finally, we reject Anthem's argument that a TCPA exemption for health care-related calls made by health care plans and providers to wireless telephone numbers will not result in abuse because patient outreach is already subject to a strict regulatory regime under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) privacy rule. The TCPA contains no exception to the prior-express-consent requirement for calls to wireless phone numbers if those calls are also regulated by other laws. HIPAA regulates the content of communications (to ensure the privacy of patient information) whereas the TCPA regulates the methodology of the communication (to restrict calls and texts made using an autodialer or an artificial or prerecorded voice, and made without the prior express consent of the called party).<sup>28</sup> A call that complies with HIPAA requirements does not necessarily comply with TCPA requirements or satisfy that statute's legislative goals.

#### IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, sections 1.2 and 64.1200 of the Commission's Rules, 47 CFR §§ 1.2, 64.1200, and the authority delegated in sections 0.141 and 0.361 of the rules, 47 CFR §§ 0.141, 0.361, that the Petition for Declaratory Ruling and Exemption filed by Anthem, Inc. in CG Docket No. 02-278 on June 10, 2015, IS DENIED.

14. IT IS FURTHER ORDERED that this Declaratory Ruling and Order shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Patrick Webre  
Chief  
Consumer and Governmental Affairs Bureau

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<sup>26</sup> The Commission has the authority to and did grant a limited exemption for health care-related calls in 2015. *See* 47 U.S.C. § 227(b)(2)(C); *see also* 2015 TCPA Declaratory Ruling and Order, 30 FCC Rcd at 8031-32, paras. 146-48. In order for such calls to be exempt from the TCPA's consent requirement they must be exigent and have a health care treatment purpose, as well as meet a number of conditions including, but not limited to, being free to the end user. Anthem has not asserted, let alone proven, that it will meet these criteria. The purported popularity of the call is not part of our exemption inquiry.

<sup>27</sup> Anthem's Petition is inherently contradictory. On the one hand, Anthem spends the majority of its petition asserting that these calls are not only beneficial to, but also welcomed by consumers. On the other hand, Anthem alleges, without any evidence, that it is difficult to obtain consent for the calls it wishes to make. *See* Anthem Petition at 9. Even if Anthem's latter allegation is correct and it is difficult to obtain consent, this provides no basis as a matter of law for an exception to or the creation of an exemption from the TCPA's consent requirement.

<sup>28</sup> *See* 2012 TCPA Order, 27 FCC Rcd at 1852, para. 57 (describing the "privacy protections" of HIPAA, in part, as "giv[ing] individuals important controls over whether and how their protected information is used and disclosed for marketing purposes" and "requir[ing] an individual's written authorization before his or her protected health information can be used or disclosed for marketing purposes"); *see also* 47 USC § 227(b)(1).