PETITION OF THE EMERY WILSON CORPORATION
d/b/a STERLING MANAGEMENT SYSTEMS FOR WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission’s (“Commission”) rules, the Emery Wilson Corporation d/b/a Sterling Management Systems (“Sterling”) respectfully requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the “Regulation”) with respect to faxes that have been transmitted by Sterling (or on its behalf) with the prior express consent or permission of the recipients or their agents (“Solicited Faxes”) after the effective date of the Regulation. For the reasons stated, a waiver is appropriate here.

I. INTRODUCTION.

Sterling is a small business that provides consulting and training to those in the dental and other professions. Sterling is currently facing a putative class action lawsuit seeking potentially multi-millions of dollars in damages because it allegedly sent faxes to existing customers who had consented to receive them. The basis for this lawsuit is the Telephone Consumer Protection Act.

On October 30, 2014, the Commission released FCC Order 14-164 (the “Fax Order”). Prior to the Fax Order’s release, various petitioners had challenged the Commission’s authority to issue the Regulation, and alternatively sought retroactive waivers of its opt-out notice requirement

1 47 C.F.R. § 1.3.

for Solicited Faxes. In response to the admitted uncertainty about whether the opt-out notice applied to Solicited Faxes, the Commission granted retroactive waivers to certain fax advertisement senders to provide temporary relief from any past obligation to provide opt-out notices. The waivers granted in the Fax Order apply only to the listed petitioners; however, the Commission noted that other, similarly situated entities, like Sterling, may also seek such waivers.

Specifically, no real purpose is served by enforcing the Regulation with respect to recipients who have already provided “prior express invitation or permission.” In contrast, the public interest would be harmed by requiring parties, like Sterling, to divert substantial resources and staff away from its productive consulting efforts to resolve unnecessary litigation efforts stemming from confusion over the Commission’s regulations. A waiver is thus appropriate here.

II. BACKGROUND.

A. The Current Statutory and Regulatory Framework.

The Telephone Consumer Protection Act (“TCPA”), as codified in 47 U.S.C. § 227 and amended by the Junk Fax Prevention Act of 2005 (“JFPA”),3 prohibits, under certain circumstances, the use of a fax machine to send an “unsolicited advertisement.”4 An “unsolicited advertisement” is “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.”5

As relevant to this Petition, the Regulation states a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out

---


4 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).

5 Id. § 227(a)(5).
In addition to the Regulation, the Commission also adopted rules implementing the JFPA. As discussed, a footnote in the Junk Fax Order led to industry-wide confusion regarding the Commission’s intent to apply the opt-out notice to Solicited Faxes sent with the prior express permission of the recipient. The Commission clarified this outstanding issue in the Fax Order.

Pursuant to the Fax Order, the Commission “confirm[ed] that senders of fax ads must include certain information on the fax that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders.”

Due to the aforementioned uncertainty, however, the Commission is now prepared to grant additional retroactive waivers:

[W]e recognize that some parties who have sent fax ads with the recipient’s prior express permission may have reasonably been uncertain about whether our requirement for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.

* * *

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


See Junk Fax Order para. 42 n.154 (“We note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”) (emphasis added).

See Fax Order para. 1.

The Commission detailed the reasons for such uncertainty in the Fax Order: “Specifically, there are two grounds that we find led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient), the combination of which present us with special circumstances warranting deviation from the adopted rule. 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. Specifically, 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. We note that all petitioners make reference to the confusing footnote language in the record. Further, some commenters question whether the Commission provided adequate notice of its intent to adopt [the Regulation]. 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.” See Fax Order para. 24-25.
We believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.

The Commission provided such other, similarly situated parties six months from the release of the Fax Order (October 30, 2014) to seek a waiver. Sterling’s Petition is thus timely.

B. Sterling is Named in a Lawsuit For Allegedly Violating the TCPA.

Sterling has been named in a lawsuit based on alleged violations of the TCPA’s fax provisions in the Southern District of Illinois. The lawsuit, Robert L. Meinders, D.C., Ltd. v. The Emery Wilson Corporation d/b/a Sterling Management Systems, Case No. 14-cv-00596 (S.D. Ill.) (the “Meinders case”), was filed by Philip A. Bock of Bock & Hatch, LLC, whose law firm alone is responsible for filing dozens (if not hundreds) of junk fax lawsuits throughout the country. Although the faxes at issue in the Meinders case were solicited and/or sent with prior express initiation or permission, plaintiff argues Sterling failed to provide an appropriate opt-out notice.

III. DISCUSSION.

A. The Commission Should Grant a Retroactive Waiver of Section 64.1200(a)(4)(iv) for Any Solicited Fax Sent by Sterling or on its Behalf.

Sterling respectfully requests that the Commission grant a retroactive waiver of the Regulation for any Solicited Faxes sent by Sterling (or on its behalf) after the effective date of the Regulation. Section 1.3 of the Commission’s rules permits the Commission to grant a waiver if good cause is shown. Generally, the Commission may grant a waiver of its rules in a particular

11 See Fax Order para. 30.

12 See Class Action Complaint, Doc. 2-1 ¶¶ 15; 32; 34-35. The parties to the Meinders case also dispute, inter alia, whether the fax(es) were solicited. However, it is not necessary for the Commission to resolve that dispute in acting on this Petition, and the dispute does not impact the issues raised in this Petition. Indeed, the Commission expressly noted that the granting of such retroactive waivers should not “be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.” See Fax Order para. 31. The two issues are distinct.

13 47 C.F.R. § 1.3; see also 47 C.F.R. § 1.925(b)(3)(i)-(ii).
case if the relief requested would not undermine the policy objective of the rule in question and
would otherwise serve the public interest.\textsuperscript{14} Furthermore, waiver is appropriate if special
circumstances warrant a deviation from the general rule and such deviation would better serve the
public interest than would strict adherence to the general rule.\textsuperscript{15} As shown, both rationales apply.

First, a grant of the requested waiver is in the public interest. The TCPA and the
Commission’s TCPA rules are intended “to allow consumers to stop unwanted faxes.”\textsuperscript{16} That
purpose is not served where, as here, the recipient of the fax had given permission to Sterling to
send a fax advertisement, and importantly, was capable of contacting Sterling for purposes of
opting out of future fax communications—yet never did. It is also undisputed that the plaintiff in
the \textit{Meinders} case was a past customer of Sterling’s, and paid $10,500 to attend multiple training
seminars in the late 1980s. Critically, Sterling’s advertising practices have never included the
sending of unsolicited fax transmissions to potential customers. Nor does Sterling purchase fax
lists from third-party vendors in order to send unsolicited faxes. The only logical conclusion is
that the plaintiff in the \textit{Meinders} case voluntarily provided his fax number. And as discussed, in
light of the Commission’s \textit{admitted} lack of clarity as to the scope/applicability of the Regulation,
the grant of a waiver would better serve the public interest than the strict adherence to the rule.

Moreover, denial of the waiver would be inequitable and could impose unfair liability on
Sterling based upon claims that Congress never intended to create. Such a waiver is also in line
with the stated purpose of the Fax Order. Indeed, the Commission made clear that the avoidance
of civil liability to businesses that may have inadvertently violated the Regulation trumps the
public interest to consumers to recover under the TCPA when it expressly stated that:

\textsuperscript{14} See \textit{WAIT} Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).
\textsuperscript{15} See \textit{Ne. Cellular Tel. Co. v. FCC}, 897 F. 2d 1164, 1166 (D.C. Cir. 1990).
\textsuperscript{16} Junk Fax Order para. 48.
The record in this proceeding demonstrates that a failure to comply with the rule—which as noted above could be the result of reasonable confusion or misplaced confidence—could subject parties to potentially substantial damages[...]. This confusion or misplaced confidence, in turn, left some businesses potentially subject to significant damage awards under the TCPA’s private right of action or possible Commission enforcement. We acknowledge that there is an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads. On balance, however, we find it serves the public interest in this instance 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.17

The public interest would also be harmed by requiring parties like Sterling to divert substantial resources and staff away from its productive consulting and training efforts to resolve unnecessary litigation efforts stemming from confusion over the Commission’s regulations. Similarly, the Commission should also seek to disincentivize parties from abusing its rules for private gain. Accordingly, Sterling respectfully submits that the public interest would be served by the granting of its Petition for a retroactive waiver from the effective date of the Regulation.

IV. CONCLUSION.

For the reasons stated above, Sterling respectfully requests that the Commission grant Sterling a retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by Sterling (or on its behalf) after the effective date of the Regulation.

Dated: November 10, 2014

Respectfully submitted,

THE EMERY WILSON CORPORATION d/b/a STERLING MANAGEMENT SYSTEMS

/s/ Joshua Briones
Joshua Briones, Esquire
Ana Tagvoryan, Esquire
Jeffrey N. Rosenthal, Esquire
Blank Rome LLP
2029 Century Park East, 6th Floor
Los Angeles, CA 90067

17 Fax Order para. 27.