

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

In the Matter of

**Petition for Waiver
of Five-M Software Systems Corporation**

CG Docket No. 02-278

CG Docket No. 05-338

**PETITION FOR WAIVER OF
FIVE-M SOFTWARE SYSTEMS CORPORATION**

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Dated: April 28, 2015

INTRODUCTION

Five-M Software Systems Corporation (“Five-M”) respectfully requests that the Commission grant Five-M a waiver from Section 64.1200(a)(4)(iv) of the Commission’s regulations with respect to any facsimiles that have been transmitted by or on behalf of Five-M prior to the date of this Petition. The referenced regulation was promulgated pursuant to the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005 (the “TCPA”), and requires solicited fax advertisements to include the same opt-out notice as unsolicited fax advertisements.

Five-M submits this waiver request in light of the Order that the Commission released in the referenced Dockets on October 30, 2014 (the “October 30 Order”). Five-M is one of many companies that have inappropriately been subjected to putative class action lawsuits for sending alleged facsimile advertisements, regardless of whether the facsimiles were solicited or unsolicited. For reasons that follow, the public interest favors granting the requested waiver.

BACKGROUND

As the Commission knows, putative class action lawsuits are pending across the country that seek windfall recoveries for alleged violations of the TCPA’s prohibition on sending unsolicited facsimile advertisements. The lawsuits rely upon the TCPA provision that allows for statutory damages based on any violation of Section 277(b) “or the regulations prescribed [there]under,” 47 U.S.C. §277(b)(3), and routinely target both unsolicited and solicited faxes even though the TCPA was not intended to regulate solicited faxes. It is common for these lawsuits to seek millions of dollars in statutory damages for alleged violations that, at best, had a negligible effect on the recipients of the facsimiles. The named plaintiffs in such cases often

participate in name only, deferring entirely to their counsel in the hopes of getting a monetary “incentive” award on top of any statutory damages.

Five-M is headquartered in Parsippany, New Jersey. For over 25 years, Five-M has provided software solutions for the distributors industry. Among other services, Five-M provides programs which enable high school students and college students to study and travel abroad.

The TCPA lawsuit in which Five-M is a defendant was brought by Wholesale Point, Inc., an interested seller of a variety of merchandise.¹ Wholesale Point, Inc. (“Wholesale Point”) is based in Willowbrook, Illinois. Wholesale Point alleges in its Complaint that it received one unsolicited facsimile from Five-M in 2013. Wholesale Point alleges that Five-M sent unsolicited facsimile advertisements to many persons as part of a mass broadcasting of faxes across the United States all of whom Wholesale Point seeks to represent in a putative class action that seeks millions of dollars in statutory damages.

This Petition does not ask the Commission to resolve specific questions regarding the particular faxes sent by Five-M, such as whether Wholesale Point or any other entity invited the faxes or gave Five-M permission to send them, or whether the faxes are “advertisements” within the meaning of the TCPA. Those types of factual determinations are properly left for the district court. Five-M seeks only a limited retroactive waiver from 47 C.F.R. §64.1200(a)(4)(iv), consistent with the waiver that the Commission has provided to similarly situated entities.

ARGUMENT

The TCPA prohibits sending unsolicited advertisements via facsimile. 47 U.S.C. §277(b)(1)(C). There is an exception for unsolicited advertisements faxed pursuant to an

¹ The action is captioned Wholesale Point , Inc. v. Five-M Software Systems Corporation. U>S. District Court, N.D. Ill Dkt. no. 15-cv-02196. See Exhibit A hereto..

established business relationship between the sender and the recipient, so long as the fax includes an opt-out notice that meets various requirements. *Id.* The Commission’s rules impose the same opt-out notice requirement on faxes that are sent with the recipient’s prior express invitation or permission – i.e., on faxes that are solicited, as opposed to unsolicited. See 47 C.F.R. §64.1200(a)(4)(iv).

To the extent the recipients of Five-M’ faxes provided their prior express invitation or permission for Five-M to send them the faxes, the faxes were, by definition, solicited not unsolicited and therefore fall outside the scope of Section 227(b) of the Act. This is true regardless of whether the faxes contained any opt-out notice. Such faxes are not “unwanted faxes,” and allowing a party to be subjected to liability for sending such faxes is not in the public interest. Five-M therefore asks the Commission to waive compliance with Section 64.1200(a)(4)(iv) with respect to all faxes sent by or on behalf of Five-M with a recipient’s prior express invitation or permission.

The Commission may waive any provision of its rules “for good cause shown.”⁴⁷ C.F.R. §1.3. Among other instances, good cause exists where the waiver of a rule’s application would be consistent “with the public interest.” *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). That is the situation here.

Indeed, the Commission has already held that a retroactive waiver from Section 64.1200(a)(4)(iv) would serve the public interest for various reasons. See generally October 30 Order at ¶¶22–31. Based upon this holding, the Commission granted waivers to multiple petitioners, *Id.* at ¶36, and held that “similarly situated parties” could “also seek waivers such as those granted in th[e] [October 30] Order,” *Id.* at ¶30.

Five-M is similarly situated to the parties to whom waivers were granted in the Commission's October 30 Order. It is filing this Petition within six months of the release of that Order. See October Order at 1. Five-M' waiver request should therefore be granted, for the reasons set forth in the Commission's Order. It does not serve the public interest, the TCPA's statutory purposes, or the interests of equity and justice to impose staggering aggregated statutory damages on Five-M or any other regulated party based upon the sending of facsimiles that Congress never intended be covered by the Act.

CONCLUSION

The Commission should grant Five-M a waiver from 47 C.F.R. §64.1200(a)(4)(iv) for all facsimiles sent by Five-M subsequent to the regulation's effective date and prior to the date of this Petition.

Dated: April 28, 2015

Respectfully submitted,

By: /s/Samuel Feldman
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Attorneys for Five-M Software
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DECLARATION

I have read the foregoing Petition for Waiver, and I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.


ALLEN P. LEVICKY
EXEC. V.P.
Five-M Software Systems Corporation

Executed on April __, 2015

CERTIFICATION OF SERVICE

The undersigned certifies that on April 28, 2015, a copy of Five-M Software Systems Corporation Petition for Waiver was served upon counsel of record at the following address via First Class Mail, postage prepaid and via email:

David Edelman, Esq.
EDELMAN, COMBS, LATTURNER & GOODWIN, LLC
20 S. Clark St., Suite 1500
Chicago, IL 60603

The undersigned also hereby certifies that on April 28, 2015, the undersigned caused to be filed, by mail and by electronic service, the foregoing Petition for Waiver with the Federal Communications Commission, Office of the Secretary, 445 12th Street, SW, Washington, D.C. 20554.

/s/Samuel Feldman
SAMUEL FELDMAN