

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

In the Matter of	)	
	)	
Petition of CVS Health Corporation,	)	CG Docket No. 02-278
Caremark, L.L.C., and their respective	)	
subsidiaries and affiliates, for	)	CG Docket No. 05-338
Retroactive Waiver of	)	
47 C.F.R. § 64.1200(a)(4)(iv)	)	

**REPLY IN SUPPORT OF PETITION FOR WAIVER**

CVS Health<sup>1</sup> respectfully submits these reply comments in support of its petition for a retroactive waiver from 47 C.F.R. § 64.1200(a)(4)(iv), with respect to any fax advertisements that were sent or may be alleged to have been sent by CVS Health before April 30, 2015, without the opt-out notices required by that rule, to recipients that had provided prior express invitation or permission.

**INTRODUCTION**

In its Order issued following the proceedings in this docket, the Commission “recognize[d] that some parties who have sent fax ads with the recipient’s prior express permission may have reasonably been uncertain about whether [the Commission’s] requirement[s] for opt-out notices applied to them.”<sup>2</sup> The Commission invited “[o]ther, similarly situated entities [to] request retroactive waivers from the Commission, as well.”<sup>3</sup> In its Petition for Waiver (the “Petition”), CVS Health demonstrated that it was similarly situated to the

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<sup>1</sup> This Reply will use the same defined terms set forth in CVS Health’s April 30, 2015 Petition for Waiver.

<sup>2</sup> Order ¶ 1.

<sup>3</sup> Order ¶ 22.

petitioners before the FCC when the Order was issued, and that there was good cause to grant such a waiver.

Plaintiffs in numerous TCPA actions, including one against Caremark, filed two responses to the Petition, one by “TCPA Plaintiffs,” and one by St. Louis Heart Center, Inc. (collectively referred to as the “Response Comments”).<sup>4</sup> However, the arguments presented in these responses are either thinly disguised attacks on the Order itself, or present arguments that the FCC expressly stated it would not consider when granting the requested waivers in the Order. The FCC should reject these arguments, and grant the waiver sought by CVS Health.

## **ARGUMENT**

### **I. THE FCC HAS AUTHORITY TO ISSUE THE RETROACTIVE WAIVERS.**

The TCPA Plaintiffs’ Comments raise the issue of the FCC’s authority to issue a retroactive waiver of its opt-out notice rules.<sup>5</sup> But the FCC has already considered and rejected this position, and should not reverse itself here.

In the Order, the FCC “reject[ed] any implication that by addressing the petitions filed in this matter while related litigation is pending, we have ‘violate[d] the separation of powers vis-à-vis the judiciary,’ as one commenter has suggested.”<sup>6</sup> This argument is identical to that presented in the TCPA Plaintiffs’ Comments—likely because it was presented by, among others,

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<sup>4</sup> *TCPA Plaintiffs’ Comments on Thirty-One Petitions for Retroactive Waiver Filed on or Before April 30, 2015*, CG Docket Nos. 02-278, 05-338 (filed May 22, 2015) (“TCPA Plaintiffs’ Comments”); *St. Louis Heart Center, Inc.’s Comments on the Petition for Waiver by CVS Health Corporation, Caremark, L.L.C. and Subsidiaries and Affiliates*, CG Docket Nos. 02-278, 05-338 (filed May 22, 2015) (“St. Louis Heart Comments”).

<sup>5</sup> See TCPA Plaintiffs’ Comments at 5-8.

<sup>6</sup> Order, ¶ 21.

the same counsel who authored the TCPA Plaintiffs' Comments.<sup>7</sup> The Order rejected that argument because the FCC was acting pursuant to its Congressional mandate to "prescribe regulations to implement the requirements of this subsection."<sup>8</sup> Beyond the FCC's authority to prescribe regulations, the FCC also noted that the TCPA's authorization of private actions "does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply."<sup>9</sup>

The FCC has long had the authority "to waive its rules if 'good cause therefor is shown.'"<sup>10</sup> The FCC may waive a rule where "particular facts would make strict compliance inconsistent with the public interest."<sup>11</sup> That is not an "interven[tion] in a private right of action,"<sup>12</sup> but instead is an exercise of the FCC's quintessential administrative authority to "define the scope of when and how" its own rules apply.<sup>13</sup> The TCPA Plaintiffs' Comments do not provide any sound basis for an exception to this general rule simply because private litigation has commenced.

The TCPA Plaintiffs' Comments attempt to overcome this problem by citing *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), and *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, - -- F. Supp. 3d ---, 2014 WL 7109630 (W.D. Mich. Dec. 12, 2014). Neither of these cases are

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<sup>7</sup> See Order, ¶ 21 and n.77 (referring to Letter from Brian J. Wanca, Anderson & Wanca, to Marlene H. Dortch, FCC, dated May 5, 2014); TCPA Plaintiffs' Comments at 10 (signed by Brian J. Wanca).

<sup>8</sup> Order, ¶ 21 (citing 47 U.S.C. § 227(b)(2)).

<sup>9</sup> *Id.*

<sup>10</sup> *AT&T Wireless Services, Inc. v. F.C.C.*, 270 F.3d 959, 961 (D.C. Cir. 2001) (quoting 47 C.F.R. § 1.3).

<sup>11</sup> *Id.* at 965 (quoting *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)).

<sup>12</sup> TCPA Plaintiffs' Comments at 5.

<sup>13</sup> Order, ¶ 21.

persuasive here. Initially, as the TCPA Plaintiffs' Comments state, *NRDC v. EPA* had been decided and even cited to the FCC prior to the Order; the FCC nonetheless invited petitions for waiver without citing *NRDC* or limiting the parties that could seek waivers.<sup>14</sup> Further, courts (including the court in which St. Louis Heart's action against Caremark is pending<sup>15</sup>) have implicitly recognized the authority of the FCC to waive application of the opt-out requirements in private litigation, as they have issued stays pending resolution of petitions for waiver much like the Petition here.<sup>16</sup> Even courts that have declined to stay TCPA litigation involving parties seeking waivers from the FCC have indicated that the FCC's determination will affect the outcome of the litigation, recognizing the FCC's authority to grant the waiver that CVS Health seeks here.<sup>17</sup>

The FCC thus has authority to grant a waiver, notwithstanding the pendency of any private litigation that may be affected by the waiver.

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<sup>14</sup> See TCPA Plaintiffs' Comments at 6-7.

<sup>15</sup> See *Beck Simmons LLC v. Francotyp-Postalia, Inc.*, No. 4:14CV1161 HEA, 2015 U.S. Dist. LEXIS 18661, at \*2 (E.D. Mo. Feb. 17, 2015) (where defendant had filed a petition for waiver of the FCC's opt-out notice requirement, the Court granted the defendant's motion to stay, "[i]n light of the Eighth Circuit's suggestion in *Nack [v. Walburg]*, 715 F.3d 680 (8th Cir. 2013)], and in the interests of reaching consistent results in similar TCPA cases").

<sup>16</sup> See, e.g., *Bondhus v. Henry Schein, Inc.*, No. 14-22982-Civ., 2015 WL 1968841, at \*4 (S.D. Fla. Apr. 30, 2015) (granting stay pending FCC decision on petition for waiver of opt-out notice requirements, because "the FCC's decision on the issue of waiver will affect the scope of the issues in this case, including the availability of certain defenses, the scope of the class, and potentially the propriety of a class action").

<sup>17</sup> See, e.g., *Simon v. Healthways, Inc.*, No. CV 14-08022 BRO (JCx), 2015 WL 1568230, at \*6 (C.D. Cal. Apr. 7, 2015) (Denying stay because there was no indication that any of the faxes at issue had been consented to, but noting that in light of the possibility of waiver of the opt-out requirement: "If discovery reveals that the contested faxes were in fact sent with Plaintiff's or other class members' permission, a stay may become appropriate or may be relevant in limiting the size of the class."); *Around the World Travel, Inc. v. Unique Vacations, Inc.*, No. 14-CV-12589, 2014 WL 6606953, at \*4 (E.D. Mich. Nov. 19, 2014) (denying stay in light of the Order because there was no indication that faxes had been consented to, but noting that "defendant may be in a better position to" move for a stay if discovery turned up evidence of consent).

**II. WHETHER CVS HEALTH HAD EXPRESS CONSENT FROM ANY RECIPIENTS OF ANY SPECIFIC FAX, WHICH IS AN ISSUE IN THE LITIGATION AND IS FOR THE COURT TO DECIDE, DOES NOT IMPACT THE PETITION.**

The St. Louis Heart Comments claim that Caremark is not similarly situated to the parties granted relief in the Order.<sup>18</sup> However, its assessment of this criterion for relief is incorrect.

The St. Louis Heart Comments focus on whether Caremark actually had the express consent of specific recipients of a specific fax. In essence, St. Louis Heart seeks to litigate its claim of a lack of consent before the FCC, rather than in court where the issue belongs. But the FCC's Order indicated that it would not wade into the factual issue of whether express consent was received on a fax-by-fax basis with respect to the Petition, and did not make any such findings when granting relief in the Order. To the contrary, the FCC stated that granting a waiver should not "be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action."<sup>19</sup> Indeed, courts have indicated that they are prepared to determine the factual issue of whether express consent has been given for a particular fax, without regard to the FCC's rulings on the petitions solicited by the Order.<sup>20</sup> That is where, if St. Louis Heart's particular case is permitted to proceed, Caremark will present its evidence, and litigate the issues relating to consent. Those issues include, among other things, evidence relating to the frequent fax communication between doctors and Caremark related to health care messaging concerning particular patients and their doctors (or clinics) and the fact that these doctors (or clinics) provided fax numbers for purposes of communicating about patient care. Thus, St. Louis Heart

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<sup>18</sup> See St. Louis Heart Comments at 4-6.

<sup>19</sup> Order, ¶ 31.

<sup>20</sup> See *supra* note 17.

misses the point to argue (based solely on the Petition) that Caremark, or CVS Health generally, is not similarly situated to the petitioners in the Order based on whether CVS Health had express consent to send any one fax—the FCC did not determine that as to any of the parties granted relief in the Order, and so should not consider the issue of express consent in granting the relief requested.

**III. THE FCC HAS ALREADY DETERMINED THAT ITS CONFLICTING GUIDANCE REGARDING THE OPT-OUT NOTICE REQUIREMENTS PRESUMPTIVELY CAUSED CONFUSION THAT CONSTITUTES GOOD CAUSE TO GRANT A RETROACTIVE WAIVER.**

The St. Louis Heart Comments claim that CVS Health never indicated awareness of the FCC’s guidance, and that the FCC has stated: “‘ignorance’ of the law ‘is not grounds for a waiver.’”<sup>21</sup> Based on this, the St. Louis Heart Comments conclude that because CVS Health did not expressly state that it was aware of the conflicting messages sent by the FCC’s regulations, it is not entitled to a waiver. But the Petition notes that CVS Health is similarly situated to the petitioners in the Order, for the very reasons cited in the Order: that the FCC’s guidance led to “confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient).”<sup>22</sup> This is not a statement that CVS Health was ignorant of the law. It is a statement that based on the law and the guidance issued by the FCC, CVS Health did not believe an opt-out notice was required for faxes sent with the recipients’ consent.

Moreover, St. Louis Heart’s argument omits the key to the FCC’s determination in the Order, which was not that the petitioners were specifically aware of the FCC’s conflicting

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<sup>21</sup> St. Louis Heart Comments at 10 (quoting Order ¶¶ 25, 26).

<sup>22</sup> Petition at 4 (quoting Order ¶ 24); *see also id.* at 5 (“CVS Health’s circumstances are identical in all material respects to the many other companies that have received retroactive waivers to date.”).

guidance, but that the FCC's guidance by itself was sufficient to establish a presumption of confusion, which no commenter had overcome with regard to the petitioners.<sup>23</sup> So too with CVS Health. Given the law and the FCC's own guidance, CVS Health did not believe that opt-out language was necessary for faxes sent with the recipients' consent. As the FCC has already recognized in the Order that its guidance caused confusion among entities regarding their obligation to put opt-out language in faxes sent with the recipients' consent, it makes no sense to ask the FCC to conduct mini-trials regarding each of the petitions invited by the FCC in an effort to determine what each petitioner's state of mind was when it was sending faxes during the time period that the FCC's guidance was causing confusion.

The TCPA Plaintiffs' Comments argue that the commenters have a due process right to investigate CVS Health's actual knowledge of the conflicting regulations that the Order recognized gave rise to a presumption of confusion. However, the Order was itself determined based solely upon the waiver petitioners' "reference[s] to the confusing footnote language"—contained in their petitions for waiver.<sup>24</sup> The waivers granted in the Order were not based on individualized evidence of each petitioner's subjective state of mind, and no hearings or discovery were conducted prior to the waivers granted in the Order, even where the petitioners were facing TCPA litigation of their own. Thus, once again, the TCPA Plaintiffs' Comments attack the FCC's authority to issue the Order in the first place, and their arguments should be rejected.

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<sup>23</sup> See Order, ¶¶ 24 (noting that "all petitioners make reference to the confusing footnote language in the record," without making any finding as to the petitioners' awareness of that language at the time they sent the faxes at issue); 25 ("the lack of explicit notice *may have* contributed to confusion or misplaced confidence about this requirement") (emphasis added); 26 ("Further, we find nothing in the record here demonstrating that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so.").

<sup>24</sup> *Id.* ¶ 24.

#### IV. THE WAIVER CVS HEALTH SEEKS IS IN THE PUBLIC INTEREST.

Both of the Response Comments attempt to distinguish CVS Health from the petitioners for whom the FCC has already granted a waiver, by claiming that CVS Health's potential losses in pending TCPA litigation are not substantial in comparison to CVS Health's overall financial resources.<sup>25</sup> There is no justification for denying the Petition based on this assertion, and the Order itself does not weigh the petitioners' resources against the potential penalties.<sup>26</sup> Indeed, many of the petitioners granted relief in the Order stated potential damages that were, if anything, vaguer than what CVS Health provided in its Petition.<sup>27</sup> The FCC should reject the approach taken in the Response Comments, which is without basis in the Order, applicable law, or sound policy.

The St. Louis Heart Comments further claim that there is no public interest in a waiver as to Caremark, because the specific faxes that St. Louis Heart received supposedly lack an

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<sup>25</sup> St. Louis Heart Comments at 8; TCPA Plaintiffs' Comments at 10.

<sup>26</sup> See Order, ¶ 27.

<sup>27</sup> See, e.g., *Purdue Pharma Petition for Declaratory Ruling Regarding the Statutory Basis for the Commission's Opt-Out Notice Rule with Respect to Solicited Faxes, and/or Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) and (iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338, at 3 (filed Dec. 12, 2013) (noting that Purdue Pharma was named as a defendant in a putative class action, and that plaintiffs in such TCPA fax cases commonly "seek millions of dollars or more in statutory damages"); *Petition of Staples, Inc. and Quill Corporation for a Rulemaking to Repeal Rule 64.1200(a)(3)(iv) and for a Declaratory Ruling to Interpret Rule 64.1200(a)(3)(iv)*, CG Docket Nos. 02-278, 05-338, at 5-6 (filed July 19, 2013) ("Staples and its subsidiary Quill are in the same position: they face class-action lawsuits in Massachusetts and Illinois, respectively, where purported classes of plaintiffs are seeking millions of dollars in damages . . ."); *Petition of Forest Pharmaceuticals, Inc., for Declaratory Ruling and/or Waiver Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) of the Commission's Rules and for Declaratory Ruling Regarding the Statutory Basis for the Commission's Opt-Out Notice Rule with Respect to Faxes Sent with the Recipient's Prior Express Invitation or Permission*, CG Docket No. 05-338, at 3-4 (filed June 27, 2013) (stating only that Forest Pharmaceuticals faced a class action and potential statutory damages sought by St. Louis Heart). Each of these petitions was cited by the Order to illustrate the potential for substantial damages, see Order, ¶ 27 n.94; none make any comparison of the potential statutory penalties to the petitioners' own resources.

important health function.<sup>28</sup> There are at least two key flaws with this argument. First, the Order did not make any findings as to the societal benefit of the faxes sent by the petitioners before the FCC.<sup>29</sup> Second, the St. Louis Heart Comments have no merit on this point. The fax Caremark sent to St. Louis Heart described a program that Caremark's health plan clients had implemented in order to provide better health care to their members; the fax provided information to St. Louis Heart so that it could in turn be prepared from questions from its patients about that program.<sup>30</sup> In the litigation, St. Louis Heart has not even disputed that this health-care related message, sent only in connection with the care of particular patients, provides benefits, as does the program itself. Health plan sponsors adopted the program for the very purpose of aiding in the care of patients with chronic conditions, like diabetes. There is plainly a societal benefit in not potentially subjecting Caremark to substantial statutory damages, based on admittedly confusing regulations adopted by the FCC, for communications that were merely informing doctors about of new benefits their patients have been provided, which improve the quality of health care being offered to patients.

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For these reasons, CVS Health Corporation, Caremark, L.L.C., and their respective subsidiaries and affiliates respectfully requests that the Commission grant them a retroactive waiver of the opt-out notice requirement of 47 C.F.R. § 64.1200(a)(4)(iv) with respect to any fax sent prior to April 30, 2015 with the invitation or permission of the recipient but that did not include the type of opt out notice specified by that rule.

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<sup>28</sup> See St. Louis Heart Comments at 8.

<sup>29</sup> See Order, ¶ 27.

<sup>30</sup> See *St. Louis Heart Center, Inc. v. Caremark, L.L.C.*, No. 12-cv-2151, Dkt. No. 79-3 (Declaration of Anne Klis), ¶¶ 9, 11-13.

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Respectfully submitted,

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