

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

In the Matter of)	
Petition of Henry Schein, Inc.)	CG Docket No. 02-278
for Retroactive Waiver of)	
47 C.F.R. § 64.1200(a)(4)(iv))	CG Docket No. 05-338
)	

PETITION FOR WAIVER

Pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, and Paragraph 30 of the Commission’s *Order*, CG Docket Nos. 02-278 and 05-338, FCC 14-164 (rel. Oct. 30, 2014), Petitioner Henry Schein, Inc. (“Henry Schein”), respectfully requests that the Commission grant it a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) (the “Rule”) insofar as it may have sent facsimile advertisements before April 30, 2015 without opt-out notices that repeated verbatim the language specified in the Rule to recipients that had provided prior express invitation or permission.

I. The FCC’s October 30, 2014 Order

On October 30, 2014, the Commission issued Order FCC 1-164 (“FCC Order”) in these dockets finding that opt-out notices conforming to the rules adopted by the Commission’s 2006 Junk Fax Order, 47 C.F.R. § 64.1200(a)(4)(iv) (“Junk Fax Order”), be included on fax advertisements, regardless of whether a fax was sent with the recipient’s prior express invitation or permission. The Commission, however, granted retroactive waivers of the opt-out requirement to twenty-four senders of fax advertisements to provide “temporary relief from any past obligation to provide the opt-out notice to such recipients required by [the Commission’s] rules.” FCC Order, ¶ 1. It also expressly allowed other similarly-situated businesses to seek their own retroactive waivers. *Id.*, ¶ 28.

As noted in the FCC Order, the Commission is permitted to waive any of its rules for good cause shown. *See* 47 C.F.R. § 1.3. In its October 30 Order, the Commission found good cause to grant the retroactive waivers because, among other factors, there was confusion in the interpretation of the Junk Fax Order, and misplaced confidence on the part of businesses that an opt-out notice was not required on faxes that were “solicited.” Specifically, the Commission noted that:

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.

* * *

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. *FCC Order*, ¶¶ 24-25 (citations omitted).

The Commission found that granting the requested retroactive waivers would serve the public interest, noting that the “TCPA’s legislative history makes clear our responsibility to balance legitimate business and consumer interests.” *Id.*, ¶ 27. Because there may have been a mistaken belief by some parties that the opt-out notice requirement did not apply, the “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.” *Id.* (citations omitted). The Commission further found that these “factual circumstances ma[de] enforcing the rule unjust or inequitable.” *Id.*, ¶ 28.

The Commission directed other similarly-situated parties seeking their own retroactive waivers to “make every effort to file within six months of the release of this Order.” *Id.*, ¶ 30.

The Commission also stated that it expected all fax senders “to be aware of and in compliance with the [opt out notice] requirement” by April 30, 2015. *Id.*

II. Henry Schein Should be Granted a Waiver

Henry Schein is entitled to a retroactive waiver because it is similarly situated to the twenty-four other petitioners granted waivers by the FCC Order. As explained in the FCC Order, the Commission may grant a waiver where “(1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.” *Id.*, ¶ 22. Here, Henry Schein meets both requirements for the same reasons that the parties who were granted waivers in the FCC Order received them.

First, the “special circumstances” that warrant a deviation from the Rule here are the same as those explained in the FCC Order. Henry Schein, too, was confused by the footnote contained in the Junk Fax Order stating that the opt-out notice requirement only applied to communications that constituted *unsolicited* advertisements. *See* Junk Fax Order, 21 FCC Rcd at 3810, n. 154. Henry Schein did not believe that the opt-out notice requirements of 47 CFR 64.1200(a)(4)(iii) were applicable to those faxes sent with the prior express invitation or permission of the recipients. Also, the fact that the notice of proposed rulemaking issued in advance of adopting the regulation at issue “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient” applies here too. FCC Order, ¶ 25. By virtue of these factual circumstances, Henry Schein was confused about the applicability of the regulation at issue.

Second, granting Henry Schein a retroactive waiver would serve the public interest. As explained in the FCC Order, this requirement is satisfied when “failure to comply with the rule—which ... could be the result of reasonable confusion or misplaced confidence—could subject

parties to potentially substantial damages.” *Id.*, ¶ 27. Here, Henry Schein faces significant liability as the defendant in a putative class action lawsuit that is currently pending in the United States District Court for the Southern District of Florida, *Bondhus v. Henry Schein, Inc.*, Case No. 14-22982. In *Bondhus v. Henry Schein, Inc.*, the plaintiff alleges that Henry Schein violated the TCPA by including opt-out language on its faxes that did not exactly track the language set forth in Section 64.1200(a)(4)(iii). The *Bondhus* plaintiff seeks to certify a nationwide litigation class of all persons in the United States sent one or more facsimiles by or on behalf of Henry Schein after August 14, 2010, whether solicited or unsolicited, that contained the same opt-out notice.

Though Henry Schein was confused about the applicability of the regulation at issue to fax advertisements sent with the prior express invitation or permission of the recipient, it made a business decision to include the opt-out notice on all fax advertisements. This was done purely as an administrative convenience so the persons sending the faxes, whether with Henry Schein or with a third-party vendor, would not need to determine whether each and every fax was unsolicited or solicited, and then add or delete the opt-out notice on each fax based on that determination.

The *Bondhus* plaintiff alleges that, regardless of whether the fax was solicited or unsolicited, Henry Schein’s opt-out notice is insufficient to meet the requirements under the TCPA and seeks statutory damages of \$500 to \$1,500 for every fax sent by Henry Schein that contains this allegedly inadequate opt-out notice. Thus, Henry Schein is potentially subject to substantial liability, as well as the cost of litigation to the parties and the federal Court. As with the twenty-four petitioners who have already been granted limited retroactive waivers, the above

discussion demonstrates that Henry Schein should be granted a waiver for its alleged failure to comply with the Rule.

CONCLUSION

For all the foregoing reasons, Henry Schein respectfully requests a retroactive waiver from liability under the TCPA for all faxes that it sent with the recipient's prior express invitation or permission.

Dated: December 17, 2014

Respectfully Submitted,

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