

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

In the Matter of	)	
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Petitions for Declaratory Ruling and Retroactive	)	
Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding	)	
the Commission's Opt-Out Notice Requirement	)	
for Faxes Sent with the Recipient's Prior Express	)	
Permission	)	

**APPLICATION FOR REVIEW**

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September 28, 2015

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Regarding the Commission’s Opt-Out Notice	)	
Requirement for Faxes Sent with the Recipient’s	)	
Prior Express Permission	)	

**APPLICATION FOR REVIEW**

Pursuant to Section 1.115 of the Commission’s rules, the “TCPA Plaintiffs” seek review by the full Commission of the Order adopted by the Consumer & Governmental Affairs Bureau on August 28, 2015, purporting to grant “retroactive waivers” from 47 C.F.R. § 64.1200(a)(4)(iv), the regulation requiring “opt-out notice” on faxes sent with “prior express invitation or permission,” to 117 petitioners. The Commission should vacate all 117 waivers as beyond the Commission’s authority under the Telephone Consumer Protection Act of 1991 (“TCPA”) and because the record on these petitions—as opposed to the petitions decided in the October 30, 2014 Order—demonstrates there was no “industry-wide confusion” about the opt-out regulation. In the alternative, the Commission should vacate the waivers granted to three petitioners, Allscripts-Misy’s Healthcare Solutions, Inc. (“Allscripts”), Alma Lasers, Inc. (“Alma”), and McKesson Corp. (“McKesson”), because the record demonstrates these petitioners did, in fact, have actual knowledge of the opt-out notice requirements, rebutting any “presumption of confusion.”

## Questions Presented

Pursuant to Section 1.115(b), TCPA Plaintiffs identify three questions for review:

(1) Whether the Commission’s October 30, 2014 Order on which the Bureau Order is based should be overturned because the Commission has no authority to retroactively “waive” a private cause of action for a violation of the “regulations prescribed under” the TCPA. (Section 1.115(b)(2)(i) & (iii)).

(2) Whether the Bureau erred in ignoring the factual record—which was not before the Commission on the October 30, 2014 Order—demonstrating that regulated entities immediately understood the plain language of the opt-out regulation, thus rebutting any industry-wide “presumption of confusion.” (Section 1.115(b)(2)(ii) & (iv)).

(3) Whether the Bureau erred in finding the “presumption of confusion” was not rebutted as to Allscripts and Alma where they were sued for opt-out notice violations before sending their faxes and as to McKesson where the Commission cited McKesson in 2008 and personally served it with a copy of § 64.1200 and advised it to comply with the regulations.

## Procedural History

On October 30, 2014, the Commission issued the “Opt-Out Order,” denying 24 petitions challenging the validity of the opt-out regulation,<sup>1</sup> but granting retroactive “waivers” purporting to relieve the petitioners of liability under the private right of action in 47 U.S.C. § 227(b)(3).<sup>2</sup> The Commission invited “similarly situated” parties to petition for

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<sup>1</sup>*In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel. Oct. 30, 2014), ¶¶ 19–20, 32 & n.70.

<sup>2</sup> *Id.* ¶¶ 22–31.

similar waivers, stating future petitions would be “adjudicated on a case-by-case basis” and the Commission did not “prejudge the outcome of future waiver requests in the order.”<sup>3</sup>

The TCPA Plaintiffs, who are plaintiffs in multiple private TCPA actions in federal and state courts around the country, filed comments on 48 post-order waiver petitions from November 18, 2014, to June 12, 2015.<sup>4</sup> In each set of comments, Plaintiffs asked the Commission to clarify whether the standard for a waiver is that the petitioner was *actually* confused about whether opt-out notice was required when it sent its faxes<sup>5</sup> or whether the Commission created a *presumption* that petitioners are confused in the absence of evidence they were “simpl[y] ignorant” or knowingly violated the law.<sup>6</sup>

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<sup>3</sup> Opt-Out Order ¶ 30 & n.102.

<sup>4</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Beck Simmons LLC’s Comments on Francotyp-Postalia Petition (Nov. 18, 2014); Physicians Healthsource, Inc.’s Comments on Allscripts Petition (Nov. 18, 2014); TCPA Plaintiffs’ Comments on Petitions for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by Alma Lasers, ASD Specialty Healthcare, Den-Mat Holdings, and Stryker Corp. (Dec. 12, 2014); TCPA Pls.’ Comments on Petitions for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke’s Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZocDoc, Inc. (Jan. 13, 2015); Physicians Healthsource, Inc.’s Comments on A-S Medication Solutions LLC’s Petition for Wavier of Section 64.1200(a)(4)(iv) of the Commission’s Rules and/or Declaratory Relief (Feb. 13, 2015); Christopher Lowe Hicklin, DC, PLC’s Comments on National Pen’s Petition for Retroactive Waiver (Mar. 13, 2015); TCPA Pls.’ Comments on Petitions for Retroactive Waivers filed by Boehringer Pharmaceuticals and Esaote North America (Apr. 10, 2015); TCPA Plaintiffs’ Comments on Thirty-One Petitions for Retroactive Waiver Filed on or Before April 30, 2015 (May 22, 2015); TCPA Pls.’ Comments on Petition for Retroactive Waiver filed by Endo Pharmaceuticals Inc. (June 12, 2015).

<sup>5</sup> Opt-Out Order ¶ 26 (stating waiver was justified because footnote 154 of the 2006 Junk Fax Order “led to confusion or misplaced confidence on the part of petitioners”); *id.* ¶ 32 (stating Commission granted waivers “to parties that have been confused by the footnote”).

<sup>6</sup> *Id.* (stating combination of footnote 154 and lack of notice “presumptively establishes good cause for retroactive waiver,” finding no evidence “that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement,” and “emphasiz[ing]” that “simple ignorance” of the law “is not grounds for a waiver”).

On August 28, 2015, the Consumer & Governmental Affairs Bureau issued an order on 117 waiver petitions.<sup>7</sup> The Bureau ruled that, under the Opt-Out Order, a petitioner need only “reference” footnote 154 of the 2006 Order to create a “presumption of confusion” justifying a waiver, which plaintiffs may “rebut” with evidence the petitioner “clearly understood the requirement and thus do[es] not deserve the presumption of confusion or misplaced confidence.”<sup>8</sup> The Bureau concluded evidence showing the petitioner used non-compliant opt-out notices is insufficient to rebut the presumption.<sup>9</sup> The Bureau concluded evidence that a petitioner was sued for opt-out notice violations before sending the faxes for which it seeks a waiver “does not rebut the presumption unlike, *e.g.*, a judicial finding.”<sup>10</sup> The Bureau Order does not mention “simple ignorance” of the law.<sup>11</sup>

### Argument

#### **I. The Commission has no authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action.**

The TCPA creates a private right of action for any person to sue “in an appropriate court” for “a violation of this subsection or the regulations prescribed under this subsection,”<sup>12</sup> and directs the Commission to “prescribe regulations” to be enforced in those

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<sup>7</sup> *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 5120879, at \*1 (CGAB Aug. 28, 2015).

<sup>8</sup> *Id.* ¶ 16.

<sup>9</sup> *Id.* ¶ 18.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* ¶¶ 1–24.

<sup>12</sup> 47 U.S.C. § 227(b)(3).

lawsuits.<sup>13</sup> The Commission reaffirmed in the Opt-Out Order that § 64.1200(a)(4)(iv) is one of the “regulations prescribed under” 47 U.S.C. § 227(b)(2).<sup>14</sup>

The “appropriate court” determines whether “a violation” of the statute or the regulations has taken place.<sup>15</sup> If the court finds a violation, the TCPA automatically awards a minimum \$500 in damages for “each such violation” and allows the court “in its discretion” to increase the damages up to \$1,500 per violation if it finds they were “willful[] or knowing[].”<sup>16</sup>

The TCPA does not authorize the Commission to “waive” its regulations in a private right of action.<sup>17</sup> It does not authorize the Commission to intervene in a private right of action.<sup>18</sup> It does not require a private plaintiff to notify the Commission it has filed a private lawsuit.<sup>19</sup> Nor does it limit a private plaintiff’s right to sue to cases where the Commission declines to prosecute.<sup>20</sup> The Commission plays no role in determining whether “a violation” has taken place, whether a violation was “willful or knowing,” whether statutory damages

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<sup>13</sup> *Id.* § 227(b)(2).

<sup>14</sup> Opt-Out Order ¶¶ 19–20.

<sup>15</sup> *Id.* § 227(b)(3)(A)–(B).

<sup>16</sup> *Id.* § 227(b)(3).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; *C.f.*, Clean Air Act, 42 U.S.C. § 7604(b) (requiring 60 days prior notice to the EPA to maintain a citizen suit).

<sup>20</sup> *C.f.*, *e.g.*, 42 U.S.C.A. § 2000e-5(f)(1) (requiring employment-discrimination plaintiffs to obtain “right-to-sue” letter from Equal Employment Opportunity Commission).

should be increased, or how much the damages should be increased. These duties belong to the “appropriate court” presiding over the lawsuit.<sup>21</sup>

Similarly, the TCPA empowers state attorneys general to sue for violations of the TCPA or the Commission’s regulations for \$500 per violation, which the court may increase for willful or knowing violations, as in private actions.<sup>22</sup> Such actions must be brought in a federal district court.<sup>23</sup> The TCPA requires the state to give notice of such an action to the Commission, which “shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.”<sup>24</sup>

The Communications Act also grants the Commission itself authority to enforce the TCPA through administrative forfeiture actions.<sup>25</sup> Neither private citizens nor state attorneys general have a role in that process, such as determining whether a violator acted “willfully or repeatedly.”<sup>26</sup>

Thus, the TCPA and the Communications Act create a tripartite enforcement scheme in which the Commission promulgates regulations that may be enforced by private citizens, the states, and the Commission, and where the Commission plays *some* role in state enforcement activities but plays *no* role in private TCPA litigation.<sup>27</sup> This scheme is similar to several other statutes, including the Clean Air Act, which empowers the EPA to issue

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<sup>21</sup> 47 U.S.C. § 227(b)(3).

<sup>22</sup> *Id.* § 227(g).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* § 227(g)(3).

<sup>25</sup> *Id.* § 503(b).

<sup>26</sup> *Id.*

<sup>27</sup> *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 688 (7th Cir. 2013) (holding TCPA “authorizes private litigation” and agency enforcement, so consumers “need not depend on the FCC”).

regulations imposing emissions standards<sup>28</sup> that are enforceable both in private “citizen suits”<sup>29</sup> and in administrative actions.<sup>30</sup>

The D.C. Circuit Court of Appeals held the EPA could not issue a regulation creating an affirmative defense for “unavoidable” violations in private litigation under the Clean Air Act in *Nat. Res. Def. Council v. EPA*,<sup>31</sup> holding it is “the Judiciary” that “determines ‘the scope’—*including the available remedies*” of “statutes establishing private rights of action”<sup>32</sup> and that, consistent with that principle, the Clean Air Act “vests authority over private suits in the *courts*, not EPA.”<sup>33</sup> TCPA Plaintiffs discussed *NRDC* extensively in comments on the 117 petitions covered by the Bureau Order, and the Bureau Order ignored the decision.

On December 12, 2014, the United States District Court for the Western District of Michigan became the first court in the country to rule on whether a Commission “waiver” from § 64.1200(a)(4)(iv) is enforceable in private TCPA litigation.<sup>34</sup> The district court held “[i]t would be a fundamental violation of the separation of powers for the administrative agency to ‘waive’ retroactively the statutory or rule requirements for a particular party in a case or controversy presently proceeding in an Article III court.”<sup>35</sup> The district court held that “nothing in the waiver—even assuming the FCC ultimately grants it—invalidates the

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<sup>28</sup> 42 U.S.C. § 7412(d).

<sup>29</sup> 42 U.S.C. § 7604(a).

<sup>30</sup> 42 U.S.C. § 7413(d).

<sup>31</sup> 749 F.3d 1055, 1062 (D.C. Cir. 2014).

<sup>32</sup> *Id.* (quoting *City of Arlington v. FCC*, --- U.S. ---, 133 S. Ct. 1863, 1871 n.3 (2013); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)).

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

<sup>34</sup> *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482, 498 (W.D. Mich. 2014).

<sup>35</sup> *Id.*

regulation itself” and that “[t]he regulation remains in effect just as it was originally promulgated” for purposes of determining whether a defendant violated the “regulations prescribed under” the TCPA, as directed by § 227(b)(3).<sup>36</sup> The district court concluded, “the FCC cannot use an administrative waiver to eliminate statutory liability in a private cause of action; at most, the FCC can choose not to exercise its own enforcement power.”<sup>37</sup>

The argument that the Commission is merely waiving “its own rules,” rather than the statutory private right of action fails because “[i]nsofar as the statute’s language is concerned, to violate a regulation that lawfully implements [the statute’s] requirements *is* to violate the statute.”<sup>38</sup> The Commission already ruled in the Opt-Out Order that the regulation lawfully implements the TCPA,<sup>39</sup> so a violation of the regulation *is* a violation of the statute.

The argument that a waiver of the opt-out regulation in a private right of action is permissible because “regulations can be applied retroactively” fails because “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”<sup>40</sup> The TCPA does not expressly authorize the Commission to issue retroactive rules.<sup>41</sup> It authorizes it to “implement” the statute.<sup>42</sup> To “implement” is inherently

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Global Crossing Telecomm’s, Inc. v. Metrophones Telecomm’s, Inc.*, 550 U.S. 45, 54 (2007) (citing *MCI Telecomm’s Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 1995) (holding Commission rule “has the force of law” and the Commission “may therefore treat a violation of the prescription as a *per se* violation of the requirement of the Communications Act that a common carrier maintain ‘just and reasonable’ rates”)).

<sup>39</sup> Opt-Out Order ¶ 19–20.

<sup>40</sup> *Bowen*, 488 U.S. at 208.

<sup>41</sup> 47 U.S.C. § 227(b)(2); *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 102 (N.D. Ill. 2013).

prospective, meaning “to begin to do or use (something, such as a plan): to make (something) active or effective.”<sup>43</sup> Neither the Commission nor the Bureau pursuant to delegated authority may interfere with a private right of action under the TCPA by “waiving” its rules, and the Commission should vacate the Bureau Order on this basis alone.

## II. The record does not support a “presumption of confusion.”

### A. The contemporaneous record demonstrates the “industry” understood immediately that opt-out notice was required on faxes sent with prior express invitation or permission.

TCPA Plaintiffs explained in comments on the 117 petitions that the proceedings following the 2006 Junk Fax Order demonstrate regulated parties immediately understood that the plain language of the 2006 rules required opt-out notice on faxes sent with permission and that no one was “confused” by footnote 154 or the notice of rulemaking.<sup>44</sup> TCPA Plaintiffs explained these proceedings were not discussed in any of the petitions covered by the Commission’s October 30, 2014 Order or any of the comments on those petitions.<sup>45</sup> The Bureau ignored this argument and did not mention the contemporaneous evidence that the “industry” understood the opt-out regulation immediately.

There were two petitions for reconsideration of the 2006 Junk Fax Order, one of which was filed by the law firm of Levanthal Senter & Lerman (“LSL”) on behalf of CBS

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<sup>42</sup> § 227(b)(2).

<sup>43</sup> See <http://www.merriam-webster.com/dictionary/implement>.

<sup>44</sup> See, e.g., TCPA Pls.’ Comments on Petitions for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke’s Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZocDoc, Inc. (Jan. 13, 2015) at 33–37; TCPA Pls.’ Comments on Petitions for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by Alma Lasers, ASD Specialty Healthcare, Den-Mat Holdings, and Stryker Corp. (Dec. 12, 2014) at 40–45.

<sup>45</sup> *Id.*

and other broadcasting clients on June 2, 2006.<sup>46</sup> The LSL petition noted that the plain language of the new rules required “that all faxed advertisements include an opt-out notice,” including those sent with prior express permission.<sup>47</sup> The LSL petition did not seek reconsideration of that rule; it sought clarification that it could place the opt-out notice on a cover page.<sup>48</sup> Public notice of the LSL petition for reconsideration was published in the Federal Register pursuant to Rule 1.429(e) on June 28, 2006.<sup>49</sup>

Three parties filed comments on the LSL petition, including the American Society of Association Executives (“ASAE”) and the Named State Broadcasters Associations (“NSBA”).<sup>50</sup> The ASAE acknowledged that the 2006 Junk Fax Order states, “entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements their opt-out notice and contact information to allow consumers to stop unwanted faxes in the future.”<sup>51</sup>

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<sup>46</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, Petition for Reconsideration or Clarification of Levanthal Senter & Lerman PLLC (June 2, 2006) (“LSL Petition”) at 1.

<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.* at 7.

<sup>49</sup> *Petitions for Reconsideration of Action in Rulemaking Proceeding*, 71 Fed. Reg. 36798, 36798 (June 28, 2006).

<sup>50</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Nos. 02-278, 05-338, Comments of American Society of Association Executives (July 12, 2006); National Association Broadcasters Comments (July 13, 2006); Joint Comments of the Named State Broadcasters Associations (July 13, 2006).

<sup>51</sup> ASAE Comments at 4.

The ASAE argued the “plain language” of this rule inappropriately extended to “solicited facsimile advertisements” and asked the Commission to “vacate” it.<sup>52</sup> The relevant section of ASAE’s 2006 comments reads as follows in its entirety:

The plain language of this provision imposes the opt-out notice requirement on both unsolicited and *solicited* facsimile advertisements. The Fax Act requires advertisers to include such notices only on any *unsolicited* facsimile advertisement, but neither the Fax Act nor the Telephone Consumer Protection Act of 1991 (“TCPA”) authorizes the Commission to impose any notice requirement on *solicited* facsimile advertisements.

By applying the notice requirement to solicited facsimile advertisements, the Commission has exceeded its authority, especially with respect to nonprofit associations. In the Fax Act, Congress explicitly authorized the Commission to exempt nonprofit professional and trade associations from any notice requirement whatsoever. This provision demonstrates that Congress recognized the favored, unique position of nonprofit associations and did not intend for the Commission to impose additional requirements on such associations – especially requirements unauthorized by Congress through the Fax Act, the TCPA, or otherwise.

Accordingly, ASAE respectfully urges the Commission to vacate the portion of the Report and Order that imposes a notice requirement with respect to *solicited* facsimile advertisements.<sup>53</sup>

The ASAE did not argue footnote 154 or the notice of rulemaking made the ruling “confusing.”<sup>54</sup> It argued the “plain language” was clear.<sup>55</sup>

The NSBA raised the same arguments, asking the Commission to “vacate the notice requirement to the extent it applies to solicited facsimile advertisements” because the

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<sup>52</sup> *Id.* at 2.

<sup>53</sup> *Id.* at 4–5.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

Commission “lack[ed] the authority” under the TCPA.<sup>56</sup> The NSBA argued the Commission should “on its own motion” correct this “critical flaw” in the 2006 Junk Fax Order.<sup>57</sup>

Following the ASAE and NSBA comments, either of the two parties that filed timely petitions for reconsideration of the 2006 order (the Direct Marketing Association and LSL) could have sought to “supplement” their petitions to argue that the rules were “confusing” via a “separate pleading stating the grounds for acceptance of the supplement,” as allowed by Rule 1.429.<sup>58</sup> Neither petitioner did so.

On October 14, 2008, the Commission decided the two petitions for reconsideration, which it granted in part and denied in part.<sup>59</sup> The Commission denied LSL’s request to allow opt-out notice to appear on a cover page.<sup>60</sup> The order does not expressly address the challenges to the Commission’s statutory authority to require opt-out notice on faxes sent with permission raised in in the ASAE and NSBA comments.<sup>61</sup>

No party petitioned for reconsideration of the 2008 order pursuant to Rule 1.429 on the basis that the rules were “confusing.”<sup>62</sup> No party appealed the 2006 order or the 2008 order under the Communications Act and the Hobbs Act on the basis that the rules were

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<sup>56</sup> Named State Broadcasters Associations Comments at 3.

<sup>57</sup> *Id.* at 5–6.

<sup>58</sup> 47 C.F.R. § 1.429; *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199 (D.C. Cir. 2003).

<sup>59</sup> *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Nos. 02-278, 05-338, Order on Reconsideration, 23 FCC Rcd 15059 (rel. Oct. 14, 2008) ¶ 23.

<sup>60</sup> *Id.* ¶ 15.

<sup>61</sup> *Id.* ¶¶ 1–24.

<sup>62</sup> 47 C.F.R. § 1.429; *see N. Am. Telecomm’ns Ass’n v. FCC*, 772 F.2d 1282, 1286 (7th Cir. 1985) (telecommunications association could obtain review of FCC orders by appealing from FCC’s subsequent reconsideration decision within appropriate time, even though association’s prior appeal of substantive FCC order had been dismissed as untimely).

“confusing” or violated the notice requirements of the Administrative Procedures Act. No party filed a petition to “clarify” the rule until more than two years later, when Anda—after having been sued for violating the regulation—filed its petition on November 30, 2010. No party ever petitioned to repeal or amend the opt-out-notice rule until nearly five years later, when Staples—after also having been sued—filed its petition on July 19, 2013.

Contemporaneous legal observers immediately understood the new rule, noting that “opt-out notice must be included in all facsimile advertisements, including those based on an established business relationship or in response to a recipient’s prior express invitation or permission.”<sup>63</sup> The courts understood the plain language of the rule, and have consistently enforced it.<sup>64</sup> The record demonstrates that the “industry” immediately understood the plain language of the rule and were not confused by footnote 154 or the notice of rulemaking. Based on this record—which was not before the Commission on the October 30, 2014 Order—the Commission should rule that there is no “presumption of confusion” and vacate the Bureau Order on that basis.

**B. There is no evidence any person was ever actually confused by the footnote 154 of the 2006 order.**

In contrast to the evidence demonstrating interested parties immediately understood opt-out notice was required on faxes sent with prior express permission, the petitioners have identified zero evidence that a single person was ever actually confused about the rule. That

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<sup>63</sup> See, e.g., *FCC Issues Regulations Implementing Junk Fax Prevention Act*, 60 Consumer Fin. L.Q. Rep. 401 (Fall 2006)

<sup>64</sup> See, e.g., *In re Sandusky Wellness Ctr., LLC*, 570 F. App’x 437 (6th Cir. 2014) (ordering district court to apply the rule); *Nack v. Walburg*, 715 F.3d 680, 687 (8th Cir. 2013) (citing “plain language” of the rule); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013) (applying plain language of the rule in affirming class certification and summary judgment).

includes contemporaneous evidence from 2006 or shortly thereafter. For example, if there was widespread industry confusion over the opt-out notice requirement, the petitioners should have easily been able to produce a law review article or other legal commentary reflecting that confusion. There is no such record because the “industry-wide confusion” is a post-hoc justification these petitioners manufactured after they were sued.

There is not even any post-hoc evidence submitted in support of the petitions. For example, any petitioner could have submitted an affidavit from a compliance officer or an attorney stating that this person read both § 64.1200(a)(4)(iv) and footnote 154, was personally “confused” about whether opt-out notice was required, and then decided not to use compliant opt-out notice. Not one person was willing to go on record with such a claim. Plaintiffs are not arguing that each petitioner must show *it* was actually confused to obtain a waiver under the October 30, 2014 Order. Rather, Plaintiffs are arguing the Commission cannot reasonably make a finding of “industry-wide confusion” where there is no evidence *anyone* was ever actually confused and, to the contrary, the evidence tends to show the “industry” understood the rule.

Compare this record to *In re Rath Microtech*, where the waiver applicant met its burden of “plead[ing] with particularity the facts and circumstances” supporting a waiver.<sup>65</sup> The applicant conducted an internal investigation and (1) reported to the Commission that it sold “10,326 non-compliant telephones,” (2) “promptly” corrected violations, (3) immediately sent equipment for testing and retesting at separate laboratories, (4) completely “redesign[ed] and modif[ied]” the equipment, (5) stated it understood “the importance of complying with

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<sup>65</sup> *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968).

FCC rules,” and (6) implemented procedures to ensure future compliance.<sup>66</sup> None of the petitioners seeking waivers here did anything remotely similar. They do not explain how many violations are at issue, *why* they failed to comply with the regulation, or what steps they have taken (if any) to ensure compliance in the future. They merely “reference” footnote 154, state there was “confusion,” and ask for a waiver.

In sum, there is no support in the record for a “presumption of confusion,” and the record of the follow-on proceedings in 2006–2008—which were not at issue in the October 30, 2014 Order—demonstrate there was no “industry-wide confusion.” The Commission should vacate the Bureau Order on this basis.

### **III. In the alternative, the “presumption of confusion” is rebutted as to Allscripts, Alma, and McKesson.**

#### **A. Allscripts had actual knowledge of the regulation.**

TCPA Plaintiff Physicians Healthsource, Inc. filed comments on the Allscripts petition, explaining it is currently the plaintiff in a private TCPA action against Allscripts in the Northern District of Illinois and explaining Allscripts was first sued for opt-out notice violations in 2009 on behalf of Radha Geismann, M.D., P.C., a medical practice in St. Louis, Missouri.<sup>67</sup> Plaintiff explained that on September 28, 2010, Dr. Geismann moved for class certification, arguing the court could determine on a classwide basis that the Allscripts fax “violates the TCPA because it does not contain the ‘opt-out notice’ required by the TCPA and FCC regulations,” citing 47 U.S.C. § 227(b)(2)(D) and 47 C.F.R. § 64.1200(a)(4)(iv).<sup>68</sup>

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<sup>66</sup> 16 FCC Rcd 16710 ¶¶ 7, 10, 13, 14 (Network Servs. Div. 2005).

<sup>67</sup> Pls.’ Comments on Allscripts Petition at 3 (discussing *Geismann v. Allscripts Healthcare Solutions, Inc.*, No. 09-cv-5114 (N.D. Ill.)).

<sup>68</sup> *Id.* at 4.

Plaintiff's counsel explained that, during discovery in *Geismann*, they determined Allscripts successfully sent the same fax it sent to Dr. Geismann “3,778 times to 3,736 different fax numbers between February 11, 2008 and April 26, 2008.”<sup>69</sup> Counsel explained the parties settled the case for \$1.9 million, in a settlement strictly limited to faxes sent “between February 11, 2008 and April 26, 2008” because that was the only time period for which Allscripts had produced evidence of its faxing activity.<sup>70</sup> Counsel explained that, after final approval of the *Geismann* settlement, Plaintiff's counsel discovered Allscripts had sent at least 36 fax advertisements to Physicians Healthsource, Inc., from July 9, 2008, to December 5, 2011.<sup>71</sup> Counsel explained Allscripts did not disclose these faxes during *Geismann*.<sup>72</sup>

Counsel explained that, of the 36 faxes Allscripts sent to Physicians Healthsource, 27 were sent after the *Geismann* case was filed on July 17, 2009, and 25 were sent after Allscripts removed the *Geismann* case to federal court on August 20, 2009.<sup>73</sup> Four of the faxes were sent after Allscripts began negotiating the *Geismann* settlement in April 2011.<sup>74</sup> Three were sent after the filing of the motion for preliminary approval of the \$1.9 million class settlement in *Geismann*.<sup>75</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 4–5.

<sup>71</sup> *Id.* at 5–6.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 6.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

Of the 36 faxes, 21 contain no opt-out notice whatsoever.<sup>76</sup> These faxes were sent first, from July 9, 2009, through March 4, 2010.<sup>77</sup> For the 15 remaining faxes, beginning April 2, 2010—one week before Allscripts would assert an EBR defense in the *Geismann* case—Allscripts began adding in fine print at the bottom of its faxes, “If you no longer wish to receive fax messages from this sender, please call” a toll-free number and dial an extension (which varied).<sup>78</sup> The fax sent December 2, 2012, states, “To unsubscribe from faxes, please call (800) 771-6747, ext. 2.”<sup>79</sup>

Counsel explained that on May 1, 2012, they filed suit against Allscripts on behalf of Physicians Healthsource in the Northern District of Illinois.<sup>80</sup> Counsel explained the Allscripts petition sought a waiver for the faxes that are the subject of the *Physicians Healthsource* litigation and that Allscripts was not entitled to such a waiver under any standard because the timeline of events established that Allscripts had actual knowledge of the opt-out-notice requirements—having been sued in a class action for violating those requirements, and having actually settled the litigation for \$1.9 million.<sup>81</sup>

The Bureau ruled evidence showing a petitioner used non-compliant opt-out notice is insufficient, in itself, to rebut the “presumption of confusion,” reasoning “businesses may well include basic opt-out information, including a phone or fax number, as a matter of good

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

business practice rather than knowledge of the rule.”<sup>82</sup> It also ruled that evidence showing a petitioner was sued for opt-out notice violations before sending the faxes for which it seeks a waiver “does not rebut the presumption unlike, *e.g.*, a judicial finding.”<sup>83</sup>

The Bureau failed to consider, however, that with respect to Allscripts, the two points are connected. Allscripts began using non-compliant opt-out notice in April 2010 *because it had been sued in a class action*. Allscripts had been sending opt-out-free faxes for years by that point, including the faxes covered by the *Geismann* settlement. There is no reason to presume Allscripts started including opt-out notice as part of a “good business practice,” where the evidence suggests the change was driven by the fact Allscripts was sued and subsequently paid a substantial amount of money as a result of its violations. The record establishes that, at least as of April 2010, Allscripts was not “confused” about whether opt-out notice was required. Although it did a poor job of attempting to comply with the rules, it knew the notice was required. The Commission should find the presumption of confusion rebutted as to Allscripts, at least as of April 2010, and vacate the waiver order accordingly.

**B. Alma had actual knowledge of the regulation.**

Physicians Healthsource also submitted comments on the Alma waiver petition, explaining it is the plaintiff in a private TCPA action against Alma in the Northern District of Illinois and arguing there is ample evidence Alma had actual knowledge of § 64.1200(a)(4)(iv) when it sent the faxes at issue in its petition, particularly with respect to

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<sup>82</sup> Bureau Order ¶ 18.

<sup>83</sup> *Id.*

faxes it sent in September and October 2011.<sup>84</sup> First, as with Allscripts, Dr. Geismann sued Alma on October 1, 2008, for violating “the regulations prescribed under 47 U.S.C. sec. 227(b)” and for violating “47 C.F.R. sec. 64.1200(a)([4]),” in particular.<sup>85</sup> Alma’s counsel in *Geismann* must have read the regulation their client was accused of violating, which stated then (as it does today), “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.”<sup>86</sup> The regulation does not refer to footnote 154 or the notice of rulemaking, and it is unambiguous. Even if Alma’s attorneys in *Geismann* failed to advise Alma of the regulation, at least with respect to the 2011 faxes, actual knowledge of § 64.1200(a)(4)(iv) is imputed to Alma.<sup>87</sup>

Second, counsel explained that Alma changed its opt-out notice throughout the class period in an apparent attempt to comply with the rules.<sup>88</sup> The December 2007 fax attached to the *Geismann* complaint provides a phone number but no fax number.<sup>89</sup> The July–August 2008 faxes attached to the *Physicians Healthsource* complaint added a fax number, as required by the regulation.<sup>90</sup> Then, in September and October 2011, after Dr. Geismann sued, Alma changed the opt-out notice again, dropping the phone number, but taking a step forward by

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<sup>84</sup> TCPA Pls.’ Comments on Petitions for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by Alma Lasers, ASD Specialty Healthcare, Den-Mat Holdings, and Stryker Corp. (Dec. 12, 2014) at 4–12.

<sup>85</sup> *Id.* at 4–5.

<sup>86</sup> § 64.1200(a)(4)(iv).

<sup>87</sup> *See, e.g.*, Restatement (Second) of Agency § 268 (“[N]otification given to an agent is notice to the principal” if given “to an agent authorized to receive it.”).

<sup>88</sup> TCPA Pls.’ Comments at 5–7.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

advising the recipient to provide the fax number “to which the request relates,” as required for an enforceable opt-out request under § 64.1200(a)(4)(v)(A).<sup>91</sup> Counsel argued Alma may have done a poor job of complying with the rules, but it was not confused about *whether* compliance was required.

Third, counsel explained that Alma’s contract with Westfax states Alma “will fully comply with” the applicable “laws, rules and regulations, including in particular, the Telephone Consumer Protection Act (“TCPA”) and all state laws similar or related thereto” and warns that “[t]he TCPA provides that the sender is solely liable for opt-out notice compliance and violations.”<sup>92</sup> Counsel argued Alma therefore had actual knowledge that there were “laws, rules and regulations” governing its conduct, and that if anything should be “presumed” based on this record, it is that Alma investigated those “rules and regulations.”<sup>93</sup>

Fourth, counsel explained an Alma witness testified Alma put each fax image through a “sign-off process” in which the content was approved by Alma’s senior director of marketing, Alma’s regulatory department, Alma’s general manager, and Alma’s legal department.<sup>94</sup> Plaintiffs argued Alma’s legal department should be “presumed” to know about the laws governing fax advertisements when signing off on fax advertisements.<sup>95</sup> Plaintiffs argued that, at the very least, the combination of factors—the 2008 lawsuit alleging violations of § 64.1200(a)(4), the evolution of the opt-out notice toward compliance, the

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<sup>91</sup> *Id.* at 7–8.

<sup>92</sup> *Id.* at 9.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

contract with Westfax, and the “sign off” by Alma’s legal department—is sufficient to rebut any “presumption” of confusion.

The Bureau Order does not mention the Westfax contract warning Alma to abide by the Commission’s rules.<sup>96</sup> Nor does it mention the evidence that Alma’s faxes were approved by its legal department.<sup>97</sup> The Commission should vacate the Bureau waiver as to Alma on this basis alone. Moreover, as with Allscripts, the Bureau did not consider the cumulative effect of the changing opt-out notice through the class period *combined with* the fact that Alma was simultaneously defending a private right of action for opt-out notice violations. It was unreasonable for the Bureau to assume these factors were unrelated. The much more likely conclusion is that Alma, like Allscripts, changed its opt-out notice *because* it had been sued for violating the regulation. That means it had actual knowledge of the requirements, and any “presumption of confusion” is rebutted.

**C. McKesson had actual knowledge of the regulation.**

TCPA Plaintiffs True Health Chiropractic, Inc. and McLaughlin Chiropractic Associates, Inc. filed comments on the McKesson waiver petition explaining they are plaintiffs in private TCPA litigation against McKesson in the Northern District of California and that on May 9, 2008, the Commission served McKesson with a Citation warning that it “apparently sent one or more unsolicited advertisements to telephone facsimile machines in violation of” the TCPA.<sup>98</sup> The Citation attached a copy of 47 U.S.C. § 227 and 47 C.F.R.

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<sup>96</sup> Bureau Order ¶¶ 1–25.

<sup>97</sup> *Id.*

<sup>98</sup> TCPA Pls.’ Comments on Petitions for Waiver of the Commission’s Rule on Opt-Out Notices on Fax Advertisements Filed by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding

§ 64.1200 and warned, “in the event of a complaint or dispute, the burden rests with the fax sender” to demonstrate compliance.<sup>99</sup> Plaintiffs argued the copy of § 64.1200 the Commission served on McKesson in 2008 stated, as it does today, that “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with” the requirements.<sup>100</sup>

Plaintiffs’ counsel explained that the faxes at issue in the private cause of action for which McKesson sought a waiver were sent in late 2009 to 2010 and contain no opt-out notice whatsoever.<sup>101</sup> Plaintiffs’ counsel argued that “[i]f the Commission is going to presume anything, it should be that when the Commission personally serves a fax advertiser with a copy of the Commission’s rules and advises the advertiser to comply, the advertiser ‘understands’ the plain language of those rules.”<sup>102</sup>

The Bureau Order ignores does not mention the Commission’s 2008 citation to McKesson.<sup>103</sup> The Commission should vacate the Bureau Order as to McKesson on this basis alone. If the Commission’s enforcement activities are to carry any weight, the Commission should rule that, when it personally serves a regulated entity—especially a Fortune 15 company like McKesson with in-house and outside counsel—with a copy of its

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Corp., St. Luke’s Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZocDoc, Inc. (Jan. 13, 2015) at 4–5.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*; *see also* 47 C.F.R. § 64.1200(a)(3)(iv) (2008) (since recodified as § 64.1200(a)(4)(iv)).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 23.

<sup>103</sup> Bureau Order ¶¶ 1–25.

rules and advises that company to comply, the company is no longer entitled to a “presumption” that it was confused about what the plain language of those rules require.

### **Conclusion**

The Commission should vacate the Bureau Order and overrule the October 30, 2014 Order because neither the Commission, not the Bureau on delegated authority, has the power to “waive” a regulation in a private right of action under the TCPA. The Commission should vacate the Bureau Order because it failed to consider the evidence—not considered in the October 30, 2014 Order—that the “industry” immediately understood the plain language of the opt-out regulation, making any “presumption of confusion” unwarranted. In the alternative, the Commission should vacate the waivers granted to Allscripts, Alma, and McKesson because the record demonstrates these petitioners had actual knowledge of the regulation, rebutting any presumption of confusion.

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