

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

IN THE MATTER OF:)	
)	CG Docket No. 02-278
Petition of Foot Levelers, Inc. for)	
Retroactive Waiver of Section)	CG Docket No. 05-338
64.1200(a)(4)(iv) of the Commission’s Rules)	

PETITION OF FOOT LEVELERS, INC. FOR RETROACTIVE WAIVER

Foot Levelers, Inc. (“Foot Levelers”) by counsel, respectfully requests a retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (the “Opt-out Requirement”) pursuant to the Federal Communications Commission’s (the “Commission’s”) Order issued on October 30, 2014,¹ Section 1.3 of the Commission’s rules and the Consumer and Governmental Affairs Bureau’s (the “Bureau’s”) Orders issued on August 28, 2015,² December 9, 2015³ and November 2, 2016.⁴ Foot Levelers seeks this waiver for facsimiles that it transmitted, or that were transmitted on its behalf, prior to April 30, 2015, with the prior express invitation or permission of the recipients or their agents, that either did not contain opt-out notices or that contained opt-out notices that did not meet the prerequisites of the Opt-out Requirement. As discussed herein, confusion over whether the Opt-out Requirement applied to these facsimiles warrants a waiver. A waiver would serve the public interest because Foot Levelers faces the possibility of crippling liability after being targeted by a plaintiffs’ firm engaged in numerous

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 29 FCC Rcd 13998 (Oct. 30, 2014) (the “2014 Anda Commission Order”).

² *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd 8598 (Aug. 28, 2015) (“Aug. Waiver Order”).

³ *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 14057 (Dec. 9, 2015) (“Dec. Waiver Order”).

⁴ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, Order, 31 FCC Rcd 11943 (Nov. 2, 2016) (“Nov. Waiver Order”).

Telephone Consumer Protection Act (“TCPA”)⁵ class actions. Foot Levelers is similarly situated to the numerous other businesses that have obtained a waiver, including those granted a waiver as recently as November 2, 2016.⁶

I. INTRODUCTION

Foot Levelers is a privately held Virginia corporation that is the world’s leading provider of individually designed functional orthotics inserts, orthotic footwear and other therapeutic products. Foot Levelers’ primary customers are healthcare professionals and their patients, to whom Foot Levelers has advertised certain products via facsimile.

II. APPLICABLE LAW

The Junk Fax Prevention Act of 2005 (“JFPA”)⁷ amended the TCPA to prohibit, under certain circumstances, the use of a facsimile (“fax”) machine, computer, or other device to send an “unsolicited advertisement” to another fax machine.⁸ The JFPA defines “unsolicited advertisement” as “any material advertising the commercial availability or quality of any property, goods or services which is transmitted to any person without that person’s prior express invitation or permission.”⁹ In 2006, the Commission adopted an Order (the “Junk Fax Order”) which amended the rules regarding fax transmissions and advertising under the JFPA.¹⁰ The Junk Fax Order required that a fax advertisement “sent to a recipient that has provided prior

⁵ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); 47 U.S.C. §227 et seq.

⁶ *Nov. Waiver Order*, 31 FCC Rcd 11943.

⁷ Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

⁸ 47 U.S.C. § 227(b)(1)(C).

⁹ *Id.* § (a)(5).

¹⁰ *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 (2006) (“*Junk Fax Order*”).

express invitation or permission to the sender must include an opt-out notice.”¹¹ The Junk Fax Order also stated in a footnote that “[w]e note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”¹²

The apparent conflict between those two statements caused a number of entities to file petitions seeking clarification of this conflict with the Commission. In response, the Commission issued a subsequent Order (the “Fax Order”), which noted that the language in its Junk Fax Order caused confusion as to whether the opt-out requirement applied to solicited fax advertisements:

While we affirm that the Commission’s rules require that an opt-out notice must be contained on all fax ads, the record indicates that a footnote contained in the Junk Fax Order caused confusion regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission or created a false sense of confidence that the requirement did not apply. As a result, we find good cause exists to grant individual retroactive waivers of section 64.1200(a)(4)(iv) of the Commission’s rules...¹³

Through the Fax Order, the Commission clarified that entities that send fax ads must meet the Opt Out Requirements, even if the recipient previously agreed to such ads from the sender. Nonetheless, due to the conflicting language in the Junk Fax Order, the Commission found that the public interest would be served through granting retroactive waivers to parties affected by such confusion:

...the waiver granted herein applies only to the petitioners insofar as they may have failed to comply with section 64.1200(a)(4)(iv) prior to six months from the release date of this Order. As a result, the waiver granted herein shall not apply to such conduct that occurs more than six months after the release date of this Order nor shall it apply to any situation other than where the fax sender had obtained the prior express invitation or

¹¹ 47 C.F.R. § 64.1200(a)(4)(iv); *see also Junk Fax Order*, 21 FCC Rcd at 3812, para. 48.

¹² *Junk Fax Order*, 21 FCC Rcd at 3818, para 42, n. 154.

¹³ *2014 Anda Commission Order*, 29 FCC Rcd at 14005, para. 15.

permission of the recipient to receive the fax advertisement. We direct the Bureau to conduct outreach to inform potential senders of our reconfirmed requirement to include an opt-out on faxes.

Other, similarly situated parties, may also seek waivers such as those granted in this Order.¹⁴

Accordingly, the Commission provided a waiver to those entities who did not include the opt-out language in solicited fax advertisements prior to six months from the release date of the Fax Order. Under such a waiver, an entity is not liable under section 64.1200(a)(4)(iv) of the Commission's regulations for failing to include the opt-out language during that period.

Subsequently, on August 28, 2015,¹⁵ December 9, 2015,¹⁶ and November 2, 2016,¹⁷ the Bureau granted more than one hundred retroactive waivers. The Bureau reaffirmed the Commission's conclusion that the waivers are in the public interest and supported by good cause.¹⁸ The Bureau also stated that waivers are appropriate and should be granted even after April 30, 2015 for faxes sent prior to that date.¹⁹

III. ANALYSIS

Foot Levelers respectfully requests that the Commission grant it a limited retroactive waiver of the Opt Out Requirement for any solicited faxes it sent, or that were sent on its behalf, after the effective date of the Opt Out Requirement and prior to April 30, 2015.

As has been established in prior waiver examinations, good cause is shown and a waiver of the Opt-out Requirement should be granted if (1) special circumstances warrant a deviation

¹⁴ *2014 Anda Commission Order*, 29 FCC Rcd at 14011, para. 29-30.

¹⁵ *Aug. Waiver Order*, 30 FCC Rcd 8598.

¹⁶ *Dec. Waiver Order*, 30 FCC Rcd 14057.

¹⁷ *Nov. Waiver Order*, 31 FCC Rcd 11943.

¹⁸ *Aug. Waiver Order* at para. 13; *Dec. Waiver Order* at para.12; *Nov. Waiver Order* at para. 12.

¹⁹ *Aug. Waiver Order* at para. 20; *Dec. Waiver Order* at para.18; *Nov. Waiver Order* at para. 18.

from the general rule and (2) the waiver would better serve the public interest than would application of the rule.²⁰ Foot Levelers is similarly situated to the more than one hundred other petitioners that have obtained a waiver, and therefore Foot Levelers requests that its waiver request be granted for the same reasons given by the Bureau in those prior grants.

A. A Deviation from the General Rule is Warranted

In the Fax Order, the Commission found that there was “industry-wide confusion” regarding whether fax ads sent with recipient consent must include an opt-out notice. This confusion, the Commission determined, stemmed from (1) the language of the previously-discussed footnote in the Junk Fax Order, and (2) the language of the notice issued prior to the rule that did not make explicit Commission’s intent to apply an opt-out requirement to solicited fax ads.²¹ Like many other companies, Foot Levelers was reasonably confused as to whether the solicited faxes it transmitted, or those that were transmitted on its behalf, were required to satisfy the Opt Out Requirements prior to the Commission’s issuance of the Fax Order. Further, the Commission has not rejected requests for retroactive waivers solely on the basis of being filed after April 30, 2015. As such, Foot Levelers is similarly situated to the petitioners who have been granted retroactive waivers of the opt-out notice requirements and seeks only the same limited retroactive waiver.²²

B. The Public Interest is Served through Issuance of a Waiver

A waiver would serve the public interest in the instant case. The Commission’s Fax Order established that the public interest is not served by subjecting businesses that were

²⁰ *Aug. Waiver Order* at para. 14; *Dec. Waiver Order* at para.13; *Nov. Waiver Order* at para. 13.

²¹ *Aug. Waiver Order*, para. 14 (citing *2014 Anda Commission Order*, 29 FCC Rcd at 14009-10, paras. 24-26).

²² Petitioners referencing the confusion between the footnote and the rule are entitled to a presumption of confusion or misplaced confidence. *See Aug. Waiver Order* at para. 14.

reasonably confused by the opt-out requirements when “failure to comply with the rule — which ... could be the result of reasonable confusion or misplaced confidence — could subject parties to potentially substantial damages.”²³

Foot Levelers is defending itself against the possibility of crippling liability in a putative class action lawsuit pending in the United States District Court for the Southern District of Ohio — *Swetlic Chiropractic & Rehabilitation Center, Inc. v. Foot Levelers, Inc. et al.*, Case No. 2:16-cv-00236-GCS-EPD. Plaintiff alleges that Foot Levelers violated the TCPA’s Junk Fax provisions by sending unsolicited fax advertisements that did not include proper opt-out notices and that Foot Levelers is precluded from arguing that its faxes were solicited because the faxes did not include the proper opt-out language.²⁴ As is the apparent case with many other petitioners who have sought and been granted a waiver, Plaintiff, represented by Anderson + Wanca, seeks to certify a class consisting of:

All 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) which Defendants did not have prior express invitation or permission, or (4) which did not display a proper opt-out notice.²⁵

Foot Levelers’ request for retroactive waiver therefore bears directly on the allegations in the pending litigation, namely, that Foot Levelers’ faxes did not contain an opt-out notice. A retroactive waiver is in the public interest because Foot Levelers—like the scores of other limited waiver recipients—faces exposure to potentially significant monetary damages as well as related defense expenses which, if the Commission does not grant the requested retroactive waiver

²³ 2014 *Anda Commission Order*, 29 FCC Red at 14010-11, para. 27.

²⁴ Plaintiff alleges that Foot Levelers is “precluded from asserting any prior express permission or invitation or that [Foot Levelers] had an established business relationship because of the failure to comply with the Opt-Out Notice Requirements in connection with such transmissions.” Complaint ¶ 30.

²⁵ Complaint ¶ 17.

request, could materially and adversely affect Foot Levelers' business and its numerous employees' livelihoods.

III. CONCLUSION

For the reasons stated above, Foot Levelers respectfully requests that the Commission grant a limited retroactive waiver of Section 61.1200(a)(4)(iv) with respect to facsimiles that were transmitted by Foot Levelers, or on Foot Levelers' behalf prior to April 30, 2015, with the prior express invitation or permission of the recipients or their agents but without opt-out notices or with opt-out notices that did not conform to the requirements of the Opt-out Requirement.

Respectfully submitted,

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