

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of)	CG Docket No. 02-278
)	
Safemark Systems, LP, For Retroactive)	CG Docket No. 05-338
Waiver of 47 C.F.R. § 64.1200(a)(4)(iv))	
)	

**PETITION OF SAFEMARK SYSTEMS, LP
FOR RETROACTIVE WAIVER OF C.F.R. § 64.1200(a)(4)(iv)**

Pursuant to Section 1.3 of the rules of the Federal Communications Commission (the “FCC” or “Commission”),¹ Safemark Systems, LP, (“Safemark” or “Petitioner”) by and through its undersigned counsel, respectfully requests a retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (the “Opt-out Requirement”) with respect to facsimiles promoting Safemark Systems, LP, client testimonials sent with the recipients’ prior invitation or permission in 2013 (the “2013 Faxes”).² The Commission has granted over 130 retroactive waivers to similarly-situated parties.³ Petitioner asks for the same relief.

¹ 47 C.F.R. § 1.3.

² These issues over “on whose behalf” the 2013 faxes were sent, and the identity of the “sender” under 47 C.F.R. § 64.1200(f)(10), are under consideration by the United States District Court for the Middle District of Florida Orlando Division in a pending lawsuit, *Gorss Motels, Inc., a Connecticut corporation, individually and as the representative of a class of similarly-situated persons v. Safemark Systems, LP and John Does 1-5*, Civil Action No. 16-cv-1638-ORL-31DAB . The filing of this waiver is in no way an admission by Safemark that it was the sender of the faxes, and Safemark does not seek, in this Petition, FCC consideration of those issues.

³ *Rules And Regulations Implementing The Telephone 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 Fax Opt-Out Requirements*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 (2014) (“2014 Anda Commission Order”); *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 8598 (2015) (“August 2015 Order”); *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*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 14057 (2015) (“December 2015 Order”).

I. BACKGROUND ON THE OPT-OUT REGULATION

The Telephone Consumer Protection Act (“TCPA”) prohibits the use of a fax machine to send unsolicited advertisements, subject to certain exceptions.⁴ “Unsolicited advertisement” is defined to mean “material advertising. . . any property, goods, or services which is transmitted to any person *without that person’s prior express invitation or permission . . .*”⁵ In 2005, Congress enacted the Junk Fax Prevention Act, which requires the sender of an unsolicited fax advertisement to provide specific information that would allow recipients to ‘opt-out’ of any future fax transmissions from the sender.⁶

In implementing the Junk Fax Prevention Act, the Commission imposed an opt-out notice requirement on *solicited* fax advertisements by adopting the Opt-out Requirement, which states that fax advertisements “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.”⁷ This requirement seemingly contradicted the plain wording of the statute, the application of which is limited to *unsolicited* advertisements. In addition the order adopting the rule (the “*Junk Fax Order*”) included a footnote that stated “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”⁸ This apparent conflict led to considerable confusion in the industry.

In the *2014 Anda Commission Order*, the Commission recognized that due to the contradictory footnote in the *Junk Fax Order*, some parties that had sent fax advertisements with

⁴ 47 U.S.C. §227(b)(1)(C).

⁵ 47 U.S.C. §227(a)(5) (emphasis added).

⁶ 47 U.S.C. §227(b)(1)(C)(iii), (b)(2)(D).

⁷ See 47 C.F.R. § 64.1200(a)(4)(iv); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, App. A (2006) (“*Junk Fax Order*”).

⁸ *Id.* at 3810, n.154 (emphasis added).

the recipients' prior invitation or permission may have reasonably been uncertain about whether the Opt-out Requirement applied to them.⁹ Accordingly, the Commission granted a retroactive waiver of the Opt-out Requirement to certain petitioners facing lawsuits premised, in part, on the failure to include opt-out language in faxes sent with prior invitation or permission.¹⁰ The *Anda Commission Order* further afforded those similarly-situated to the petitioners therein an opportunity to request retroactive waiver and encouraged parties to make every effort to file such requests within six months of the release date, *i.e.*, April 30, 2015. However, the date was not fixed and allowed for waivers to be granted after that date. The Consumer and Governmental Affairs Bureau (the "Bureau") has in fact granted waivers filed after that date.¹¹

Notably, in the *December 2015 Order*, the Bureau granted relief to parties filing waiver requests through September 21, 2015. The Bureau declined to reject the petitions solely on the basis that they were filed after the six-month filing date referenced in the *2014 Anda Commission Order*. The Bureau noted that all five of the petitions sought waiver for faxes sent prior to the April 30, 2015 deadline imposed by the *2014 Anda Commission Order* and concluded that "granting waivers to the five parties here does not contradict the purpose or intent of the initial waiver order because these parties are similarly-situated to the initial waiver recipients."¹²

Since the *Anda Commission Order*, the Commission has granted over 130 retroactive waivers of the Opt-out Requirements to parties that have asserted in waiver requests that (i) the subject faxes were sent without compliant opt-out provisions to recipients who had previously provided permission or invitation to receive them and (ii) that such faxes should not be subject to

⁹ *2014 Anda Commission Order* at ¶¶ 24-26.

¹⁰ *Id.* at ¶¶ 1, 26-27.

¹¹ *Id.* at ¶ 2.

¹² *December 2015 Order* at ¶ 18.

TCPA liability because there was industry-wide confusion caused by the seemingly contradictory statements contained in a footnote in the *Junk Fax Order* and the Opt-out Requirement.¹³

II. FACTS OF THE SAFEMARK CASE.

Safemark is a direct supplier of in-room safes, to the franchisees of franchisors of the AmeriHost Inn®, Baymont Inn & Suites®, Days Inn®, Howard Johnson®, Knights Inn®, Ramada®, Super 8 Motel®, Travelodge®, Wingate® and Wyndham® guest lodging franchise systems (each a “Lodging System”, and collectively the “Lodging Systems”). In 2013, Safemark engaged a fax broadcasting company to send facsimiles promoting client testimonials and providing information about Safemark’s presence at a forthcoming Lodging Systems conference. The fax numbers were provided for the use and reference of Safemark, by the Strategic Sourcing department of the Lodging Systems. As a matter of good business practices, Safemark included the telephone number and email address in the faxes that recipients could contact in order to opt-out of future faxes. To the extent that any companies were sent faxes without the prior invitation or permission of the recipient, such faxes were sent without the knowledge or consent of Safemark.

On September 19, 2016, a certain recipient of the 2013 Faxes filed a lawsuit against Safemark on behalf of themselves and as representatives of a proposed class of similarly-situated persons in the United States District Court for the Middle District of Florida (the “Court”) titled *Gorss Motels, Inc., a Connecticut corporation, individually and as the representative of a class of similarly-situated persons v. Safemark Systems, LP and John Does 1-5* (Case No. 6:16-cv-1638-ORL-31DAB) (the “Safemark Case”). The suit alleges that Safemark is liable under the TCPA for, among other things, sending¹⁴ facsimile advertisements that did not display the proper opt-out

¹³ *December 2015 Order* at ¶¶ 8, 13 n. 55.

¹⁴ These issues over “on whose behalf” the 2013 faxes were sent, and the identity of the “sender” under 47 C.F.R. § 64.1200(f)(10), are under consideration in the Safemark Case. The filing of this waiver is in no way an admission by Safemark that it was the sender of the faxes, and Safemark does not seek, in this Petition, FCC consideration of those issues.

language. In the Complaint, the plaintiffs seek class certification for “[a]ll persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of Defendants, and (3) from which Defendants did not have prior express invitation or permission, or (4) which did not display a proper opt-out notice.”¹⁵ The plaintiffs further allege that the faxes at issue constitute an advertisement and that the faxes did not contain compliant opt-out notices.¹⁶ The plaintiffs claim that Safemark is precluded from asserting any prior express permission or invitation from the recipients of the faxes because the transmitted faxes did not include a complete opt-out notice.¹⁷

The Petition does not request that the Commission resolve the factual or legal questions raised in the pending Safemark case, including whether any particular recipient provided prior express permission; such issues remain within the jurisdiction of the United States District Court. As the Bureau indicated in the *December 2015 Order*, “the granting of a waiver does not confirm or deny that the petitioners had the prior express permission of the recipients to send the faxes. That remains a question for triers of fact in the private litigation.”¹⁸

Here, Petitioner seeks the same relief afforded to over 130 petitioners in the *2014 Anda Commission Order*, *August 2015 Order*, and *December 2015 Order*.

III. GOOD CAUSE EXISTS TO GRANT SAFEMARK A RETROACTIVE WAIVER.

Pursuant to 47 C.F.R. Section 1.3, the Commission may waive any provision of its rules for “good cause shown.” Specifically, a waiver may be granted if: “(1) special circumstances

¹⁵ *Gorss Motels, Inc., a Connecticut corporation, individually and as the representative of a class of similarly-situated persons v. Safemark Systems, LP and John Does 1-5* (Case No. 6:16-cv-1638-ORL-31DAB), Complaint ¶17 (Sept. 16, 2016).

¹⁶ *Id.* at ¶¶ 12-16.

¹⁷ *Id.* at ¶¶ 25-29.

¹⁸ *December 2015 Order* at ¶ 16.

warrant deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.”¹⁹ The Commission should grant Petitioner the requested waiver for the same reasons that waivers were granted in the *2014 Anda Commission Order*, *August 2015 Order*, and *December 2015 Order*.

First, special circumstances warrant deviation from the general rule. As the Commission and the Bureau recognized in those prior decisions, the *Junk Fax Order* “caused confusion or misplaced confidence” as to whether the opt-out requirement applied to solicited fax advertisements because it stated that the “opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”²⁰ In addition, the Commission's notice of intent to adopt Section 64.1200(a)(4)(iv) likewise “did not make explicit that the Commission contemplated an opt-out requirement on fax advertisements sent with prior express permission of the recipient” thereby further contributing to the confusion or misplaced confidence about the opt-out notice requirement.²¹ As in the prior orders regarding retroactive waiver of the Opt-out Requirement, the confusion caused by the inconsistent statement in the *Junk Fax Order* and the lack of explicit notice warrants deviation from the Opt-out Requirement and supports granting a retroactive waiver here.²²

The 2013 Faxes at issue in the Safemark Case included limited opt-out information, but as the Bureau has recognized, including a limited opt-out notice is not an indication that a petitioner understood the Opt-out Requirement. To the contrary, the Bureau noted in the *August 2015 Order* that:

businesses may well include basic opt-out information, including a phone or fax number, as a matter of good business practice rather than knowledge of the rule.

¹⁹ *2014 Anda Commission Order* at ¶ 23

²⁰ *Id.* at ¶ 24.

²¹ *Id.* at ¶ 25.

²² *See, December 2015 Order* ¶13.

Indeed, a business that understood the rule would have presumably included all elements of the required notice, not just a few.²³

Safemark is similarly-situated to the petitioners referenced by the Bureau in the *August 2015 Order* in that it directed the inclusion contact information for use, in part, in opting out of facsimile communications for legitimate business purposes but confusion remained regarding application of the specific Opt-out Requirement to these facsimile communications.

Second, granting the requested waiver would serve the public interest. Like the petitioners granted retroactive waivers of the Opt-out Requirement in previous Commission and Bureau orders, Safemark faces potentially ruinous class action litigation on the basis of the purported non-compliant opt-out information from fax recipients who provided prior invitation or permission to receive the 2013 Faxes. In the *2014 Anda Commission Order*, the Commission noted that “confusion or misplaced confidence ... left some businesses potentially subject to significant damage awards under the TCPA's private right of action,” and the “TCPA's legislative history makes clear our responsibility to balance legitimate business and consumer interests.”²⁴ Based on these circumstances, the Commission concluded that, on balance, the public interest was served by “grant[ing] a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward.”²⁵ The same public interest supports granting Safemark a waiver in this case.

IV. CONCLUSION.

For the foregoing reasons, Safemark respectfully requests that the Commission grant a retroactive waiver from the provisions of 47 C.F.R. Section 64.1200(a)(4)(iv) for facsimiles sent by or on behalf of Safemark, prior to the April 30, 2015 deadline imposed by the *2014 Anda*

²³ *August 2015 Order* ¶ 18.

²⁴ *2014 Anda Commission Order* at ¶ 27.

²⁵ *Id.*

Commission Order, affording the same relief previously granted by the Commission and the Bureau to 130 similarly-situated petitioners.

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Respectfully submitted,

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