

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

In the Matter of	)	
	)	
Petition for Waiver Of International Dental Supply	)	CG Docket No. 02-278
Co.	)	
	)	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 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 International Dental Supply Co. (“International Dental”) respectfully requests that the Commission grant 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 International Dental (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 the instant petition. International Dental 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 of the Regulation’s

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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> Waiver Order at ¶¶ 30, 48.

adoption. As a result, International Dental faces the possibility of substantial costs or damages, such that waiver is in the public interest.<sup>6</sup> In short: International Dental is in the same position as the parties already provided with a retroactive waiver. Therefore, International Dental respectfully requests a retroactive waiver of Section 64.1200(a)(4)(iii).

## **I. BACKGROUND.**

Petitioner is a small privately held retailer of dental supplies. It is focused on meeting the needs of dental practices by offering a range of products at competitive prices. On average, International Dental employs between ten and fifteen individuals at any given time.

International Dental is currently facing a putative class action lawsuit by Scott Barr D.D.S. (“Barr” or “Plaintiff”) for the alleged faxing of a one-page document on July 25, 2013, *Scott Barr D.D.S. v. International Dental Supply Co.*, No. 13-cv-69181, Dkt. #1 (S.D.Fl.) (filed Sep. 11, 2013) (hereinafter cited as “*Barr*”). In particular, Plaintiff alleges that International Dental’s faxes “violated the TCPA because [it] failed to [include] the opt-out notice required by...47 C.F.R. §64.1200(a)(3)(iv).”<sup>7</sup> One of International Dental’s defenses is that it obtained prior express consent before sending the subject faxes.<sup>8</sup> For its part, Barr denies that it consented to receive faxes from International Dental.<sup>9</sup> However, this factual dispute is properly resolved in the underlying litigation and does not impact this Petition.<sup>10</sup>

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

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

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

<sup>7</sup> Class Action Complaint, *Barr*, Dkt. #1 at ¶ 49 (filed on Sep. 11, 2013) (“Complaint”).

<sup>8</sup> International Dental’s Answer And Affirmative Defenses, *Barr*, Dkt. #42 (filed on Feb. 29, 2015) (“Answer”).

<sup>9</sup> Complaint, *Barr*, Dkt. #1 at ¶¶ 30-32.

<sup>10</sup> Waiver Order at ¶ 26.

<sup>11</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).

business relationship (“EBR”) defense for fax advertisements sent pursuant to relationships that Congress recognized as implying consent.<sup>12</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>13</sup> 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 EBR exemption.<sup>14</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>15</sup> The Junk Fax Order is the first articulation of any rule 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.<sup>16</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>17</sup> Concurrently, the Commission acknowledged—given the unique backdrop of the Regulation’s inception and its subsequent impact on liability—that requiring retroactive, strict adherence is not in the public interest.

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

<sup>13</sup> 47 U.S.C. § 227(b)(2)(D) (“JFPA”).

<sup>14</sup> Junk Fax Order, 21 FCC Rcd at 3812.

<sup>15</sup> *Id.* at 3809, n. 154.

<sup>16</sup> *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>17</sup> Waiver Order at ¶ 1.

The Commission determined that “good cause” exists for waiving the Regulation.<sup>18</sup> 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>19</sup> Second, waiver is in the public interest. Inadvertent violations could result in substantial, potentially catastrophic, liability.<sup>20</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>21</sup> 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.<sup>22</sup> 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.”<sup>23</sup> Similarly, the Commission did not make any evidentiary rulings regarding whether there was actual confusion on the part of the petitioners.<sup>24</sup>

## **II. INTERNATIONAL DENTAL SHOULD BE GRANTED A WAIVER OF THE REGULATION.**

International Dental falls squarely within the class of persons for whom the Commission intended to retroactively waive Section 64.1200(a)(4)(iv). International Dental is “similarly situated” to the original petitioners. Waiver, in its case, is supported by the same good cause.

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<sup>18</sup> *Id.* at ¶¶ 23-28, 48.

<sup>19</sup> *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”).

<sup>20</sup> *Id.* at ¶ 27.

<sup>21</sup> *Id.* at ¶¶ 24-25.

<sup>22</sup> *Id.* at ¶ 31

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at ¶ 26.

Thus, International Dental should receive the same retroactive waiver of Section 64.1200(a)(4)(iv) that the Commission provided in its Waiver Order.

**A. International Dental Is Similarly Situated To The Original Petitioners.**

Like the original petitioners, International Dental has been sued in a putative class action lawsuit for an alleged violation of 47 U.S.C. § 227 (b)(1) and the Regulation.<sup>25</sup> It is facing potential class-wide liability and substantial damages similar to that described by the parties already granted waivers.

International Dental raises the same defense as the original petitioners: it had express permission to send the subject fax.<sup>26</sup> International Dental also faces potentially substantial liability for an alleged violation that occurred after the Junk Fax Order—when there was understandable confusion regarding the applicability of the Regulation. International Dental had the same “misplaced confidence” that the Commission describes in its Waiver Order; and, consequently, had no legal certainty whether an opt-out notice was required for solicited faxes.<sup>27</sup> Thus, International Dental 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 shown.<sup>28</sup> “Good cause” exists upon a showing of “special circumstances warranting an exception in the public interest.”<sup>29</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

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<sup>25</sup> Complaint, *Barr*, Dkt. # 1.

<sup>26</sup> Answer, *Barr*, Dkt. #42.

<sup>27</sup> Waiver Order at ¶¶ 24, 26.

<sup>28</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>29</sup> *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.<sup>30</sup> The same “special circumstances” and “public interest” concerns exist with regard to International Dental such that 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 International Dental.<sup>31</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>32</sup> International Dental was affected by this “confusing situation;” lacked certainty regarding the scope of the Regulation; and, has been accused violating the Act and Regulation after the Commission issued the Junk Fax Order.<sup>33</sup>

Second, granting International Dental a retroactive waiver of the Regulation is in the public interest. As the Commission made clear, public interest favors shielding businesses—like International Dental—from catastrophic liability for inadvertent 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>34</sup>

Waiver in International Dental’s case serves the same public interest concerns that the Commission seeks to ameliorate through its Waiver Order. International Dental is now facing a potential class action lawsuit for an alleged violation of the Act and Regulation; and, has asserted that the subject fax—sent after the Junk Fax Order—was a *solicited* communication. Yet, despite the Commission’s acknowledgement that “misplaced confidence” and lack of certainty on the

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<sup>30</sup> Waiver Order ¶ 36.

<sup>31</sup> *Id.* ¶¶ 23-26.

<sup>32</sup> *Id.* at ¶¶ 15, 24, 27-28.

<sup>33</sup> Complaint, *Barr*, Dkt. # 1 at ¶ 31, Exh. A.

<sup>34</sup> Waiver Order at ¶ 27.

part of petitioners, similarly situated to International Dental, was reasonable, the alleged failure to include a required opt-out notice leaves International Dental 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 International Dental to massive class action liability for engaging in consensual communications with its subscribers. Consequently, there is “good cause” for granting the requested waiver.

For all of these reasons, Petitioner International Dental Supply Co., respectfully requests that the Commission grant it 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,

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 International Dental Supply Co.*