

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

In the Matter of)	CG Docket No. 02-278
)	
Petition of Wells Fargo & Company for)	CG Docket No. 05-338
Waiver of Section 64.1200(a)(4)(iv) of the)	
Commission’s Rules)	

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

Pursuant to Section 1.3 of the Commission’s rules and to the *Order* issued by the Commission on October 30, 2014 in the above-referenced dockets, Wells Fargo & Company¹ (“Wells Fargo”) respectfully requests that the Commission grant Wells Fargo a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s rules with respect to any advertising facsimiles that were sent or may be alleged to have been sent by Wells Fargo with the recipients’ prior express invitation or permission, but that did not include the opt out notice specified in that rule.²

I. Background

Under the Telephone Consumer Protection Act (“TCPA”), persons and entities are prohibited from transmitting advertisements via facsimile without the recipient’s prior express invitation or permission.³ Congress amended the TCPA in 2005 by enacting the Junk Fax

¹ This includes all subsidiaries and affiliates of Wells Fargo & Company.

² See 47 C.F.R. § 64.1200(a)(4)(iv); 47 C.F.R. § 1.3; *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (Oct. 30, 2014) (“*Order*”).

³ See 47 U.S.C. §§ 227(b)(1)(C), (a)(5). The Commission may waive any of its rules if good cause is shown. 47 C.F.R. § 1.3.

Prevention Act (“JFPA”), which, in relevant part, established an exception to the unsolicited fax advertisement prohibition where there is an established business relationship between the parties and the sender of the fax advertisement provides specified notice and contact information on the fax that allows the recipient to “opt out” of any future fax transmissions from the sender.⁴ In 2006, as required by the JFPA, the Commission adopted the *Junk Fax Order* amending its rules concerning fax transmissions, including the following: “[a] facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice” that complies with the requirements of 47 C.F.R. § 64.1200(a)(4)(iii).⁵ The *Junk Fax Order* also contained a contradictory footnote that stated, in relevant part, that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”⁶

In its 2014 *Order*, the Commission clarified that the opt out notice requirement contained in Section 64.1200(a)(4)(iv) applies to solicited fax advertisements – that is, fax advertisements sent with the recipient’s express invitation or permission.⁷ However, the Commission also granted to various petitioners a retroactive waiver of Section 64.1200(a)(4)(iv), finding that a waiver was supported by good cause and was in the public interest because of the potential confusion regarding whether the opt out language was required in solicited fax advertisements.⁸

Specifically, the Commission found that good cause existed for a waiver because of a combination of two factors: *first*, the inconsistent footnote in the *Junk Fax Order* discussed

⁴ Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified* at 47 U.S.C. § 227.

⁵ 47 C.F.R. § 64.1200(a)(4)(iv); *see also* 47 C.F.R. § 64.1200(a)(4)(iii); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (“*Junk Fax Order*”).

⁶ *Junk Fax Order*, 21 FCC Rcd at 3810, n.154 (emphasis added).

⁷ *Order* ¶ 1.

⁸ *Order* ¶¶ 24-28.

above; and, *second*, a “lack of explicit notice” provided prior to the *Junk Fax Order* that the Commission was considering an opt out requirement on fax advertisements sent with the prior express invitation or permission of the recipient.⁹ The Commission found that this “specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.”¹⁰ It also noted that a waiver was in the public interest because the confusion regarding the rule “left some businesses” open to liability under TCPA lawsuits.¹¹ Finally, the Commission invited other parties “similarly situated” to the petitioners to also seek waivers such as those granted in the *Order*.¹² Wells Fargo is a similarly situated party and seeks such a waiver.

II. Wells Fargo is Similarly Situated to the Petitioners and Should Be Granted a Retroactive Waiver of the Opt Out Notice Requirement

Wells Fargo respectfully requests that the Commission grant it a retroactive waiver of the opt out notice requirement contained in 47 C.F.R. § 64.1200(a)(4)(iv) as was granted to multiple petitioners in the *Order*. A waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the rule.¹³ As explained by the Commission, “[t]he record in this proceeding demonstrates that a failure 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, as well as possible liability for forfeitures under the Communications Act.”¹⁴ For similar reasons and as explained below, there is good cause for a waiver because of the

⁹ *Order* ¶¶ 24-25.

¹⁰ *Order* ¶ 26.

¹¹ *Order* ¶ 28.

¹² *Order* ¶ 30.

¹³ *Order* ¶ 23.

¹⁴ *Order* ¶ 27.

“reasonable confusion” surrounding the opt out notice requirement and the “potentially substantial damages” faced by Wells Fargo under the TCPA.

As was the case for those petitioners that have already been granted a waiver, Wells Fargo’s potential noncompliance with the opt out notice requirement was the result of the confusion surrounding the footnote in the *Junk Fax Order* and related confusion caused by the “lack of explicit notice” that the Commission was considering an opt out notice requirement for solicited fax ads.¹⁵ Wells Fargo would not knowingly or willfully violate any requirements of the statute or expose itself to additional litigation risk by ignoring an FCC rule implementing the TCPA.¹⁶ Rather, it was the confusion caused by the “specific combination” of the inconsistent footnote and “lack of explicit notice” that led to any potential noncompliance on the part of Wells Fargo with the opt out notice requirement. Accordingly, as the Commission has recognized in similar cases, there is a presumption that good cause exists for Wells Fargo to be granted a waiver.

Granting a waiver to Wells Fargo would also serve the public interest due to the substantial risk of TCPA liability that Wells Fargo faces on an ongoing basis. Wells Fargo, like other large banks, is frequently the target of TCPA litigation.¹⁷ Indeed, the regularity with which

¹⁵ *Order* ¶¶ 24-25.

¹⁶ *See* Wells Fargo Notice of Ex Parte, CG Docket No. 02-278, at 4, 21-23 (Jan. 26, 2015) (detailing the protocols that Wells Fargo uses “to ensure consumer consent” and facilitate the accuracy of communications).

¹⁷ A search for TCPA cases involving banks and lending institutions on Bloomberg Law’s docket monitoring database indicates that approximately 200 TCPA lawsuits were filed against banks and lending institutions in 2014 and 40 such TCPA lawsuits were filed in the first quarter of 2015. *See also* Wells Fargo Notice of Ex Parte, CG Docket No. 02-278, at 4-5 (May 15, 2014) (detailing an example of one such lawsuit brought against Wells Fargo); Wells Fargo Notice of Ex Parte, CG Docket No. 02-278, at 7 (July 7, 2014) (noting that frivolous TCPA lawsuits cost the company millions of dollars in litigation defense as well as significant use of internal resources). It is not surprising, then, that two major trade associations representing banks and financial institutions – the Consumer Bankers Association and the American Bankers

unsubstantiated TCPA litigation is filed against Wells Fargo requires that it seek a waiver as a prophylactic measure. As the Commission has explained, a waiver “serves the public interest in this instance” because the confusion surrounding the rule “*could* subject parties to *potentially* substantial damages.”¹⁸ Wells Fargo faces the same threat of “potentially substantial damages” that motivated the Commission to grant other petitioners a waiver of the opt out notice requirement. Accordingly, granting Wells Fargo a waiver of the requirement would serve the public interest.

Association – and one individual bank – Citizens Bank, N.A. – have filed petitions with the FCC on TCPA issues; all three petitions indicated that a motivating factor for filing the petition was the liability risk associated with frivolous TCPA litigation. *See* Petition of Citizens Bank, N.A., CG Docket No. 02-278, at 2 (Jan. 6, 2015) (stating that the clarification requested “would likely reduce the amount of vexatious class litigation” brought under the TCPA); Petition of Consumer Bankers Association, CG Docket No. 02-278, at 3 (Sept. 19, 2014) (advocating that the clarification requested would help “quash frivolous litigation” brought under the TCPA); Petition of American Bankers Association, CG Docket No. 02-278, at 8 (Oct. 8, 2014) (noting the “unreasonable and excessive litigation risks” that exist under the TCPA). Members of the Commission are also aware of the TCPA liability risk faced by banks. In recent remarks, Commissioner Michael O’Rielly noted that the “broadened scope of the TCPA” has created “uncertainty and litigation risk for legitimate businesses[,]” and questioned whether the Commission should make TCPA compliance “harder” for banks when sending “*timely and relevant*” customer communications. Commissioner Michael O’Rielly, *Remarks of Commissioner Michael O’Rielly, Federal Communications Commission, before the Association of National Advertisers*, at 4 (Apr. 1, 2015) (emphasis retained), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0401/DOC-332813A1.pdf.

¹⁸ *Order* ¶ 27 (emphasis added).

III. Conclusion

For the foregoing reasons, Wells Fargo respectfully requests that the Commission grant Wells Fargo a retroactive waiver of Section 64.1200(a)(4)(iv) for any fax that was sent prior to April 30, 2015 with the invitation or permission of the recipient but that did not include the type of opt out notice specified by that rule.

Respectfully submitted,

WELLS FARGO & COMPANY

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April 29, 2015