

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

In the Matter of)	
)	
Petition for Waiver Of American Homepatient, 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**

Eric L. Samore
Erin A. Walsh
SmithAmundsen LLC
150 N. Michigan Avenue, Suite 3300
Chicago, Illinois 60601
(312) 894-3200 (ph)
(312) 894-3210 (fax)
esamore@salawus.com
ewalsh@salawus.com

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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 Petitioner American Homepatient, Inc. (“Homepatient”) respectfully requests that the Commission grant Petitioner a retroactive waiver of Section 64.1200(a)(4)(iv) of its Rules (the “Regulation”), to the extent the Regulation may apply to any faxes transmitted by Homepatient (or on its 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 Homepatient denies that its faxed advertisements and has filed a motion to dismiss the pending private action on this basis. Defendant’s Memorandum In Support Of Motion To Dismiss The Complaint Or, In The Alternative, Dismiss Or Strike The Class Allegations, *Radha Geismann, MD, P.C. v. American Homepatient, Inc.*, No. 4-14-cv-001538 RLW, Dkt. #10 (E.D.Mo.) (filed on Oct. 13, 2014) (“Motion To Dismiss”).

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 *Id.* at ¶¶ 30, 48.

Good cause exists for granting the instant Petition. Initially, Homepatient 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 notice. And, as a result, Homepatient is facing the possibility of substantial costs or liability, such that waiver is in the public interest. Moreover, Homepatient is similarly positioned to the original petitioners. For these reasons, and those set forth below, Homepatient respectfully requests a retroactive waiver of Section 64.1200(a)(4)(iii).

I. BACKGROUND.

Homepatient is a privately held company. It is a supplier of home medical equipment supplies and services with a focus in respiratory care. Homepatient has been selected as a contracted provider with Medicare for respiratory products and services.

Homepatient is facing a putative class action lawsuit by Radha Geismann, MD, P.C. (“Geisman” or “Plaintiff”) for allegedly faxing a one-page document on June 22, 2013, *Radha Geismann, MD, P.C. v. American Homepatient, Inc.*, No. 4-14-cv-001538 RLW, Dkt. #1 (E.D.Mo.) (filed on Sep. 8, 2014) (*Geismann*).⁷ One of Homepatient’s defenses is that it obtained prior express consent before sending the subject fax.⁸ Homepatient also maintains that the fax is not an “advertisement” and does not “promote a commercial product or service.”⁹ For its part, Geismann denies that it provided consent and contends that the subject fax is an advertisement.¹⁰ However, these factual disputes are properly resolved in the private lawsuit and do not impact this Petition.¹¹

⁷ Class Action Petition, *Geismann*, Dkt. #1-3 at Exh. A (E.D.Mo.) (filed on Sep. 8, 2014) (“Complaint”).

⁸ Answer And Jury Demand, *Geismann*, Dkt. # 12 at p. 13 (E.D. Mo.) (filed on Oct. 13, 2014) (“Answer”).

⁹ Motion to Dismiss, *Geismann*, Dkt. # 10 at p. 6-8.

¹⁰ Complaint, *Geismann*, Dkt. #1-3 at ¶¶ 10, 12-16; Plaintiff’s Memorandum In Opposition To Defendant’s Motion To Dismiss And Alternative Motion To Strike Class Allegations, *Geismann*, Dkt. # 25 at pps. 6-9 (E.D.Mo.) (filed on Nov. 14, 2014) (“Plaintiff’s Opposition”).

¹¹ Waiver Order at ¶ 26.

A. The TCPA And Its Implementing Regulations.

The TCPA prohibits the use of a fax machine to send unsolicited advertisements.¹² 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.¹³ 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.¹⁴ 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 requirements for the EBR exemption.¹⁵ At the same time, the Commission stated, in a footnote, that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”¹⁶ 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.¹⁷

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.”¹⁸ Concurrently, the

¹² 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).

¹³ Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified at* 47 U.S.C. § 227.

¹⁴ 47 U.S.C. § 227(b)(2)(D).

¹⁵ Junk Fax Order, 21 FCC Rcd at 3812.

¹⁶ *Id.* at 3809, n. 154.

¹⁷ *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”).

¹⁸ Waiver Order at ¶ 1.

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.¹⁹

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.²⁰ 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 costs and damages. 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. It 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.”²² Similarly, the Commission did not make any evidentiary rulings regarding whether there was actual confusion on the part of the petitioners.²³

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

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

¹⁹ *Id.* at ¶¶ 23-28, 48.

²⁰ *Id.* at ¶¶ 23-25 (“[T]he 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”).

²¹ *Id.* at ¶¶ 24-25, 27.

²² *Id.* at ¶ 31

²³ *Id.* at ¶ 26.

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

A. Homepatient Is Similarly Situated To The Original Petitioners.

Like the original petitioners, Homepatient has been sued in a putative class action lawsuit for an alleged violation of 47 U.S.C. § 227 (b)(1) and the Regulation. This lawsuit seeks substantial damages—similar to the potential liability described in the Waiver Order.

Homepatient asserts the same defense as the original petitioners: it had express permission to send the subject fax—which it contends is not an advertisement. Homepatient is also confronted with the possibility of substantial costs and damages for an alleged violation that occurred June 22, 2013—after the Junk Fax Order—when there was reasonable confusion regarding the applicability of the Regulation. Homepatient was subject to 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.²⁴ Thus, Homepatient is “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 requirements for good cause.²⁵ “Good cause” exists upon a showing of “special circumstances warranting an exception in the public interest.”²⁶ 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-

²⁴ Waiver Order at ¶¶ 24, 26.

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

²⁶ *BellSouth Corp. v. F.C.C.*, 162 F.3d 1215, 1225 (D.C. Cir. 1999);

seven petitioners.²⁷ The same “special circumstances” and “public interest” concerns exist with regard to Homepatient 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 Homepatient.²⁸ 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 may not apply to solicited fax advertisements.²⁹ Homepatient was affected by this “confusing situation;” lacked certainty regarding the scope of the Regulation; and, is accused of a violation that allegedly occurred after the Junk Fax Order.³⁰

Second, granting Homepatient a retroactive waiver of the Regulation is in the public interest.³¹ As the Commission made clear, public interest favors shielding businesses from substantial 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...³²

Waiver in Homepatient’s case serves the same public interest concern that the Commission seeks to ameliorate through its Waiver Order. Homepatient faces a potential class action lawsuit for an alleged violation that occurred after the Junk Fax Order; and, has asserted that the subject fax was a *solicited* transactional communication. Yet, despite the Commission’s acknowledgement that “misplaced confidence” and lack of certainty on the part of petitioners similarly situated to

²⁷ Waiver Order ¶ 36.

²⁸ *Id.* ¶¶ 23-26.

²⁹ *Id.* at ¶¶ 15, 24, 27-28.

³⁰ Complaint, *Geismann*, Dkt # 1 at ¶ 10, Exh. A.

³¹ *Nat’l Ass’n of Broadcasters v. FCC*, 569 F.3d 416, 426 (D.C. Cir. 2009).

³² Waiver Order at ¶ 27.

Homepatient was reasonable, Homepatient's alleged failure to include the opt-out notice leaves it vulnerable to substantial damages. Thus, retroactive waiver of the Regulation, here, is in the public interest.

Draconian application of the Regulation, despite the confusion and uncertainty, could expose Homepatient to massive costs and class action liability for engaging in consensual communications with its account-holders. Consequently, there is "good cause" for granting the requested waiver.

For all of these reasons, Petitioner American Homepatient, Inc., respectfully requests that the Commission grant this Petitioner 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,

By: /s/ Erin A. Walsh

SmithAmundsen LLC
150 North Michigan Avenue, Suite 3300
Chicago, Illinois 60601
(312) 894-3200 (ph)
(312) 894-3210 (f)

Counsel for American Homepatient, Inc.