

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

In the Matter of

Park Surgical Company, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules CG Docket No. 02-278
CG Docket No. 05-338

**PETITION OF PARK SURGICAL COMPANY, INC. FOR RETROACTIVE
WAIVER**

Pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules Park Surgical Company, Inc. ("Park Surgical") 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 Park Surgical 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 Park Surgical, to file requests for the same relief.

I. INTRODUCTION

Park Surgical is a small family owned company. Park Surgical was founded 81 years ago in Boro Park, Brooklyn. One of the original founders is still on staff and works with patients every day. Everyone in Park Surgical has experience in the medical industry. From leasing specialized medical equipment to providing for doctors offices to supplying band aids to local sports organizations, Park Surgical performs quickly, efficiently and in a cost effective manner. Personal, competent service is what Park Surgical is all about and is what has allowed it to grow and prosper. Park Surgical has received demand letters and/or been named as a defendant in TCPA class action lawsuits authored or filed by plaintiffs and their TCPA attorneys. The plaintiffs' letters and Complaints included allegations that these plaintiffs and unknown putative classes of recipients received facsimile

advertisements from Park Surgical without a compliant opt-out notice. The allegations and any future similar allegations subject Park Surgical to potentially substantial monetary damages for alleged violations of the opt-out notice requirement for faxes allegedly sent at the request of the recipients. Park Surgical consistently disputed and denied the facsimiles these plaintiffs allegedly received were unsolicited facsimile advertisements. The basis for the demand letters and lawsuits is the TCPA. Park Surgical believes the facsimiles it sent were solicited (i.e. sent with prior express invitation or permission).

Park Surgical communicates with its customers and prospective customers, including those who make inquiries to Park Surgical, in person, by mail and email, on the telephone and by sending facsimiles. Park Surgical uses facsimiles to gather information from these recipients on some occasions and on other occasions to market and advertise its goods and services.

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 a particular dispute in acting on this Petition, and a 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

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.¹

On October 30, 2014, the Commission released FCC Order 14-164 (the “Fax Order”).² 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 Park Surgical, 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 Park Surgical 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.

1 [¶] See Fax Order, para. 31.

2 [□] 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”),³ prohibits, under certain circumstances, the use of a fax machine to send an “unsolicited advertisement.”⁴ 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.”⁵

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.”⁶ In addition to the Regulation, the Commission also adopted rules implementing the JFPA.⁷ 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.⁸ 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

3 □ 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).

4 □ 47 U.S.C. Sections 227(a)(5) and (b)(1)(C).

5 □ *Id.*, Section (a)(5).

6 □ 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).

7 □ *See generally* Junk Fax Order.

8 □ 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).

agreed to receive fax ads from such senders.”⁹ Due to the confusion,¹⁰ however, the Commission decided to grant retroactive waivers to parties affected by the confusion. Affected parties are those, like Park Surgical, who have sent faxes with the recipient’s prior express permission and may reasonably have been uncertain about the opt-out notice requirements for such faxes. 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 Park Surgical, have six months from the release of the Fax Order (October 30, 2014) to seek a waiver.¹¹ Thus, Park Surgical’s Petition is timely.

III. DISCUSSION

9 Fax Order, para. 1.

10 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 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).

11 Junk Fax Order, para. 48.

A. The Commission Should Grant Park Surgical A Waiver.

Park Surgical respectfully requests that the Commission grant a limited retroactive waiver of the Regulation for any Solicited Facsimiles sent by Park Surgical (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 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 Park Surgical 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 Park Surgical would not undermine the TCPA’s policy objective “to allow consumers to stop unwanted faxes.”¹² This policy is not undermined where Park Surgical sent Solicited Faxes to customers, prospective customers and others who made inquiries and who all gave their permission or invitation to receive facsimile advertisements from Park Surgical.

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. Park Surgical, like many other companies, was reasonably confused as to whether Solicited Faxes must include an

12 □ Fax Order, para. 27.

opt-out notice. Park Surgical is not relying on simple ignorance of the TCPA or the FCC's attendant regulations as grounds for this waiver. For Park Surgical, a waiver is particularly in the public interest because denial of a waiver could subject Park Surgical 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 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, Park Surgical sent Solicited Faxes to its customers, prospective customers and others who made inquiries to Park Surgical about its products and services and who also consented to receive such fax ads and was reasonably uncertain about whether the opt-out notices were required on such faxes. Therefore, Park Surgical 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 Park Surgical's 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 Park Surgical to a further diversion of time, capital and other resources defending any TCPA demands and lawsuit and potentially millions of dollars in monetary damages that would put it out of business.

D. Other Matters.

Park Surgical 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. Park Surgical is a part of this industry-wide confusion for businesses that mistakenly believed 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 Park Surgical that it sent any facsimile advertisements, or 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 Park Surgical, in fact, had the prior express permission of any recipients to be sent faxes, including the faxes at issue in the prior demand letters and private rights of action.

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. Park Surgical 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. Park Surgical 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

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

March 3, 2015

Respectfully submitted,

William B. Hayes
257 Jackson Street
Denver, Colorado 80206
303 514 0658

Counsel to Park Surgical Company, Inc.