

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	CG Docket No. 02-278
)	
Petition for Waiver)	CG Docket No. 05-338
of M3 USA Corporation)	

PETITION FOR WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission’s (“FCC” or the “Commission”) regulations, 47 C.F.R. § 1.3, M3 USA Corporation (“M3”) respectfully requests the Commission grant it a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s regulations, 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-Out Rule”) with respect to any solicited facsimiles that have been transmitted by or on behalf of M3 prior to April 30, 2015.

This request for waiver is being submitted pursuant to the Commission’s Order granting a number of retroactive waivers of the Opt-Out Rule and inviting “similarly situated parties” to seek similar waivers.¹ As the Commission has already determined that good cause exists for such retroactive waiver requests and that granting the waiver would serve the public interest, M3 respectfully requests that the Commission expeditiously grant its petition for waiver.²

I. BACKGROUND

M3 provides qualitative and quantitative medical market research through double-blind research surveys to healthcare professionals. M3 conducts research surveys concerning

¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petition 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, ¶ 30 (rel. Oct. 30, 2014) (“Fax Order”).

² See *Fax Order* at ¶ 22; see also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

medications, procedures and techniques. As part of its double-blind surveys, M3 sends survey invitations via facsimile.

The Telephone Consumer Protection Act of 1991 (“TCPA”) prohibits the use of a fax machine to send an “unsolicited advertisement.”³ In 2005, Congress enacted the Junk Fax Prevention Act to “require the sender of an *unsolicited* fax advertisement to provide specified notice and contact information on the fax that allows recipients to ‘opt out’ of any future fax transmissions from the sender.”⁴ Further, as a result of confusion regarding the FCC’s treatment of opt-out language on solicited faxes, M3 did not believe any of their solicited facsimiles required compliant opt-out notices. However, as a consequence of this regulatory uncertainty, M3 – like so many other companies – now finds itself as a defendant in a putative class action lawsuit filed in federal court which alleges violations of the TCPA.⁵

The named plaintiffs in that action, along with the putative class, seek damages for alleged violations of the TCPA on the grounds that, among other things, M3 allegedly sent facsimile transmissions to the named plaintiffs and the putative class which did not bear the opt-out notice required by the Opt-Out Rule.⁶ This petition for waiver does not ask the Commission to resolve the factual and legal questions raised in the pending litigation. By this filing, M3 seeks only to obtain the same retroactive waiver of the Opt-Out Rule that the Commission

³ Pub. L. No. 102-243, 105 Stat. 2394, *codified at* 47 U.S.C. §§ 227 *et seq.*

⁴ 47 C.F.R. § 64.1200(a)(4)(iv) (emphasis added); *see also 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 F.C.C. Rcd. 3787, 3810 n.154 (“Junk Fax Order”) (2006) (stating that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements” (emphasis added)).

⁵ *See Comprehensive Health Care Systems Of The Palm Beaches, Inc. v. M3 USA Corporation*, No. 9:16-cv-80967-BB, DE 44 (S.D. Fla.) (second amended complaint). The plaintiffs in this action—Comprehensive Healthcare and Dr. Robert Mauthe M.D., P.C.—have filed over a dozen TCPA class actions combined.

⁶ *See id.* ¶¶ 66-69.

granted to multiple petitioners in the Fax Order and to over 100 applicants that subsequently filed waiver petitions.⁷

II. GRANT OF THE M3 RETROACTIVE WAIVER REQUEST IS IN THE PUBLIC INTEREST.

As the Commission concluded in the Fax Order, good cause exists for a retroactive waiver of the Opt-Out Rule insofar as it relates to the failure to comply with the Opt-Out Rule's opt-out notice requirements for facsimile transmissions sent with the prior express invitation or permission of recipients.⁸

The Commission recognized that this good cause is based, first, on the "inconsistency" between a footnote to the Junk Fax Order and the Opt-Out Rule; the Commission stated that this inconsistency has "caused confusion or misplaced confidence" regarding the applicability of the Opt-Out Rule to facsimiles sent with prior express permission.⁹ This acknowledged inconsistency has contributed to substantial uncertainty surrounding the opt-out notice requirements for *solicited* fax advertisements. Like the petitioners that were granted retroactive waivers in the Fax Order, there is "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."¹⁰ As a "similarly situated party" – *i.e.*, an entity that sent solicited fax transmissions that lacked an opt-out notice – good cause exists to resolve this inconsistency by granting M3's request for a retroactive waiver.

⁷ See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 8598 (2015) [hereinafter Waiver Petition Order] (granting 117 waiver petitions); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 14057 (2015) (granting 5 petitions); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 05-338, 2016 WL 6538219, at *2 (OHMSV Nov. 2, 2016) (granting 22 petitions).

⁸ Fax Order at ¶ 22.

⁹ Junk Fax Order at n.154; see also Fax Order at ¶ 24.

¹⁰ Fax Order at ¶ 26.

Grant of the retroactive waiver request would also be in the public interest. M3 notes that the Commission has already decided that such retroactive waivers will serve the public interest because the “confusion or misplaced confidence . . . left some businesses potentially subject to significant damage awards” and that “on balance . . . it serves the public interest . . . to grant 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.”¹¹ Based on this finding, the FCC granted a retroactive waiver to all of the petitioners explicitly referenced in the Order and further invited other “similarly situated parties” to seek retroactive waivers as well.¹²

Though M3 is filing this waiver petition outside of the April 30, 2015 cutoff date in the Fax Order, it seeks a retroactive waiver pertaining *only* to solicited faxes it transmitted prior to the April 30, 2015 cutoff. The putative class action M3 is presently facing concerns a putative class time period reaching back as early as June of 2012.¹³ Importantly, the Commission’s April 30, 2015 date was not a hard cutoff date for *filing petitions*—indeed, the Commission noted simply that “we expect that parties will make every effort to file within six months of the release of this Order.”¹⁴ The Commission subsequently granted waiver petitions filed as late as June of 2015 on the basis that “[t]hese petitions sought waiver for faxes sent prior to the April 30, 2015 deadline” and “[a]s such, granting waivers to these parties does not contradict the purpose or intent of the initial waiver order as the parties involved are similarly situated to the initial waiver

¹¹ *Fax Order* at ¶ 27.

¹² *Id.* at ¶ 30.

¹³ *See* , No. 9:16-cv-80967-BB, DE 44 ¶ 44. The statute of limitations for a TCPA action is four (4) years. *See* 28 U.S.C. § 1658(a).

¹⁴ *Fax Order* at ¶ 2.

recipients.” The Commission also recently granted waiver petitions filed as late as September 27, 2016.¹⁵ Given that the faxes at issue in this petition were sent before April 30, 2015, M3 is similarly situated to the initial waiver recipients.¹⁶

The FCC’s rationale in granting retroactive waivers to the petitioners referenced above applies equally to M3 because the uncertainty surrounding the Opt-Out Rule could potentially expose it to frivolous lawsuits and monetary damage awards. The Commission has acknowledged that substantial confusion previously existed with respect to the opt-out requirements for solicited fax advertisements. Thus, not only does good cause exist to grant M3 a waiver of the Opt-Out Rule, but such a grant would be in the public interest.

¹⁵ *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 05-338, 2016 WL 6538219, at *5 ¶ 18 (OHMSV Nov. 2, 2016) (“These petitions sought waiver for faxes sent prior to the April 30, 2015 compliance deadline imposed by the 2014 Anda Commission Order. As such, granting waivers to the 22 petitioners here does not contradict the purpose or intent of the initial waiver order because these parties are similarly situated to the initial waiver recipients.”).

¹⁶ *See Waiver Petition Order* ¶ 20.

III. CONCLUSION

For the foregoing reasons, M3 respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) effective through April 30, 2015.

February 14, 2017

Respectfully Submitted,

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