

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

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

PETITION FOR RETROACTIVE WAIVER

Pursuant to 47 C.F.R. § 1.3 and Paragraph 30 of the Commission’s *Order*, CG Docket Nos. 02-278, 05-338, FCC 14-164, 61 Communications Reg. (P&F) 671 (Oct. 30, 2014) (the “*Order*”), Petitioners Healthways, Inc. (“Healthways”) and Healthways WholeHealth Networks, Inc. (“WholeHealth Networks”) (together, “Petitioners”) hereby request that the Commission grant Petitioners a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s rules, 47 C.F.R. § 64.1200(a)(4)(iv), with respect to any alleged advertising faxes sent with the recipients’ prior express invitation or permission.

In the *Order*, the Commission clarified that the opt-out notice requirement under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the “TCPA”), which is set forth in 47 U.S.C. § 227(b)(1)(C) and (2)(d) of the statute, and in the implementing regulation, 47 C.F.R. § 64.1200(a)(4)(iv), applies to solicited fax advertisements (*i.e.*, fax advertisements sent with the recipients’ prior express invitation or permission). The Commission also granted a retroactive waiver of Section 64.1200(a)(4)(iv) to several petitioners who were facing lawsuits alleging that the petitioners had violated Section 64.1200(a)(4)(iv) by failing to include the “opt-out” language in advertising faxes. The Commission determined that, because of potential confusion regarding whether the opt-out language was required in solicited fax advertisements, good cause supported a retroactive waiver, and that a waiver

was in the public interest. *See Order* ¶¶ 26-28. The Commission invited “similarly-situated parties” to seek retroactive waivers of the opt-out requirement with respect to solicited advertising faxes. *See id.* ¶ 30.

As Petitioners demonstrate below, they are similarly-situated to the petitioners who were granted retroactive waivers in the *Order*. Petitioners respectfully request that the Commission grant them a retroactive waiver of Section 64.1200(a)(4)(iv) for the same reasons that supported the Commission’s retroactive waivers in the *Order*.

I. **BACKGROUND**

Healthways, together with its subsidiaries, provides specialized, comprehensive solutions to help people improve their well-being, thereby improving their health and productivity, and reducing their health-related costs. Healthways’ customers include health plans, large self-insured employees (including state and municipal government entities), and providers of healthcare, including integrated healthcare systems, hospitals, and physician groups.

WholeHealth Networks, a subsidiary of Healthways, maintains an extensive network of complementary, alternative, and physical medicine practitioners, which offers convenient access to the significant number of individuals who seek health services outside of the traditional healthcare system. Those practitioners are required to complete an application to become part of that network. WholeHealth Networks regularly communicates with the practitioners who have elected to join the network, including by facsimile, regarding the practitioners’ participation in the network, their provision of health services, and other aspects of the ongoing relationships between WholeHealth Networks and the network members.

The TCPA prohibits the use of any telephone facsimile machine, computer, or other device to send an “unsolicited advertisement” to a fax machine. 47 U.S.C. § 227(b)(1)(C). The TCPA was amended in 2005 by the Junk Fax Protection Act (“JPFA”). *See* Junk Fax Protection Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). Among other things, the JPFA codified an exception to the TCPA’s prohibition on unsolicited advertising faxes for companies that send fax advertisements to those with whom they have an established business relationship. *See* 47 U.S.C. § 227(b)(1)(C)(i). The JPFA also amended the TCPA to require the sender of an “unsolicited advertisement” to provide a specified notice on the fax that allows recipients to “opt out” of any future fax transmissions from the sender. *See id.* §§ 227(b)(1)(C)(iii) and 227(b)(2)(D).

The Commission amended its rules to incorporate the changes in the JPFA. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Protection Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (the “*Junk Fax Order*”). Among other things, in the *Junk Fax Order*, the Commission adopted a rule that provided that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.” 47 C.F.R. § 64.1200(a)(4)(iv). The *Junk Fax Order*, however, also stated in a footnote that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.” *Junk Fax Order*, 21 FCC Rcd at 3810 n.154 (emphasis added).

Numerous parties filed petitions challenging the Commission’s rule applying the opt-out notice requirement to solicited advertising faxes. The Commission resolved those petitions in the *Order*, issued on October 30, 2014. In the *Order*, the Commission acknowledged that the

“inconsistent footnote” in the *Junk Fax Order* (which stated that the opt-out notice requirement applied only to *unsolicited* advertisements) “caused confusion or misplaced confidence regarding the applicability of the [opt-out notice] requirement.” *Order* ¶¶ 24, 28. The Commission also recognized that “the lack of explicit notice” in the notice of proposed rulemaking that the Commission contemplated requiring opt-out notices on solicited fax advertisements “may have contributed to confusion or misplaced confidence.” *Id.*

The Commission's rules provide that the Commission may suspend, revoke, amend, or waive any of its rules at any time "for good cause shown." 47 C.F.R. § 1.3. In order to waive a rule, the Commission must find that (a) "special circumstances warrant a deviation" from the rule; and (b) waiver would "better serve the public interest" than would application of the rule. *See* Order ¶ 23. The Commission found in the Order that both of these requirements were satisfied with respect to the petitioners' challenge of the application of the opt-out notice requirement to solicited faxes. *See id.* ¶¶ 26-27.

The same "special circumstances" identified by the Commission in the *Order* exist here.

Petitioners are similarly-situated to the parties granted retroactive waivers in the Order. Petitioners currently are facing two putative class action lawsuits in which plaintiffs contend that Petitioners violated the TCPA and the Commission's regulations by not including opt-out notices on alleged advertising faxes sent by Medversant Technologies, L.L.C. and WholeHealth Networks. *See* Complaint, *Simon v. Healthways, Inc., Healthways WholeHealth Networks, Inc., Medversant Technologies, L.L.C., et al.*, No. 2:14-08022 BRO-JC (C.D. Cal.) (filed September 16, 2014); Class Action Complaint, *Affiliated Health Care Associates, P.C. v. Medversant Technologies, LLC, Healthways WholeHealth Networks, Inc., et al.*, No. 1:14-cv-10247 (N.D. Ill.) (filed December 22, 2014).¹ One of the Petitioners' defenses to the claims in those actions is that the alleged recipients of the faxes at issue –

¹ Medversant Technologies, L.L.C., also has filed a petition for retroactive waiver with the Commission. *See In the Matter of Petition of Medversant Technologies, LLC for Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338, Petition for Waiver (filed Jan. 8, 2015).

who are members of the network managed by WholeHealth Networks – provided their prior express invitation or permission to receive such faxes.²

Moreover, the alleged advertising faxes at issue in *Simon* and *Affiliated* were sent after the Commission issued the *Junk Fax Order* – which included the “inconsistent” footnote stating that the opt-out notice requirement applied only to *unsolicited* advertising faxes – and before the Commission issued its October 30, 2014 *Order* clarifying the opt-out notice requirement. As the Commission has recognized, that footnote caused “confusion” and “misplaced confidence” regarding the applicability of the opt-out notice requirement to solicited faxes. *Order* ¶ 24. The Commission concluded that such confusion and misplaced confidence, coupled with questions about whether the Commission had provided adequate notice about its intent to adopt the opt-out notice requirement for solicited faxes, “presumptively establishes good cause for retroactive waiver of the rule.” *Id.* ¶ 26.

In addition, granting a retroactive waiver to Petitioners would serve the public interest. *See Order* ¶ 27. The Commission found in the Order that the public interest requirement was satisfied because “a 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. The same is true here. As described above, Petitioners are defendants in a putative class litigation. Absent a waiver, Petitioners could be subjected to substantial statutory damages for allegedly failing to comply with a rule that the Commission has determined was the subject of confusion. Under those circumstances, a waiver would better serve the public interest than application of the rule.

² *See, e.g., Simon v. Healthways, Inc., et al.*, Defendants Healthways, Inc. and Healthways WholeHealth Networks, Inc.’s First Amended Answer at 5 (filed Nov. 26, 2014). WholeHealth Networks has not yet responded to the complaint in *Affiliated*.

For all of these reasons, Petitioners Healthways, Inc. and Healthways WholeHealth Networks, Inc. respectfully request that the Commission grant them the same retroactive waiver of Section 64.1200(a)(4)(iv) that the Commission already has granted to other, similarly-situated parties.

Dated: March 2, 2015

Respectfully submitted,

HEALTHWAYS, INC. and HEALTHWAYS
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