

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

In the Matter of:

Petition of United Auto Credit Corporation For
Waiver of Section 64.1200(a)(4)(iv) of the
Commission's Rules

CG 02-278
CG 05-338

**PETITION OF UNITED AUTO CREDIT CORPORATION
FOR RETROACTIVE WAIVER**

Pursuant to the Order issued by the Federal Communications Commission (the “Commission”) on October 30, 2014,¹ and the Orders issued by the Consumer and Governmental Affairs Bureau (the “Bureau”) on August 28, 2015, and December 9, 2015,² and Section 1.3 of the Commission's rules, United Auto Credit Corporation (“UACC”), on behalf of itself and its parents, subsidiaries and affiliates (“UACC or Petitioner”)³ respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) (the “Rule”) as applied to faxes purportedly transmitted by or on behalf of UACC with the recipients' prior express invitation or permission prior to April 30, 2015.

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

² *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-976 (rel. Aug. 28, 2015) (hereinafter “August 28 Order”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-1402 ¶ 12 (rel. Dec. 9, 2015) (hereinafter “December 9 Order”).

³ These affiliates include, but are not limited to, UACC's parent corporation United PanAm Financial Corp. (“United PanAm”) and United PanAm's parent corporation, Unitas Holdings Corp. (“Unitas”) and the “John Doe” defendants named in *Vinny's Landscaping, Inc. v. United Auto Credit Corporation, United PanAm Financial Corp., Unitas Holdings Corp. and John Does 1-10*, Case No. 2:16-cv-10275 (E.D. Mich.). This request is intended to include these entities without conceding that that these entities were or could be properly named as defendants or engaged in the sending of any facsimiles as alleged in the lawsuit.

BACKGROUND

The Telephone Consumer Protection Act (“TCPA”), as codified in 47 U.S.C. § 227 *et seq.*, and amended by the Junk Fax Prevention Act of 2005 (“JFPA”), prohibits the sending of unsolicited advertisements to telephone facsimile machines, subject to certain exceptions.⁴ “Unsolicited advertisement” is defined to mean “material advertising the commercial availability of or quality of any property, goods, or services which is transmitted to any person *without that person’s prior express invitation or permission*, in writing or otherwise.”⁵ The Rule 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.”⁶ However, the Commission also stated that “the opt-out notice requirement *only applies* to communications that constitute *unsolicited* advertisements,” that is, faxes transmitted *without* express invitation or permission.⁷

In response to a number of petitions seeking clarification of this conflict, the Commission acknowledged that its notice of proposed rulemaking was unclear regarding the opt-out requirement as applied to facsimile advertisements sent with the prior express permission of the recipient:

The record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission.

* * *

⁴ See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); *see also* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C. § 227 *et seq.*

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

⁶ See 47 C.F.R. § 64.1200(a)(4)(iv); *see also* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration, 21 FCC Rcd at 3812, ¶ 48 (2006) (the “*Junk Fax Order*”).

⁷ See Junk Fax Order, 21 FCC Rcd at 3818, ¶ 42 n.154 (“We note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”) (emphasis added).

Further, some commenters question whether the Commission provided adequate notice of its intent to adopt section 64.1200(a)(4)(iv). Although we find the notice adequate to satisfy the requirements of the Administrative Procedure Act, we acknowledge that the notice provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.⁸

As a result, the Commission decided to grant retroactive waivers of the Rule to those petitioners “to provide [them] with temporary relief from any past obligation to provide the opt-out notice to such recipients [of solicited faxes] required by our rules . . . [because] the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.”⁹ The Commission invited “similarly situated” parties to seek similar relief.¹⁰

In the August 28 Order and December 9 Order, the Bureau on delegated authority followed suit, granting waivers to parties that were “similarly situated” to the original petitioners.¹¹ The Bureau noted that although certain of these petitions were filed after April 30, 2015, the petitions sought waivers only for faxes sent prior to April 30, 2015, and therefore “granting waivers to these parties d[id] not contradict the purpose or intent of the initial waiver order as the parties involved are similarly situated to the initial waiver recipients.”¹²

ARGUMENT

UACC is similarly situated to the parties previously granted waivers, and should also receive a waiver pursuant to the *2014 Anda Commission Order* for solicited faxes sent prior to April 30, 2015.

⁸ *Id.* ¶¶ 24-25 (footnotes omitted).

⁹ *2014 Anda Commission Order* ¶¶ 1, 22.

¹⁰ *Id.* ¶¶ 2, 30.

¹¹ *August 28 Order* ¶ 11; *December 9 Order* ¶ 10.

¹² *August 28 Order* ¶ 20; *December 9 Order* ¶ 18.

UACC and related companies United PanAm and Unitas are defendants in a purported class action lawsuit, *Vinny's Landscaping, Inc. v. United Auto Credit Corporation, United PanAm Financial Corp., Unitas Holdings Corp. and John Does 1-10*, Case No. 2:16-cv-10275 (E.D. Mich.) brought by a plaintiff who apparently received a one-page fax on one occasion in December 2012; UACC's investigation determined that the fax was intended for a car dealer who was in a contractual relationship with UACC and had consented to receive faxes from UACC. (The plaintiff's fax number was only one digit different from the fax number of the intended recipient.) UACC does not believe that the fax was an advertisement, but the Court recently denied defendants' motion to dismiss the complaint, ruling that "at this early stage, the Court cannot hold that the fax does not constitute an advertisement as a matter of law."¹³ The Court noted that "the Court does not have the benefit of reviewing record evidence" and "Plaintiff has alleged enough to withstand dismissal at the 12(b)(6) stage."¹⁴ Plaintiff purports to represent a class of persons since as far back as January 26, 2012 who received a fax advertisement that did not contain the required opt-out notice. The complaint was filed by serial TCPA litigators Anderson & Wanca.¹⁵

As noted above, in the *2014 Anda Commission Order*, the Commission found there was good cause to waive the Rule as applied to the original petitioners based on "the inconsistent footnote" in the Junk Fax Order and the "lack of explicit notice" that the opt-out requirement would apply to fax ads sent with the prior express permission of the recipient.¹⁶ Based on that finding of good cause, the Commission granted waivers of the Rule to petitioners where "no

¹³ Opinion & Order Denying Defendants' Motion to Dismiss, at p. 6, *Vinny's Landscaping v. United Auto*, Case No. 2:16-cv-10275 (E.D. Mich. filed Sept. 14, 2016), ECF No. 26.

¹⁴ *Id.* at pp. 11, 14.

¹⁵ This petition does not seek a ruling on any other issue (such as whether the faxes were advertisements or were solicited or unsolicited).

¹⁶ *2014 Anda Commission Order* ¶¶ 24-26.

record evidence demonstrates 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” and “where the petitioners referenced the confusion between the footnote and the rule.”¹⁷

The same “good cause” justifying the waiver of the Rule for the original petitioners also justifies waiver of the Rule for UACC: “the public interest is better served by granting such a limited retroactive waiver than through strict application of the [R]ule.”¹⁸ This is because, as the Commission previously stated, it is not in the public interest (as would be the case here absent a waiver) to leave businesses “potentially subject to significant damage awards under the TCPA’s private right of action or possible Commission enforcement” based on conflicting statements from the Commission regarding the Rule.¹⁹

CONCLUSION

For the reasons set forth above, UACC respectfully requests that the Commission grant this Waiver Petition and the request for a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) for solicited fax advertisements purportedly transmitted by or on behalf of UACC or related companies United PanAm and Unitas prior to April 30, 2015.

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Respectfully submitted,

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¹⁷ *December 9 Order* ¶ 14 (citing *2014 Anda Commission Order* ¶¶ 24-26).

¹⁸ *2014 Anda Commission Order* ¶ 22.

¹⁹ *Id.* ¶ 27.

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