

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	CG Docket No. 02-278
)	
Petition for Waiver)	CG Docket No. 05-338
of EXP Pharmaceutical Services Corp.)	

PETITION FOR WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission’s (“FCC” or the “Commission”) regulations, 47 C.F.R. § 1.3, EXP Pharmaceutical Services Corp. (“EXP”) respectfully requests that the Commission grant EXP a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s regulations, 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-Out Rule”) with respect to any facsimiles that have been transmitted by or on behalf of EXP prior to April 15, 2015.

This request for waiver is being submitted pursuant to the Commission’s recent Order granting a retroactive waiver of the Opt-Rule and inviting “similarly situated parties” to seek similar waivers.¹ As the Commission has already determined that good cause exists for such retroactive waiver requests and grant of the waiver would serve the public interest, EXP respectfully requests that the Commission expeditiously grant its petition for waiver.²

I. BACKGROUND

EXP is a company that provides pharmaceutical reverse distribution services, an increasingly important component of the healthcare industry in the U.S. EXP’s services

¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petition 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 No. 02-278, 05-338, Order, FCC 14-164, ¶30 (rel. Oct. 30, 2014) (“*Fax Order*”).

² See *Fax Order* at ¶22; see also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

facilitate the safe handling and secure return of controlled substances. EXP provides these valuable services to hospitals, pharmacies and other healthcare facilities in both the private and public sectors. As part of its offerings, EXP provides important information about its products and services via facsimile to its customers who have consented to receive such communications.

The Telephone Consumer Protection Act (“TCPA”), enacted in 1991, prohibits the use of a fax machine to send an “unsolicited advertisement.”³ In 2005, Congress enacted the Junk Fax Prevention Act to “require the sender of an *unsolicited* fax advertisement to provide specified notice and contact information on the fax that allows recipients to ‘opt out’ of any future fax transmissions from the sender.”⁴ Therefore, EXP did not believe that that any of its solicited facsimiles required opt-out notices. However, as a consequence of this regulatory uncertainty, EXP – like many other companies operating in the healthcare industry – now finds itself a defendant in a putative class action lawsuit filed in federal court which alleges, among other things, violations of the TCPA.⁵

The named plaintiff in that case, along with the putative class, seeks damages for alleged violations of the TCPA on the grounds that, among other things, EXP allegedly sent facsimile transmissions to the named plaintiff and the putative class which did not bear the opt-out notice required by the Opt-Out Rule.⁶ This petition for waiver does not ask the Commission to resolve the factual and legal questions raised in the pending litigation; these issues properly remain

³ Pub. L. No. 102-43, 105 Stat. 2394 (codified at 47 U.S.C. § 227).

⁴ 47 C.F.R. § 64.1200(a)(4)(iv)(emphasis added); *see also* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, fn. 154 (“*Junk Fax Order*”) (2006) (stating that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements” (emphasis added)).

⁵ *See Glen Ellyn Pharmacy, Inc. v. EXP Pharmaceutical Services Corp., & John Does 1-10*, Case No. 1:14-cv-08132 (N.D. Ill.). References to “DE ____” refer to ECF docket entries in the case.

⁶ Class Action Complaint, DE 2, 6.

within the jurisdiction of the district court. By this filing, EXP seeks only to obtain the same retroactive waiver of the Opt-Out Rule that the Commission granted to multiple petitioners in the Fax Order.

II. GRANT OF THE EXP RETROACTIVE WAIVER REQUEST IS IN THE PUBLIC INTEREST.

As the Commission concluded in the Fax Order, good cause exists for a retroactive waiver of the Opt-Out Rule insofar as it relates to the failure to comply with the Opt-Out Rule's opt-out notice requirements for facsimile transmissions sent with the prior express invitation or permission of recipients.⁷

The Commission recognized that this good cause is based, first, on the "inconsistency" between a footnote to the Junk Fax Order and the Opt-Out Rule; the Commission stated that this inconsistency has "caused confusion or misplaced confidence" regarding the applicability of the Opt-Out Rule to facsimiles sent with prior express permission.⁸ This acknowledged inconsistency has contributed to substantial uncertainty surrounding the opt-out notice requirements for *solicited* fax advertisements. Like the petitioners granted retroactive waivers in the Fax Order, there is "nothing in the record here demonstrating 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."⁹ As a "similarly situated party" – *i.e.*, a defendant in a pending TCPA lawsuit – good cause exists to resolve this inconsistency by granting EXP's request for a retroactive waiver.

⁷ Fax Order at ¶22.

⁸ Junk Fax Order at fn. 154; *see also* Fax Order at ¶24.

⁹ Fax Order at ¶26.

Grant of the retroactive waiver request would also be in the public interest. EXP notes that the Commission has already decided that such retroactive waivers will serve the public interest because the “confusion or misplaced confidence...left some businesses potentially subject to significant damage awards” and that “on balance...it serves the public interest...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.”¹⁰ Based on this finding, the FCC granted a retroactive waiver to all of the petitioners explicitly referenced in the Order and further invited other “similarly situated parties” to seek retroactive waivers as well.¹¹

The FCC’s rationale in granting retroactive waivers to the petitioners referenced above applies equally to EXP as it too is a defendant in a putative class action lawsuit in which its alleged failure to comply with the Opt-Out Rule has the potential to expose it to monetary damage awards. The Commission has acknowledged that substantial confusion previously existed with respect to the opt-out requirements for solicited fax advertisements. Thus, not only does good cause exist to grant EXP a waiver of the Opt-Out Rule, but such a grant would be in the public interest.

¹⁰ *Fax Order* at ¶27.

¹¹ *Id.* at ¶30.

III. CONCLUSION

For the foregoing reasons, EXP respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. §64.1200(a)(4)(iv) effective through April 15, 2015.

Respectfully Submitted,

January 23, 2015

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