

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

In the Matter of)	
)	
Petition for Waiver of Integrated Pain Management, S.C., Tian Medical, LLC, Tian Medical, Inc. and Dr. Tian Xia.)	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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TABLE OF CONTENTS

I. BACKGROUND.....2

 A. The TCPA And Its Implementing Regulations.....2

 B. The Commission’s Waiver Order.....3

II. PETITIONERS SHOULD BE GRANTED A WAIVER OF THE REGULATION.....4

 A. Petitioners Are Similarly Situated To The Parties For Whom The Regulation
 Has Already Been Waived.....5

 B. Good Cause Exists For Waiving The Regulation5

PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Rules¹ of the Federal Communication Commission (the “Commission”), and the Commission’s Order dated October 30, 2014 (“Waiver Order”),² Petitioners Integrated Pain Management, S.C. (“IPMS”), Tian Medical, LLC (“Tian LLC”), Tian Medical, Inc. (“Tian Inc.”) and Dr. Tian Xia (“Xia”) (collectively “Petitioners”) respectfully request that the Commission grant Petitioners 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 Petitioners (or on their behalf) with the prior express permission of the recipients or their agents.³

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).⁴ 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.⁵ 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, 2015.⁶

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

² *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”).

³ Petitioners deny in the pending private action that the subject fax is an “advertisement.”

⁴ Waiver Order at ¶ 1.

⁵ *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”).

⁶ Waiver Order at ¶¶ 30, 48.

Good cause exists for granting Petitioners' request for a retroactive waiver. Petitioners have 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 notice of the Regulation's adoption. As a result, Petitioners are facing the possibility of substantial costs or liability, such that waiver is in the public interest.⁷ Further, Petitioners are similarly positioned to the parties for whom the Commission has already waived the Regulation. For these reasons, and those stated below, Petitioners respectfully request a retroactive waiver.

I. BACKGROUND.

Petitioners are currently facing a putative class action lawsuit by Michael C. Zimmer P.C. (“Zimmer” or “Plaintiff”) for allegedly faxing unsolicited advertisements on July 11, 2012 and September 24, 2012, *Michael C. Zimmer, P.C. v. Integrated Pain Management, S.C., et al.*, No. 14-cv-01121, Dkt. #31 (E.D.Mo.) (filed Mar. 6, 2015) (hereinafter cited as “Zimmer”).⁸

One of Petitioners defenses is that the recipients provided prior express consent before the sending of the subject faxes.⁹ In addition, Petitioners have and/or will assert that the subject faxes are not “unsolicited advertisements,” but permitted “informational” communications. However, these factual disputes are properly resolved in the private action and do not impact this Petition.¹⁰

A. The TCPA And Its Implementing Regulations.

The TCPA prohibits the use of a fax machine to send unsolicited advertisements.¹¹ The Junk Fax Prevention Act of 2005 (“JFPA”) amended the Act and codified the established

⁷ Waiver Order at ¶¶ 24-27.

⁸ Second Amended Class Action Complaint, *Zimmer*, Dkt. #31 (E.D.Mo.) (filed on Mar. 6, 2015) (“Complaint”).

⁹ Answer And Affirmative Defenses To the Second Amended Class Action Complaint, *Zimmer*, Dkt. #39 (E.D.Mo.) (filed on Apr. 22, 2015) (“Answer”).

¹⁰ Waiver Order at ¶ 26.

¹¹ 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).

business relationship (“EBR”) defense for fax advertisements sent pursuant to relationships that Congress recognized as implying consent.¹² 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.¹³ The JFPA makes no mention of the Regulation and does not extend the opt-out requirement to *solicited* fax advertisement.

The Commission adopted the Regulation in the Junk Fax Order along with the requirements for the EBR exemption.¹⁴ At the same time, the Commission stated, in a footnote, that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”¹⁵ The Junk Fax Order is the first articulation of any regulation calling for opt-out language on solicited fax advertisements; indeed, the Commission did not explicitly reference any such requirement in its Notice of Proposed Rulemaking.¹⁶

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.”¹⁷ 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.

¹² Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified at* 47 U.S.C. § 227.

¹³ 47 U.S.C. § 227(b)(2)(D).

¹⁴ Junk Fax Order, 21 FCC Rcd at 3812.

¹⁵ *Id.* at 3809, n. 154.

¹⁶ *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”).

¹⁷ Waiver Order at ¶ 1.

The Commission determined that “good cause” exists for waiving the Regulation.¹⁸ 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.¹⁹ Second, waiver is in the public interest. Inadvertent violations—arising after the Junk Fax Order when the industry was afflicted by understandable confusion—could result in substantial, potentially catastrophic, liability.²⁰ 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.”²¹ The Commission also invited “similarly situated” parties to seek the same waiver on or before April 30, 2015.

The Commission explicitly declined to resolve factual disputes in its Order.²² It granted waivers but did not “confirm or deny whether petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.”²³ Similarly, the Commission did not make any evidentiary rulings regarding whether there was actual confusion on the part of the petitioners.²⁴

II. PETITIONERS SHOULD BE GRANTED A WAIVER OF THE REGULATION.

Petitioners fall squarely within the class of persons for whom the Commission intended to retroactively waive Section 64.1200(a)(4)(iv). Petitioners are “similarly situated” to the

¹⁸ *Id.* at ¶¶ 23-28, 48.

¹⁹ *Id.* at ¶¶ 23-25 (“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”).

²⁰ *Id.* at ¶ 27.

²¹ *Id.* at ¶¶ 24-25.

²² *Id.* at ¶ 31

²³ *Id.*

²⁴ *Id.* at ¶ 26.

original petitioners; and, equivalent good cause supports this Petition. Thus, Petitioners should receive the same retroactive waiver of Section 64.1200(a)(4)(iv) provided in the Waiver Order.

A. Petitioners Are Similarly Situated To The Parties For Whom The Regulation Has Already Been Waived.

Like the original petitioners, Petitioners have been sued in a putative class action lawsuit for an alleged violation of 47 U.S.C. § 227 (b)(1) and the Regulation.²⁵ This lawsuit seeks substantial, similar to the liability described by the original petitioners and the Commission.

Petitioners assert the same defense as the original parties: the recipients provided express permission to receive the subject faxes.²⁶ Petitioners are also confronted with the possibility of substantial costs or liability for alleged violations that occurred after the Junk Fax Order—when there was reasonable confusion regarding the applicability of the Regulation.²⁷ Petitioners had the same “misplaced confidence” that the Commission describes in its Order; and, consequently, no legal certainty that an opt-out notice is required for solicited faxes.²⁸ Simply, Petitioners are “similarly situated” to the parties who have already received waivers.

B. Good Cause Exists For Waiving the Regulation.

The Commission’s rules allow it “at any time” to waive its own regulations for good cause.²⁹ “Good cause” exists upon a showing of “special circumstances warranting an exception in the public interest.”³⁰ 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

²⁵ Second Amended Class Action Complaint, *Zimmer*, Dkt. #31.

²⁶ Answer, *Zimmer*, Dkt. #39.

²⁷ Complaint, *Zimmer*, Dkt. #31 at Exh. A

²⁸ Waiver Order at ¶¶ 24, 26.

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

³⁰ *BellSouth Corp. v. F.C.C.*, 162 F.3d 1215, 1225 (D.C. Cir. 1999); *Nat'l Ass'n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

twenty-seven petitioners.³¹ The same “special circumstances” and “public interest” concerns exist with regard to Petitioners, 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 Petitioners.³² 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.³³ Petitioners were affected by this “confusing situation;” lacked certainty regarding the scope of the Regulation; and, are accused of violations that allegedly occurred after the Junk Fax Order.³⁴

Second, granting Petitioners a retroactive waiver of the Regulation is in the public interest. As the Commission made clear, public interest favors shielding businesses from 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...³⁵

Waiver in Petitioner’s case serves the same public interest concern that the Commission seeks to ameliorate through its Waiver Order. Petitioners are facing a potential class action lawsuit for alleged violations of the Act and Regulation that occurred after the Junk Fax Order; and, have asserted that the subject faxes were *solicited* non-advertisements. Yet, despite the Commission’s acknowledgement that “misplaced confidence” and lack of certainty on the part of parties similarly situated to Petitioners was reasonable, the alleged failure to include the required opt-out

³¹ Waiver Order at ¶ 36.

³² *Id.* ¶¶ 23-26.

³³ *Id.* at ¶¶ 15, 24, 27-28.

³⁴ Complaint at ¶ 31, Exh. A.

³⁵ Waiver Order at ¶ 27.

notice leaves Petitioners vulnerable to substantial damages. Thus, retroactive waiver of the Regulation, here, is in the public interest.

Draconian application of the Regulation, despite the confusion, could expose Petitioners to massive class action liability for engaging in consensual communications. Consequently, there is “good cause” for granting the requested waiver.

For all of these reasons, Petitioners Integrated Pain Management, S.C., Tian Medical, Inc., Tian Medical, LLC and Dr. Tian Xia, respectfully request that the Commission grant them the same retroactive waiver of Section 64.1200(a)(4)(iv) granted to the parties in its October 30, 2014 Order for any solicited faxes sent after the effective date of the Regulation.

Respectfully submitted,

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