

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| <i>In the Matter of</i> |) | |
| |) | |
| Petition of Zoetis, Inc. f/k/a |) | |
| Pfizer Animal Health; Zoetis, LLC; |) | CG Docket No. 02-278 |
| and Zoetis Products, LLC |) | CG Docket No. 05-338 |
| For Retroactive Waiver of |) | |
| 47 C.F.R. § 64.1200(a)(4)(iv) |) | |

**COMMENT OF DR. MARK W. STURDY D/B/A ROCHESTER VETERINARY CLINIC
TO PETITION OF ZOETIS INC. FORMERLY KNOWN AS PFIZER ANIMAL
HEALTH; ZOETIS, LLC; AND ZOETIS PRODUCTS, LLC**

The petition for retroactive waiver filed by Zoetis, Inc., formerly known as Pfizer Animal Health; Zoetis LLC; and Zoetis Products, LLC (collectively, the “Zoetis Petitioners”) is abusive and should be denied.

The “Zoetis Petitioners” claim that the faxed webinar invitations were sent to their “customers who had provided prior express invitation or permission.” (Petition, p. 5).

However, the waiver contemplated by the FCC does not extend to faxes sent in the context of an established business relationship (i.e. customers). Rather, because the Commission’s notice of intent to adopt Section 64.1200(a)(4)(iv) “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent *with prior express invitation or permission of the recipient*,” such retroactive waivers should only be considered in those instances involving prior express invitation or permission where there is some evidence that the petitioner misunderstood and, as the FCC provided, **not** in instances involving established business relationships or “customers.”

The Zoetis Petitioners have failed to supply any basis for their assertions that they obtained “prior express permission” from anyone, including plaintiff.

The sender of the faxes — whoever that it is — would certainly have knowledge of whether someone agreed to receive faxes from it. The Commission has repeatedly held that the business claiming consent or an established business relationship has the burden of proof. “[A] sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient's prior express invitation or permission.” *In re: Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278; CG Docket No. 05-338, FCC Release 06-42, 21 FCC Rcd 3787, at 3812, 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006). The FCC has consistently adhered to this position. *Virtual Auto Loans*, EB-09-TC-230, 2009 FCC LEXIS 4342 (March 9, 2009); *New York Security and Private Patrol, Inc.*, EB-09-TC-231, 2009 FCC LEXIS 4343 (March 9, 2009).

Courts have also followed this rule and placed the burden of proof on the sender of the communication. *Gutierrez v. Barclays Group*, 10cv1012 DMS (BGS), 2011 U.S. Dist. LEXIS 12546, 2011 WL 579238, at *2 (S.D. Cal. Feb. 9, 2011); *Van Sweden Jewelers, Inc. v. 101 VT, Inc.*, 1:10-cv-253, 2012 WL 4074620, 2012 U.S. Dist. LEXIS 85663 (W.D.Mich., June 21, 2012); *Green v. Service Master on Location Servs. Corp.*, 07 C 4705, 2009 WL 1810769, 2009 U.S. Dist. LEXIS 53297 (N.D. Ill. June 22, 2009); *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 WL 2224892, * 3-4, 2008 U.S. Dist. LEXIS 41766 (N.D. Ill. May 27, 2008) (observing that issue of consent is an affirmative defense); *Hinman v. M & M Rental Ctr., Inc.*, 596 F. Supp. 2d 1152 (N.D. Ill. 2009) (finding that consent did not exist with respect to the class because the TCPA allocates the burden of obtaining consent on the senders of unsolicited faxes, rather than

requiring recipients to "opt-out"); *Lampkin v. GGH, Inc.*, 2006 OK CIV APP 131, 146 P.3d 847, ¶27 (Okla. Ct. App. 2006) (recipient should not be charged with proving the negative propositions that it did not give permission or did not have a business relationship with sender). This is consistent with the general rule that the party claiming the benefit of an exception in a federal statute, and the party who logically would have evidence of consent or an established business relationship, has the burden of coming forward with at least some evidence of the applicability of these exceptions. *E.E.O.C. v. Chicago Club*, 86 F.3d 1423, 1429-30 (7th Cir. 1996); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 128 S. Ct. 2395, 2400, 171 L. Ed. 2d 283 (2008) ("[T]he burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."); *Irwin v. Mascott*, 96 F. Supp. 2d 968 (N.D. Cal. 1999).

Here, the Zoetis Petitioners offer absolutely nothing to substantiate that (a) they are the sender(s) or (b) that anyone consented to receiving faxes from it. There is also no evidence that the Zoetis Petitioners or anyone else that sent the fax misunderstood anything about its obligation to include an opt-out notice. The faxes at issue are not specifically addressed to any person, which would normally be the case if consent to send it had been obtained.

Petitioners' statement that they "did not understand that they needed to comply with the opt-out notice requirement for faxes sent to its customers who had a provided prior express invitation or permission (i.e. faxes that were "solicited")," (Petition, p. 5) is intentionally obfuscatory and confusing. Petitioners used the same (defective) opt-out in all instances, making the statement that they were confused appear to be disingenuous, at best. They have made no distinction in the opt-out notice utilized for those advertisements sent pursuant to an "established

business relationship”; those sent with that it deems “provided prior express invitation;” or others.

On this record, no action by the Commission is warranted. The petition is nothing more than a baseless attempt to complicate an enforcement action by the recipient of the fax.

Respectfully submitted,

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