

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

In the Matter of)	
)	
Petition of Creditsmarts Corp. for Waiver of)	CG Docket No. 02-278 Section
64.1200(a)(4)(iv) of the Commission's)	
Rules)	CG Docket No. 05-338

PETITION OF CREDITSMARTS CORP. FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules Creditsmarts Corp. ("Creditsmarts") respectfully requests that the Commission grant it a retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (the "Regulation") with respect to faxes that have been transmitted by Creditsmarts with the prior express consent or permission of the recipients or their agents ("Solicited Faxes") after the effective date of the Regulation. The Commission recently granted a number of such waivers and invited similarly situated parties, such as Creditsmarts, to file requests for the same relief.

I. INTRODUCTION

Creditsmarts' business is an Internet based Lending Tree business model. Creditsmarts.com allows its auto dealers' car buyers the opportunity to complete a simple loan application form online. The information submitted is automatically sent via the Internet to Creditsmarts' participating lenders who offer auto loans. If initial income and credit information is adequate, the auto dealer's customer may select from a list of auto lenders. Creditsmarts' service is all online and self-executing on Creditsmarts' website. Creditsmarts is not in personal contact and there are no facsimiles or other communication between Creditsmarts, auto dealers, auto lenders and auto dealers' car buying customers during this process.

From time to time, Creditsmarts' business includes sending facsimiles with updated rate quotes, new lending programs offered by participating auto lenders and other commercial information. Creditsmarts sends such facsimiles to auto dealers who registered with Creditsmarts

on its website and to other businesses that also provided prior express consent to receive such facsimiles.

Creditsmarts is a small private company. It has no history of any FCC complaints, TCPA lawsuits or any notices or complaints from any recipient of a facsimile other than City Select Auto Sales, Inc. a serial TCPA class action plaintiff.

Creditsmarts is currently a defendant in one of many TCPA class action lawsuits initiated by the named plaintiff and its TCPA attorneys. The Complaint alleges plaintiff (an auto dealer) and a putative class of other recipients received facsimile advertisements from Creditsmarts without a compliant opt-out notice in violation of the TCPA. The Complaint seeks potentially millions of dollars in monetary damages for such violation. The basis for the lawsuit is the TCPA. The plaintiff and Creditsmarts dispute whether the faxes at issue in the lawsuit were solicited (i.e. sent with prior express invitation or permission).¹

Since the adoption of Section 64.1200(a)(4)(iv), plaintiffs and their attorneys have seized on the controversy and uncertainty of the Regulation and Commission rule created in part by confusing and conflicting statements regarding the scope and applicability of such rule to Solicited Faxes to bring numerous class action lawsuits for TCPA violations. Such lawsuits have been brought against legitimate companies for engaging in consensual communications where the fax recipients had provided consent to receive faxes. Many of these class action lawsuits seek millions of dollars in damages based on the Commission's conflicting statements pertaining to the Regulation.

However, it is not necessary for the Commission to consider that dispute in acting on this Petition, and the dispute does not impact the sole issue raised in this Petition. The Commission expressly noted that granting a waiver should not "be construed in any way to confirm or deny

¹ See Select Auto Sales, Inc. v. Creditsmarts Corp., et al., Civil Action No. 13-cv-4595-NLH-JS, United States District Court for the District of New Jersey (filed July 30, 2013).

whether the petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.²

On October 30, 2014, the Commission released FCC Order 14-164 (the “Fax Order”).³ Prior to the release various petitioners had challenged the Commission’s authority to issue the Regulation and alternatively sought retroactive waivers of its opt-out notice requirement 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 identified petitioners, and the Commission made clear that other similarly situated parties, like Creditsmarts, may also seek such waivers.

There is no public interest in strict enforcement of the Regulation against businesses that were confused by the Regulation and therefore did not include compliant opt-out notices to fax recipients who had provided “prior express invitation or permission” to be sent faxes. In contrast public interest would be harmed by requiring parties like Creditsmarts to divert substantial capital, time and human resources from its lawful business to engage in unnecessary (and possibly business ending) litigation because of past confusion over the Commission’s Regulation. A waiver is thus appropriate here.

II. BACKGROUND

A. The Current Statutory and Regulatory Framework.

2 *See* Fax Order, para. 31.

3 *See* 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 (rel October 30, 2014).

The TCPA, as codified in 47 U.S.C. Section 227 *et seq.*, and amended by the Junk Fax Prevention Act of 2005 (“JFPA”),⁴ prohibits, under certain circumstances, the use of a fax machine to send an “unsolicited advertisement.”⁵ 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....”⁶

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 notice.”⁷ In addition to the Regulation, the Commission also adopted rules implementing the JFPA.⁸ As explained in the Fax Order, a footnote in the Junk Fax Order led to industry-wide confusion regarding the Commission’s intent to apply the opt-out notice requirement to Solicited Faxes.⁹ The Commission clarified this important issue in the Fax Order.

Pursuant to the Fax Order, the Commission “confirmed 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.”¹⁰ Due to the confusion,¹¹ however, the Commission

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).

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

6 *Id.* Section (a)(5).

7 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, para. 48 (2006) (the “Junk Fax Order”); *see* 47 C.F.R. Section 64.1200(a)(4) (iv).

8 *See generally* Junk Fax Order.

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

10 Fax Order, para. 1.

11 The Commission detailed the reasons for such confusion in the Fax Order: “Specifically, there are two grounds that we find led to confusion among affected parties that the opt-out notice did not apply to fax ads sent with the prior express permission of the recipient, the combination of which presents us with special circumstances warranting deviation from the rule. The record

decided to grant retroactive waivers to parties affected by the confusion. Affected parties are those, like Creditsmarts, who have sent fax ads with the recipient's prior express permission and may reasonably have been uncertain about the opt-out notice requirements for such fax ads. The Commission stated:

“We recognize that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether our requirements 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 those parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.

“We believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.”

Fax Order, para. 1.

The Commission stated that other affected parties similarly situated as the petitioners, like Creditsmarts, have six months from the release of the Fax Order (October 30, 2014) to seek a waiver.¹² Thus, Creditsmarts' Petition is timely.

III. DISCUSSION

A. The Commission Should Grant Creditsmarts A Waiver.

Creditsmarts respectfully requests that the Commission grant a limited retroactive waiver of the Regulation for any Solicited Facsimiles sent by Creditsmarts (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 case if the waiver would not undermine the policy objective of the pertinent rule and

indicates that inconsistency between a footnote contained in the Junk Fax Order (only unsolicited advertisements) and the rule (all advertisements) caused confusion regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission. Further, the notice of intent to adopt the Regulation did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with prior express permission of the recipient.” Fax Order, para. 24-25 (emphasis in original).

12 Junk Fax Order, para. 48.

would otherwise serve the public interest. Further, a 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. As shown, both rationales apply and Creditsmarts is entitled to a waiver under this standard for the same reasons the parties granted waivers in the Fax Order received them.

B. Waiver Would Not Undermine the TCPA Policy Objective.

Granting a waiver to Creditsmarts would not undermine the TCPA's policy objective "to allow consumers to stop unwanted faxes."¹³ Creditsmarts does not send fax advertisements to the general consumer public. This policy is not undermined where, as here, Creditsmarts sent Solicited Faxes with pertinent business information to auto dealers who registered and qualified for its services and other businesses that also consented to receive such fax ads.

C. Special Circumstances Warrant Deviation from the General Rule.

The Commission explained in the Fax Order that special circumstances counsel in favor of deviation from the general rule rather than strict adherence. The Fax Order found there was "industry-wide confusion" as to whether Solicited Faxes must include an opt-out notice, based in part on the special circumstance of the confusing footnote in the Junk Fax Order. Creditsmarts, like many other companies, was reasonably confused as to whether Solicited Faxes must include an opt-out notice. Creditsmarts is not relying on simple ignorance of the TCPA or the FCC's attendant regulations as grounds for this waiver. For Creditsmarts, a waiver is particularly in the public interest because denial of a waiver would subject Creditsmarts to potentially millions of dollars in monetary damages and force it out of business. In the Fax Order the Commission made it clear that the public interest favors not subjecting businesses that understandably were confused by the Regulation and inadvertently may not have fully complied with the Regulation and are now

13 Fax Order, para. 27.

the subject of TCPA class action lawsuits seeking millions of dollars in monetary damages. In the Fax Order, the Commission stated

“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 upon 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.”

Fax Order, para. 27.

To summarize, Creditsmarts sent Solicited Faxes with pertinent business information to auto dealers who registered and qualified for its services and other businesses that also consented to receive such fax ads and was reasonably uncertain about whether the opt-out notices were required on such fax ads. Therefore, Creditsmarts is similarly situated to the petitioners who were granted waivers in the Fax Order and equally entitled to the same limited retroactive waiver. Due to the nature and extent of Creditsmarts Solicited Faxes, the waiver will not undermine the TCPA policy objective and the public interest will be better served by the Commission granting the waiver instead of subjecting Creditsmarts to a further diversion of time, capital and other resources defending its TCPA lawsuit and potentially millions of dollars in monetary damages that would put it out of business.

D. Other Matters.

Creditsmarts supports and agrees with the Commission’s finding in the Fax Order that good cause exists due to the special circumstances (i.e. the footnote, the explicitness of the notice, enforcing the rule would be unjust or inequitable, etc.), that the public interest is better served (i.e. the confusion subjects the parties to potentially substantial damages for inadvertent violations and

by balancing the legitimate business and consumer interests) by the granting of an individual limited retroactive waiver of this rule for any prior conduct and that confusion was created in the Junk Fax Order adopting this requirement, so that several parties face liability exposure in private rights of action. Creditsmarts is a part of this industry-wide confusion for businesses that mistakenly believed that the opt-out notice did not apply to Solicited Faxes. The confusion or misplaced confidence does warrant some relief from its potentially substantial consequences and the rule is not waived indefinitely so consumers will not be deprived of the rule's value.

This request for a waiver is not an acknowledgement or admission by Creditsmarts that it sent any facsimile advertisements in violation of the TCPA including any facsimile advertisements that failed to comply with the Regulation's opt-out notice requirement. The granting of the waiver should not be construed in any way to confirm or deny whether Creditsmarts, in fact, had the prior express permission of any recipients to be sent faxes, including the faxes at issue in the private right of action currently pending against it (*see* Footnote 1, *supra*).

This Petition does not contest the protections afforded by the opt-out notice requirement going forward, the statutory authority to require opt-out information on fax ads (or, alternatively, that Section 227(b) of the Act was not the statutory basis of that requirement), or seek a repeal of the rule or a finding of substantial compliance. Creditsmarts does not believe the Commission has violated the separation of powers vis-a-vis the judiciary and is interpreting the TCPA as the expert agency. Creditsmarts now fully understands how the two rules – one requiring the fax sender to include opt-out information and the other requiring the recipient to use that information when making an opt-out request are intended to work in concert and will include an opt-out notice on any fax ads it may send in accordance with the TCPA and its Regulation and rule.

IV. CONCLUSION

Creditsmarts is similarly situated to those parties who were granted waivers in the Fax Order and is seeking the same retroactive waiver of the Regulation in order to provide Creditsmarts with

the same temporary relief other petitioners were granted. For these reasons, Creditsmarts respectfully requests that the Commission grant it a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any Solicited Faxes sent by Creditsmarts (or on its behalf) after the effective date of the Regulation.

Respectfully submitted, January 29, 2015

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