

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

In the Matter of	)	
	)	
Petition for Waiver Of Cynosure, Inc.	)	CG Docket No. 02-278
	)	
	)	CG Docket No. 05-338
	)	
	)	

**PETITION FOR WAIVER OF SECTION 64.1200(a)(4)(iv)  
OF THE COMMISSION’S RULES OR, IN THE ALTERNATIVE,  
FOR A DECLARATORY RULING**

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**PETITION FOR RETROACTIVE WAIVER OF SECTION 64.1200(a)(4)(iv)  
AND/OR DECLARATORY RULING**

Pursuant to Section 1.3 of the Rules<sup>1</sup> of the Federal Communication Commission (the “Commission”), and the Commission’s Order dated October 30, 2014 (“Original Waiver Order”),<sup>2</sup> Petitioner, Cynosure, Inc. (“Cynosure”), respectfully requests that the Commission grant it a retroactive waiver of Section 64.1200(a)(4)(iv) (the “Regulation” or “Rule”), to the extent the Regulation may apply to any faxes transmitted by Cynosure (or on its behalf) with the prior express permission of the recipients or their agents.

In its Original Waiver Order, the Commission clarified that an opt-out notice is required under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA” or “Act”), and the Commission’s Regulation, 47 C.F.R. § 64.1200(a)(4)(iv), for facsimile advertisements sent with the recipients’ prior express permission or invitation (“solicited fax advertisements”) and must comply with the requirements of 47 U.S.C. § 227(b)(1)(C) and (2)(D) and 47 C.F.R. § 64.1200(a)(4)(iii).<sup>3</sup> At the same time, the Commission recognized that “good cause” exists for granting a retroactive waiver of the Rule—specifically, the state of justified, industry-wide confusion, which has given rise to substantial liability for inadvertent violations.<sup>4</sup> Accordingly, the Commission retroactively waived compliance with Section 64.1200(a)(4)(iv) for the petitioners through April 30, 2015 and invited similarly situated parties to seek the same relief.<sup>5</sup>

Good cause exists for granting Cynosure’s request for a retroactive waiver. Cynosure is similarly positioned to other waiver recipients. It has been subject to the special circumstances

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<sup>1</sup> 47 C.F.R. § 1.3; 5 U.S.C. § 554 (e).

<sup>2</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, FCC 14-164, 29 FCC Rcd 13998 (Oct. 30, 2014) (“Original Waiver Order”).

<sup>3</sup> Original Waiver Order, ¶ 1.

<sup>4</sup> *Id.* at ¶¶ 23-28, 48, *ref.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 2005, Report and Third Order on Reconsideration*, 21 FCC Rcd 3787, 3812, n. 154 (2006) (“Junk Fax Order”).

<sup>5</sup> *Id.* at ¶¶ 2, 29-30, 48.

addressed in the Original Waiver Order. Specifically, due to the industry-wide confusion regarding proper application of the Regulation following the Junk Fax Order, created by the inclusion of an inconsistent footnote and absence of any reference to the Commission’s intent to require opt-out notices on solicited faxes in its notice of rule-making, Cynosure lacked legal certainty regarding the application of the Regulation to solicited faxes. Like other petitioners, Cynosure is a defendant to claims brought pursuant to the TCPA for having sent faxes without compliant opt-out provisions to persons who had previously given express consent.<sup>6</sup> As a result, Cynosure is facing the possibility of substantial costs or liability, such that waiver is in the public interest.<sup>7</sup> For these reasons, and those set forth below, Cynosure respectfully requests a retroactive waiver of Section 64.1200(a)(4)(iii).

Alternatively, pursuant to Sections 1.2 and 1.3 of the Rules,<sup>8</sup> Cynosure requests that the Commission issue a declaratory ruling to clarify: (a) the Rule applies to unsolicited advertisements, only; or, (b) the Rule’s statutory basis is not 47 U.S.C. § 227 (b). Clarification in either regard will provide necessary guidance and is consistent with the text and goals of the Act.

## **I. BACKGROUND.**

Cynosure is currently facing a putative class action lawsuit by ARcare, Inc., *Arcare, Inc. v. Cynosure, Inc.*, Case No. 1:16-cv-1157-DPW (D.Mass), for allegedly sending unsolicited faxes in violation of the TCPA.<sup>9</sup> In particular, ArCare, Inc. alleges that the faxes did not “have

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<sup>6</sup> See Defendant Cynosure, Inc.’s Answer and Affirmative Defenses to Complaint, *Arcare, Inc. v. Cynosure, Inc.*, Case No. 1:16-cv-1157-DPW, Dkt. 22 at pps. 4, 10 (filed Sep. 30, 2017) (“Answer”).

<sup>7</sup> Junk Fax Order at ¶¶ 24-27.

<sup>8</sup> 47 C.F.R. §§ 1.2 and 1.3; 5 U.S.C. § 554 (e).

<sup>9</sup> See Class Action Complaint, *Arcare, Inc. v. Cynosure, Inc.*, Case No. 1:16-cv-1157-DPW, Dkt #1 (filed Jul. 27, 2016) (“Complaint”).

compliant opt out notices, in violation of 47 U.S.C. § 227 (b)(1)(C) and 47 C.F.R. 64.1220(a)(4).<sup>10</sup>

Cynsure denies that the subject faxes were “unsolicited” and asserts that it obtained prior express consent.<sup>11</sup> For its part, ArCare, Inc. claims that it did not consent.<sup>12</sup> However, these factual disputes are properly resolved in the private lawsuit and not relevant to this Petition.<sup>13</sup>

**A. The TCPA And Its Implementing Regulations.**

The TCPA prohibits faxing unsolicited advertisements—those sent “without prior express invitation or permission.”<sup>14</sup> The Junk Fax Prevention Act of 2005 (“JFPA”) amended the TCPA and codified the established business relationship (“EBR”) defense for unsolicited advertisements sent pursuant to relationships that Congress recognized as implying consent.<sup>15</sup> At the same time, Congress concluded that exempting these unsolicited advertisements from liability might result in some continued unwanted faxing. Consequently, the JFPA specifies that to come within the safe-harbor of an EBR,<sup>16</sup> unsolicited fax advertisements must include an opt-out notice to inform recipients how to stop future faxes.<sup>17</sup> The JFPA does not mention the Regulation or extend the opt-out requirement to *solicited* fax advertisements.

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<sup>10</sup> See *id.* at ¶¶ 29, 14-16.

<sup>11</sup> Answer at ¶¶ 29, 14-16, p. 10.

<sup>12</sup> *Id.* at ¶ 14.

<sup>13</sup> Original Waiver Order, ¶ 26; *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 8598 (Aug. 28, 2015) (“Aug. 28 Waiver Order”); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 14057 (Dec. 9, 2015) (“Dec. 9 Waiver Order”).

<sup>14</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227; 47 U.S.C. § 227 (a)(5) and (b)(1)(C)(the definition of “unsolicited advertisement” has not been amended).

<sup>15</sup> Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified at* 47 U.S.C. § 227.

<sup>16</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Red 8752 1 54 (1992).

<sup>17</sup> 47 U.S.C. § 227(b)(2)(D).

The Commission’s Junk Fax Order is the first articulation of any requirement for opt-out language on solicited fax advertisements—indeed, no such requirement was referenced in the Notice of Proposed Rulemaking that preceded adoption of the Regulation.<sup>18</sup> As described in the Notice, the Junk Fax Order implemented the requirements for asserting the “EBR” safe-harbor for unsolicited faxes, such as the inclusion of a compliant opt-out provision on unsolicited faxes.<sup>19</sup> At the same time, without explicit notice, the Commission adopted the Regulation which appeared to extend those requirements to advertisements to faxes sent pursuant to the recipient’s prior express consent.<sup>20</sup> Concurrently, however, the Commission stated: “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”<sup>21</sup>

The Commission did not identify a basis of statutory authority to support the Rule in the Junk Fax Order.<sup>22</sup> Yet, it created a cause of action and potential liability that are found nowhere in the Act.

#### **B. The Original Waiver Order.**

The Commission issued its Original Waiver Order in response to challenges to the Rule. The Commission declined to invalidate its Rule after addressing several petitions for declaratory relief and/or rule making.<sup>23</sup> At the same time, the Commission acknowledged—given the unique backdrop of the Rule’s inception and its subsequent impact on liability—that requiring draconian, retroactive adherence is not in the public interest. For this reason, it granted

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<sup>18</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act*, Notice of Proposed Rulemaking, 20 FCC Rcd. 19758, 19767-70 (2005)(“Junk Fax NPRM”).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*; see also Junk Fax Order, 21 FCC Rcd at 3812.

<sup>21</sup> *Id.* at 3809, n. 154 (herein, the “footnote”).

<sup>22</sup> See *id.* at ¶ 64 (locating authority for all rules adopted in the order under “sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended”).

<sup>23</sup> Original Waiver Order, ¶ 1.

retroactive waivers of the Regulation to parties that had sent solicited fax advertisements that did not include a compliant notice.

The Commission determined that the following “good cause” exists for waiving the Rule.<sup>24</sup> First, special circumstances warrant deviation. Specifically, the inconsistent footnote in the Junk Fax Order and lack of explicit notice regarding the Regulation in the Notice of Proposed Rulemaking created “confusion” and engendered “misplaced confidence” that the opt-out rule does not apply to solicited fax advertisements.<sup>25</sup> Second, it found that waiver of the Regulation is in the public interest. Inadvertent violations arising after the Junk Fax Order when the industry was afflicted by understandable confusion could result in substantial liability.<sup>26</sup> Thus, the Commission granted waivers to provide “temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules” through April 30, 2015 and invited “similarly situated” parties to seek the same waiver.<sup>27</sup>

The Commission declined to resolve factual disputes. It granted waivers without “confirm[ing] or deny[ing] whether [the] 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>28</sup> The Commission also did not make any evidentiary rulings regarding whether there was actual, individual confusion.<sup>29</sup> It stated that Parties are entitled to a “presumption” of confusion or misplaced confidence due to

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<sup>24</sup> *Id.* at ¶¶ 23-28, 48.

<sup>25</sup> *Id.* (“the footnote stated that ‘the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.’ The use of the word ‘unsolicited’ in this one instance may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient”).

<sup>26</sup> *Id.* at ¶ 27.

<sup>27</sup> *Id.* at ¶¶ 24-25.

<sup>28</sup> *Id.* at ¶ 31.

<sup>29</sup> *Id.* at ¶ 26.

the contradictory footnote, lack of explicit notice and generalized lack of certainty regarding Regulation and its proper application.<sup>30</sup>

**C. Subsequent Waiver Orders.**

Since the Original Waiver Order, the Consumer and Governmental Affairs Bureau (the “Bureau”) has granted one-hundred and twenty-two (122) retroactive waivers in two subsequent orders (“Subsequent Waiver Orders”).<sup>31</sup> It reaffirmed that waivers are supported by good cause and in the public interest<sup>32</sup> and held that waivers are appropriate and should be granted even after April 30, 2015.<sup>33</sup>

Neither the Bureau nor the Commission has required proof of consent.<sup>34</sup> The Bureau explained that a “waiver does not confirm or deny whether 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.”<sup>35</sup>

The Commission and Bureau have also declined to require proof or pleading of “specific, detailed grounds for individual confusion.”<sup>36</sup> “Petitioners referencing the confusion between the footnote and the rule are entitled to a presumption of confusion or misplaced confidence.”<sup>37</sup> This presumption confusion cannot be rebutted by the inclusion of a “limited opt-out notice.”<sup>38</sup> The Bureau explained that a “business that understood the rule would have presumably included all

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<sup>30</sup> Original Waiver Order, ¶ 26.

<sup>31</sup> Aug. 28 Waiver Order, ¶ 11; Dec. 9 Waiver Order, ¶ 1.

<sup>32</sup> Aug. 28 Waiver Order, ¶ 13; Dec. 9 Waiver Order, 12.

<sup>33</sup> Aug. 28 Waiver Order, 20; Dec. 9 Waiver Order, ¶ 18.

<sup>34</sup> Aug. 28 Waiver Order, ¶ 17; Dec. 9 Waiver Order 16.

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

<sup>36</sup> Dec. 9 Waiver Order, ¶ 17; *see also* Aug. 28 Waiver Order, ¶ 15.

<sup>37</sup> Aug. 28 Waiver Order, ¶ 14.

<sup>38</sup> Aug. 28 Waiver Order, ¶ 18.



elements of the required notice, not just a few.”<sup>39</sup> Similarly, a prior lawsuit or claim premised on the absence of compliant opt-out provisions is insufficient to demonstrate the entity had a “clear” understanding of the application and force of the Rule to denial of a waiver request.<sup>40</sup> Thus, every party that petitioned for relief based on generalized “confusion between the footnote and the rule” has been granted the same retroactive waiver.<sup>41</sup>

## **II. CYNOSURE SHOULD BE GRANTED A RETROACTIVE WAIVER.**

Cynosure falls squarely within the class of persons for whom the Commission intended to retroactively waive Section 64.1200(a)(4)(iv). Initially, Cynosure is “similarly situated” to the waiver recipients and equivalent good cause supports its Petition. Moreover, the same “good cause”—the potential for liability for inadvertent mistakes made due to a lack of legal certainty regarding the Regulation—exists. Cynosure, therefore, respectfully requires that it be granted the same waiver of Section 64.1200(a)(4)(iv) previously accorded other Petitioners.

### **A. Cynosure Is Similarly Situated To The Waiver Recipients.**

Cynosure is in precisely the same legal position as the prior waiver recipients and should be accorded the same “temporary relief” from the Rule.

First, Cynosure lacked legal certainty regarding the application of the Regulation to solicited faxes. It had the same misplaced confidence regarding the Rule described by the original Petitioners following the inclusion of an inconsistent footnote in the Junk Fax Order and the absence of any reference to the Commission’s intent to require opt-out notices on solicited faxes in its notice of rule-making.<sup>42</sup> Second, like the original petitioners, Cynosure is now facing

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Dec. 9 Waiver Order, ¶ 14.

<sup>42</sup> Original Waiver Order, ¶ 27.

a putative class action alleging violations of the Act for having sent faxes without compliant opt-out provisions and has asserted that any recipients had previously given express consent.<sup>43</sup>

Therefore, Cynosure is “similarly situated” to the waiver recipients and respectfully requests that the Regulation be retroactively waived in its case.

**B. Good Cause Exists For Waiving the Regulation.**

The Commission may “at any time” waive its own regulations for good cause.<sup>44</sup> “Good cause” exists where there are “special circumstances warranting an exception in the public interest.”<sup>45</sup> The Commission has already found both elements exist with regard to Section 64.1200(a)(4)(iv) and, consequently, has granted retroactive waivers to one-hundred and fifty (150) similarly-situated petitioners.<sup>46</sup> Equivalent “special circumstances” and “public interest” concerns exist with regard to Cynosure, such that retroactive waiver is warranted.

First, the special circumstances already detailed by the Commission counsel in favor of deviation from the Rule with regard to Cynosure. Specifically, the “confusing situation” following the Junk Fax Order—caused by the inconsistent footnote and lack of notice—resulted in “misplaced belief” that the opt-out notice requirement does not apply to solicited fax advertisements.<sup>47</sup> Cynosure was affected by this potential for “misplaced confidence,” lacked certainty regarding the scope and application of the Rule and is now accused of violations that allegedly occurred after the Junk Fax Order.<sup>48</sup>

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<sup>43</sup> Answer, ¶¶ 14-16, 29 p. 10; Original Waiver Order, ¶ 11.

<sup>44</sup> 47 C.F.R. § 1.3; *Keller Commc'ns, Inc. v. F.C.C.*, 130 F.3d 1073, 1076 (D.C. Cir. 1997).

<sup>45</sup> *BellSouth Corp. v. F.C.C.*, 162 F.3d 1215, 1225 (D.C. Cir. 1999).

<sup>46</sup> Original Waiver Order, ¶ 36.

<sup>47</sup> *Id.* at ¶¶ 15, 23-26, 27-28.

<sup>48</sup> Answer, ¶ 14, Exh. A.

Second, granting Cynosure a retroactive waiver is in the public interest.<sup>49</sup> Public interest favors shielding businesses from inadvertent violations given the generalized confusion:

[F]ailure to comply with the rule—which...could be the result of reasonable confusion or misplaced confidence—could subject parties to potentially substantial damages...it serves the public interest...to grant a retroactive waiver to ensure that any such confusion did not result in inadvertent violations...<sup>50</sup>

Waiver in Cynosure’s case serves the same public interest concerns that the Commission sought to ameliorate through its prior waiver orders. Cynosure faces a potential class action lawsuit for alleged violations of the Act and Rule that occurred after the Junk Fax Order; and, has asserted that the subject fax was a *solicited* communication. As the Commission has acknowledged, any “misplaced confidence” and lack of certainty regarding the Rule on the part of petitioners, similarly situated to Cynosure, was reasonable, and may have resulted in unknowing, inadvertent violations. Similarly, Cynosure’s alleged failure to include a “proper” opt-out notice may leave it vulnerable to claims for violation of the Regulation—no matter how inadvertent. Thus, retroactive waiver of the Rule, here, is in the public interest.

For these reasons, there is good cause to retroactively waive the Rule as to Cynosure.

### **III. IN THE ALTERNATIVE, A DECLARATORY RULING IS PROPER.**

As an alternative to granting Cynosure a retroactive waiver, the Commission should issue a declaration ruling to clarify: (1) Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements; or, (2) Section 227(b) of the TCPA is not the legal basis of the Rule.

Initially, clarification that the Regulation does not apply to “solicited” facsimiles is proper for at least three reasons. First, the text of the Rule and the Commission’s orders is unclear and, as currently implemented, inconsistent with the Act. Indeed, the Act’s prohibitions

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<sup>49</sup> *Nat’l Ass’n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

<sup>50</sup> Original Waiver Order, ¶ 27.

are confined to “unsolicited advertisements,”<sup>51</sup> as are the Commission’s regulations. Section 64.1200(a)(4)(iv) stands alone, with no basis in the statute or any other provision of the Commission’s rules.<sup>52</sup> Second, as the Commission has acknowledged,<sup>53</sup> application of Section 64.1200(4)(iv) to solicited fax advertisements exceeds the Commission’s authority under the JFPA and the Communications Act.<sup>54</sup> Third, requiring opt-out language on solicited faxes—as Section 64.1200(a)(4)(iv) purportedly contemplates—runs contrary to the First Amendment.<sup>55</sup>

Separately, the Commission may resolve this uncertainty by clarifying that the basis for the Rule is not Section 227(b)—indeed, this should have been accomplished when the Rule was enacted.<sup>56</sup> That Section 227(b)(2) cannot serve as the statutory basis for the Rule, if any such basis exists, is clear. The Rule does not align with the language, legislative history or purpose of Section 227(b)—all of which are squarely limited to “unsolicited” fax advertisements.<sup>57</sup>

#### IV. CONCLUSION.

For all of these reasons, Petitioner, Cynosure, Inc., respectfully requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) granted to the parties in the October 30, 2014 Waiver Order for any solicited faxes sent after the effective date of the Regulation through April 30, 2015. Alternatively, Petitioner respectfully requests that the

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<sup>51</sup> *E.g.*, 47 U.S.C. § 227 (b)(1)(C); *see also Biggerstaff v. F.C.C.*, 511 F.3d 178, 182 (D.C. Cir. 2007).

<sup>52</sup> Junk Fax Order, 21 FCC Rcd at 3788-89, 3791

<sup>53</sup> *Id.* at 3810, n.154, 3788-89; JFPA NPRM, FCC Rcd at 19,758.

<sup>54</sup> 47 U.S.C. §227(b)(1)(C), (D); *see also Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 462 (2002); *Fed. Mar. Comm’n v. Seatrain Lines, Inc.*, 411 U.S. 726 (1972); *EchoStar Satellite LLC v. FCC*, 704 F.3d 992, 998 (D.C. Cir. 2013); *Util. Air Reg. Group v. E.P.A.*, 134 S. Ct. 2427, 2442 (2014), *citing University of Tex. Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517, 2529 (2014).

<sup>55</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of NY.*, 447 U.S. 557, 566 (1980); *Greater New Orleans Broad. Ass’n, Inc. v. U.S.*, 527 U.S. 173, 188 (1999); *Edgefield v. Fane*, 507 U.S. 761,770-71 (1993).

<sup>56</sup> An agency engaging in rulemaking must include a “reference to the legal authority under which the rule is proposed” in its notice of proposed rulemaking, and provide “a concise general statement of [the rule’s] basis and purpose” in its final rule. 5 U.S.C. § 553(b)(2), (c); *Home Box Office Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977).

<sup>57</sup> *Supra* at pp. 3-6.

Commission issue a declaratory ruling, clarifying: (1) that Section 64.1200(a)(4)(iv) of the Commission's rules applies only to unsolicited fax advertisements; and/or (2) that Section 227(b) of the TCPA is not the statutory basis for Section 64.1200(a)(4)(iv) of the Commission's rules.

Respectfully submitted,

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