

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

In the Matter of	)	
	)	
Petition for Waiver of First Index, Inc.	)	CG Docket No. 02-278
	)	
	)	CG Docket No. 05-338
	)	
	)	

**PETITION FOR WAIVER OF SECTION 64.1200(a)(4)(iv)  
OF THE COMMISSION’S RULES**

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## PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Rules<sup>1</sup> of the Federal Communication Commission (the “Commission”), and the Commission’s Order dated October 30, 2014 (“Waiver Order”),<sup>2</sup> Petitioner First Index, Inc. (“First Index”) respectfully requests that the Commission grant First Index a retroactive waiver of Section 64.1200(a)(4)(iv) of its Rules (“Regulation”), to the extent the Regulation may apply to any faxes transmitted by First Index (or on its behalf) with the prior express permission of the recipients or their agents.

In its Waiver Order, the Commission clarified that an opt-out notice is required under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA” or “Act”), and the Commission’s Regulation, 47 C.F.R. § 64.1200(a)(4)(iv), for facsimile advertisements sent with the recipients’ prior express permission or invitation (“solicited fax advertisements”) and must comply with the requirements of 47 U.S.C. § 227(b)(1)(C) and (2)(D) and 47 C.F.R. § 64.1200(a)(4)(iii).<sup>3</sup> At the same time, the Commission recognized that “good cause” exists for granting a retroactive waiver of this requirement—specifically, the state of justified, industry-wide confusion, which has given rise to substantial liability for inadvertent violations.<sup>4</sup> Accordingly, the Commission retroactively waived its Regulation for twenty-seven petitioners and invited similarly situated parties to seek the same relief on or before April 30, 2015.<sup>5</sup>

Good cause exists for granting First Index’s request for this retroactive waiver. First Index has been subject to the same special circumstances addressed in the Waiver Order—including confusion caused by an inconsistent footnote in the Junk Fax Order and lack of explicit

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<sup>1</sup> 47 C.F.R. §§ 1.2, 1.3; 5 U.S.C. § 554 (e).

<sup>2</sup> *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, FCC 14-164, 29 FCC Rcd 13998 (Oct. 30, 2014) (“Waiver Order”).

<sup>3</sup> *Id.* at ¶ 1.

<sup>4</sup> *Id.* at ¶¶ 23-28, 48, *ref.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 2005, Report and Third Order on Reconsideration*, 21 FCC Rcd 3787, 3812, n. 154 (2006) (“Junk Fax Order”).

<sup>5</sup> *Id.* at ¶¶ 30, 48.

notice of the Regulation's adoption. As a result, First Index has been sued for substantial costs and class-wide damages, such that waiver is in the public interest.<sup>6</sup> In short: First Index is similarly positioned to the parties for whom the Commission has already waived the Regulation. For these reasons, and those stated below, First Index respectfully requests a retroactive waiver of Section 64.1200(a)(4)(iii).

## **I. BACKGROUND.**

Until 2010, First Index was a business-to-business marketing company focused on connecting suppliers and buyers of custom-manufactured parts. It is no longer in operation after filing for bankruptcy in 2010.

Prior to closing its doors, First Index was sued by Arnold Chapman ("Chapman" or "Plaintiff") for the alleged faxing of a one-page document on February 7, 2006 and November 7, 2006,<sup>7</sup> *Chapman v. First Index, Inc.*, No. 09-cv-05555 (N.D.Ill.) (filed Sep. 8, 2009) (hereinafter cited as "*Chapman*"). Chapman's claim is brought on behalf of a putative class of persons that allegedly received unsolicited fax advertisements from First Index between 1996 and 2008.<sup>8</sup> One of First Index's defenses is that it obtained prior express consent before sending the renewal request.<sup>9</sup> For his part, Chapman has challenged First Index's proof of consent. However, this factual dispute does not impact First Index's request for a retroactive waiver and is properly resolved in the context of a private right of action.<sup>10</sup>

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<sup>6</sup> Waiver Order at ¶¶ 24-27.

<sup>7</sup> Class Action Complaint, *Chapman*, Dkt. #1-1; see also *Chapman v. First Index, Inc.*, No. 09 C 5555, 2014 WL 840565, at \*1 (N.D. Ill. Mar. 4, 2014).

<sup>8</sup> *Chapman*, 2014 WL 840565 at \*1.

<sup>9</sup> Defendant's Amended Affirmative Defenses, *Chapman*, Dkt. #77 at p.2 (filed on May 18, 2011).

<sup>10</sup> Waiver Order at ¶ 26.

On March 4, 2014, the Northern District of Illinois denied class certification.<sup>11</sup> In its Order, the Court noted testimony by former employees that “First Index only sent faxes to those contacts who first provided consent to receive faxes.”<sup>12</sup> The Court subsequently entered judgment in favor of First Index pursuant to Fed. R. Civ. Pro. 68.<sup>13</sup> These orders have been appealed to the Seventh Circuit and are set for oral argument on May 19, 2015.

**A. The TCPA And Its Implementing Regulations.**

The TCPA prohibits the use of a fax machine to send unsolicited advertisements.<sup>14</sup> The Junk Fax Prevention Act of 2005 (“JFPA”) amended the Act and codified the established business relationship (“EBR”) defense for fax advertisements sent pursuant to relationships that Congress recognized as implying consent.<sup>15</sup> As a condition of this defense, unsolicited fax advertisements must include an opt-out notice to inform recipients how to contact the sender and stop future faxes.<sup>16</sup> The JFPA makes no mention of the Regulation and does not extend the opt-out requirement to *solicited* fax advertisements.

The Commission adopted the Regulation in the Junk Fax Order along with the EBR exemption.<sup>17</sup> At the same time, the Commission stated, in a footnote, that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”<sup>18</sup> The Junk Fax Order is the first articulation of any regulation calling for opt-out language on solicited

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<sup>11</sup> *Chapman*, 2014 WL 840565 at \* 2.

<sup>12</sup> *Id.* at \*1.

<sup>13</sup> *Chapman*, 2014 WL 3511227, at \*5 (N.D. Ill. July 16, 2014).

<sup>14</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227; 47 U.S.C. § 227 (a)(5) and (b)(1)(C).

<sup>15</sup> Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified at* 47 U.S.C. § 227.

<sup>16</sup> 47 U.S.C. § 227(b)(2)(D).

<sup>17</sup> Junk Fax Order, 21 FCC Rcd at 3812.

<sup>18</sup> *Id.* at 3809, n. 154.

fax advertisements; indeed, the Commission did not explicitly reference any such requirement in its Notice of Proposed Rulemaking.<sup>19</sup>

**B. The Commission’s Waiver Order.**

The Commission issued the Waiver Order in response to numerous petitions challenging Section 64.1200(a)(4)(iii). Declining to invalidate the Regulation, the Commission clarified: “senders of fax ads must include certain information on the fax ads that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders.”<sup>20</sup> Concurrently, the Commission acknowledged—given the unique backdrop of the Regulation’s inception and its impact on liability—that requiring retroactive, strict adherence is not in the public interest.

The Commission determined that “good cause” exists for waiving the Regulation. First, special circumstances warrant deviation. Specifically, the inconsistent footnote in the Junk Fax Order and lack of explicit notice created “confusion” and engendered “misplaced confidence” that the opt-out rule does not apply to solicited fax advertisements.<sup>21</sup> Second, waiver is in the public interest. Inadvertent violations—arising during the period of understandable, industry-wide confusion regarding the Regulation—could result in substantial costs and damages.<sup>22</sup> Based on this “good cause,” the Commission “grant[ed] retroactive waivers of [the] opt-out notice requirement...to provide...temporary relief from any past obligation to provide the opt out notice to such recipients required by our rules.”<sup>23</sup> The Commission also invited “similarly situated” parties to seek the same waiver on or before April 30, 2015.

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<sup>19</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act*, Notice of Proposed Rulemaking, 20 FCC Rcd. 19758, 19767-70 (2005)(“Junk Fax NPRM”).

<sup>20</sup> Waiver Order at ¶ 1.

<sup>21</sup> *Id.* at ¶¶ 23-28, 48 (“the footnote stated that ‘the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.’ The use of the word ‘unsolicited’ in this one instance may have caused some parties to misconstrue the Commission’s intent to apply the opt-out notice to fax ads sent with the prior express permission of the recipient”).

<sup>22</sup> *Id.* at ¶ 27.

<sup>23</sup> *Id.* at ¶¶ 24-25.

The Commission explicitly declined to resolve factual disputes in its Order.<sup>24</sup> It did not “confirm or deny whether petitioners, in fact, had the prior express permission of the recipients ...in the private rights of action.”<sup>25</sup> Similarly, the Commission did not make any evidentiary rulings regarding whether there was actual confusion on the part of the petitioners.<sup>26</sup>

## **II. FIRST INDEX SHOULD BE GRANTED A WAIVER OF THE REGULATION.**

First Index falls squarely within the class of persons for whom the Commission intended to retroactively waive Section 64.1200(a)(4)(iv). First Index is “similarly situated” to the original petitioners; and, equivalent good cause supports its Petition. Thus, First Index should receive the same retroactive waiver of Section 64.1200(a)(4)(iv) already provided in the Waiver Order.

### **A. First Index Is Similarly Situated To The Original Petitioners.**

Like the original petitioners, First Index has been sued for an alleged violation of 47 U.S.C. § 227 (b)(1) and the Regulation. This lawsuit seeks the substantial damages that are similar to those described by the Commission and the original petitioners.

First Index has asserted the same defense as the original petitioners: it had express permission to send the subject fax.<sup>27</sup> The lawsuit, also, similarly, seeks substantial damages for alleged violations that occurred after the Junk Fax Order when there was understandable confusion regarding the applicability of the Regulation.<sup>28</sup> First Index had the same “misplaced confidence” that the Commission describes in its Order; and, consequently, had no legal certainty that an opt-out notice is required for solicited faxes.<sup>29</sup> Thus, First Index is “similarly situated” to the parties who have already received waivers.

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<sup>24</sup> *Id.* at ¶ 31

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at ¶ 26.

<sup>27</sup> *Id.* at \* 2; Waiver Order at ¶ 11.

<sup>28</sup> *Chapman*, 2014 WL 840565 at \* 1; Waiver Order at ¶¶ 24-27.

<sup>29</sup> Waiver Order at ¶¶ 24, 26.

**B. Good Cause Exists For Waiving the Regulation.**

The Commission’s rules allow it “at any time” to waive requirements for good cause shown.<sup>30</sup> “Good cause” exists upon a showing of “special circumstances warranting an exception in the public interest.”<sup>31</sup> The Commission has already determined that both elements are present with regard to Section 64.1200(a)(4)(iv) and, accordingly, has granted retroactive waivers to twenty-seven petitioners.<sup>32</sup> The same “special circumstances” and “public interest” concerns exist with regard to First Index such that retroactive waiver of the Regulation is warranted.

First, the special circumstances detailed in the Order counsel in favor of deviation from the Regulation with regard to First Index.<sup>33</sup> The “confusing situation” following the Junk Fax Order—caused by the inconsistent footnote and lack of explicit notice—resulted in “misplaced belief” that the opt-out notice requirement did not apply to solicited fax advertisements.<sup>34</sup> First Index was affected by this “confusing situation;” lacked certainty regarding the scope of the Regulation; and, is accused of a violations that allegedly occurred after the Junk Fax Order.<sup>35</sup>

Second, granting First Index a retroactive waiver of the Regulation is in the public interest. As the Commission made clear, public interest favors preventing catastrophic liability for inadvertent, alleged violations resulting from the generalized state of confusion:

[F]ailure 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...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...<sup>36</sup>

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<sup>30</sup> 47 C.F.R. § 1.3; *Keller Commc'ns, Inc. v. F.C.C.*, 130 F.3d 1073, 1076 (D.C. Cir. 1997).

<sup>31</sup> *BellSouth Corp. v. F.C.C.*, 162 F.3d 1215, 1225 (D.C. Cir. 1999); *Keller Commc'ns, Inc.*, 130 F.3d at 1076.

<sup>32</sup> Waiver Order at ¶ 36.

<sup>33</sup> *Id.* ¶¶ 23-26.

<sup>34</sup> *Id.* at ¶¶ 15, 24, 27-28.

<sup>35</sup> *Chapman*, 2014 WL 840565 at \* 1.

<sup>36</sup> Waiver Order at ¶ 27.

Waiver in First Index's case serves the same public interest concern that the Commission seeks to ameliorate through its Waiver Order. First Index faces a lawsuit for an alleged violation of the Act and Regulation; and, has asserted that the subject faxes were solicited. Yet, despite the Commission's acknowledgement that "misplaced confidence" on the part of petitioners, similarly situated to First Index, was reasonable, First Index's alleged failure to include a required opt-out notice leaves it vulnerable to substantial costs or damages. Thus, retroactive waiver of the Regulation, here, is in the public interest.

Draconian application of the Regulation, despite the confusion, could expose First Index to massive liability for engaging in consensual communications with its customers. Consequently, there is "good cause" for granting the requested waiver.

For all of these reasons, Petitioner First Index, Inc., respectfully requests that the Commission grant Navinet the same retroactive waiver of Section 64.1200(a)(4)(iv) that it provided in its Waiver Order dated October 30, 2014 for any faxes transmitted with prior express permission or invitation after the effective date of the Regulation.

Respectfully submitted,

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