

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 |) | CG Docket No. 02-278 |
| |) | |
| Junk Fax Prevention Act of 2005 |) | CG Docket No. 05-338 |
| |) | |
| Petition to Seek Retroactive Waiver as Granted By the FCC Order on October 30, 2014 |) | |
| |) | |

**PETITION TO SEEK RETROACTIVE WAIVER FOR TEMPORARY RELIEF FROM
PAST REQUIREMENTS OF 47 C.F.R § 64.1200(a)(4)(iv) AS APPLICABLE TO
SOLICITED FAXES**

I. Introduction

Amsterdam Printing & Litho, Inc. (“the Petitioner” or “Amsterdam”) hereby petitions the Federal Communications Commission (“FCC” or “the Commission”), pursuant to 47 C.F.R § 64.1200(a)(4)(iv), as to the FCC Order released on October 30, 2014, entitled “Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission” (“FCC Order”).¹

As a similarly situated party to the previous petitioners, the Petitioner requests a retroactive waiver and temporary relief from any past obligation to provide the opt-out requirement to certain solicited fax advertisements made with a recipient’s prior express permission such as those granted in the FCC Order.

II. Background

Amsterdam is a company located in Amsterdam, New York, that markets and sells promotional products to businesses. As part of its marketing strategy, Amsterdam advertises its promotional products via facsimile.

III. FCC Order on the Junk Fax Prevention Act of 2005

A. The Commission granted retroactive waivers to petitioners with temporary relief from any past requirement to have opt-out notices on solicited faxes.

¹ See http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db1030/FCC-14-164A1.pdf.

The FCC issued an Order on October 30, 2014, sustaining its rule that advertisements faxed with the consent of the recipient must include a notice with instructions for how to opt-out of future faxes.

This Order responded to numerous petitions that argued the Telephone Consumer Protection Act's ("TCPA") "junk fax" provision and opt-out requirement apply only to "unsolicited" fax advertisements, and thus do not cover faxes "solicited" by those who consent to receive the faxed advertisements.

However, the FCC noted that its order adopting the rule may have been confusing, and the agency granted retroactive waivers to petitioners with temporary relief from any past requirement to have opt-out notices on solicited faxes. The FCC explained that:

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

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 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 (Oct. 30, 2014) (*Fax Order*), ¶ 15.

Specifically, the footnote stated that the "opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements." *Id.* at ¶ 24. However, the word "unsolicited" caused some parties to misinterpret the FCC's intent to apply the opt-out notice to fax advertisements sent with the prior express consent of the recipient. *Id.* The FCC found that granting a retroactive waiver would serve the public interest, and "the TCPA's legislative history makes clear our responsibility to balance legitimate business and consumer interests." *Id.* at ¶ 27.

Thus, the FCC ruled:

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 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.

Id. at ¶¶ 29-30.

Therefore, the FCC provided a waiver to those who failed to include the opt-out language in fax advertisements sent with the prior express consent of the recipient prior to the Order. Those individuals cannot be liable for not including the opt-out language during that designated time period.

B. The Commission should similarly grant the Petitioner a retroactive waiver with temporary relief from any past requirement to have opt-out notices on solicited faxes.

1. The Petitioner is similarly situated to the parties that received retroactive waivers by the FCC.

As stated above in the FCC Order in *supra* Part II.A. “Other, similarly situated parties, may also seek waivers such as those granted in this Order.” *Id.* at ¶ 30.

The Petitioner is similarly situated to the parties that were granted retroactive waivers by the FCC Order because it sent certain faxes that were solicited or sent with prior express consent of the recipients, but without the opt-out language as required by 47 U.S.C. § 64.1200(a)(4)(iv).

As with the parties that were granted waivers by the FCC Order, the Petitioner is potentially subject to substantial liability as well as the costs of litigation. While the Petitioner strives to maintain the highest standards of customer service and compliance with state and federal law, including those who gave prior express consent to receive faxes from the company, it respectfully requests a retroactive waiver as to its past actions.

2. A retroactive waiver from the FCC is appropriate in this situation.

The Commission may grant a waiver in the following circumstances:

- (i) The underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or
- (ii) In view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.

47 C.F.R. § 1.925(b)(3).

The purpose of § 64.1200 is to allow consumers to stop unwanted faxes. That purpose would not be furthered by penalizing the transmission of information where the recipient provides prior

express consent to receive a fax, but where the fax did not appropriately contain the opt-out language as required by the FCC Order.

The grant of a limited retroactive waiver to the Petitioner would serve the public interest by preventing the abuse of the private right of action created by the TCPA by the exploitation of minor omissions in the opt-out notice disclosure for solicited faxes. This will prevent expensive and time-consuming litigation that have threatened businesses like the Petitioner's business. In light of these circumstances, the factors that weighed in favor of granting retroactive waivers to the parties addressed by the FCC Order are applicable here, and good cause exists for the grant of a retroactive waiver to the Petitioner.

IV. CONCLUSION

As a similarly situated party to the previous petitioners, the Petitioner respectfully requests a retroactive waiver and temporary relief from any past obligation to provide the opt-out requirement to certain solicited fax advertisements made with a recipient's prior express permission as required by 47 U.S.C. § 64.1200(a)(4)(iv) such as those granted in the FCC Order.

The Petitioner understands the importance of compliance with the FCC's rules, including the FCC Order and has implemented procedures going forward to ensure compliance with the TCPA and specifically § 64.1200(a)(4)(iv).

Dated: September 27, 2016

Respectfully submitted,

/s/ William E. Raney

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