

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:

Petition of MedTech Imaging, Inc. For Waiver of
Section 64.1200(a)(4)(iv) of the Commission's Rules

CG Docket No. 05-338

PETITION OF MEDTECH IMAGING, INC. FOR WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules,¹ MedTech Imaging, Inc. ("MedTech") respectfully requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the "Regulation") with respect to faxes that have been transmitted by MedTech (or on its behalf) with the prior express consent or permission of the recipients or their agents ("Solicited Faxes") after the effective date of the Regulation. For the reasons stated, a waiver is appropriate here.

I. INTRODUCTION.

MedTech is a small distributor of quality pre-owned ultrasound equipment. MedTech is currently facing a putative class action lawsuit seeking potentially uncapped statutory damages. The basis for this lawsuit is the Telephone Consumer Protection Act.

On October 30, 2014, the Commission released FCC Order 14-164 (the "Fax Order").² Prior to the Fax Order's release, various petitioners had challenged the Commission's authority to issue the Regulation, and alternatively sought retroactive waivers of its opt-out notice requirement for Solicited Faxes. In response to the admitted uncertainty about whether the opt-out notice

¹ 47 C.F.R. § 1.3.

² See *Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel October 30, 2014).

applied to Solicited Faxes, the Commission granted retroactive waivers to certain fax advertisement senders to provide temporary relief from any past obligation to provide opt-out notices. The waivers granted in the Fax Order apply only to the listed petitioners; however, the Commission noted other, similarly situated entities, like MedTech, may also seek such waivers.

Specifically, no real purpose is served by enforcing the Regulation with respect to recipients who have already provided “prior express invitation or permission.” In contrast, the public interest would be harmed by requiring parties, like MedTech, to divert substantial resources and staff away from its productive medical imaging distribution efforts to resolve unnecessary litigation stemming from confusion over the Commission’s regulations. A waiver is thus appropriate here.

II. BACKGROUND.

A. The Current Statutory and Regulatory Framework.

The Telephone Consumer Protection Act (“TCPA”), as codified in 47 U.S.C. § 227 and amended by the Junk Fax Prevention Act of 2005 (“JFPA”),³ prohibits, under certain circumstances, the use of a fax machine to send an “unsolicited advertisement.”⁴ An “unsolicited advertisement” is “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”⁵

As relevant to this Petition, the Regulation states a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out

³ See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); see also Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C. § 227 *et seq.*

⁴ 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).

⁵ *Id.* § 227(a)(5).

notice.”⁶ In addition to the Regulation, the Commission also adopted rules implementing the JFPA.⁷ As discussed, a footnote in the Junk Fax Order led to industry-wide confusion regarding the Commission’s intent to apply the opt-out notice to Solicited Faxes sent with the prior express permission of the recipient.⁸ The Commission clarified this outstanding issue in the Fax Order.

Pursuant to the Fax Order, the Commission “confirm[ed] that senders of fax ads must include certain information on the fax that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders.”⁹ Due to the aforementioned uncertainty,¹⁰ however, the Commission is now prepared to grant additional retroactive waivers:

[W]e recognize that some parties who have sent fax ads with the recipient’s prior express permission may have reasonably been uncertain about whether our requirement for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.

* * *

⁶ See 47 C.F.R. § 64.1200(a)(4)(iv); see also Junk Fax Order, 21 FCC Rcd at 3812, para. 48.

⁷ See generally *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration*, 21 FCC Rcd 3787 (2006) (the “Junk Fax Order”).

⁸ See Junk Fax Order para. 42 n.154 (“We note that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”) (emphasis added).

⁹ See Fax Order para. 1.

¹⁰ The Commission detailed the reasons for such uncertainty in the Fax Order: “Specifically, there are two grounds that we find led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient), the combination of which present us with special circumstances warranting deviation from the adopted rule. The record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission. Specifically, 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. We note that all petitioners make reference to the confusing footnote language in the record. Further, some commenters question whether the Commission provided adequate notice of its intent to adopt [the Regulation]. Although we find the notice adequate to satisfy the requirements of the Administrative Procedure Act, we acknowledge that the notice provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.” See Fax Order para. 24-25.

[W]e believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.

The Commission provided such other, similarly situated parties six months from the release of the Fax Order (October 30, 2014) to seek a waiver.¹¹ MedTech's Petition is thus timely.

B. MedTech is Named in a Lawsuit For Allegedly Violating the TCPA.

MedTech has been named in a lawsuit based on alleged violations of the TCPA's fax provisions in the Middle District of Pennsylvania. The lawsuit is titled *Robert Mauthe, M.D., P.C. v. MedTech Imaging, Inc.*, Case No. 3:15-cv-00656 (M.D. Pa.) (the "*Mauthe* case"). Plaintiff argues MedTech failed to provide an appropriate opt-out notice on the faxes at issue in the *Mauthe* case.¹²

III. DISCUSSION.

A. The Commission Should Grant a Retroactive Waiver of Section 64.1200(a)(4)(iv) for Any Solicited Fax Sent by MedTech or on its Behalf.

MedTech respectfully requests that the Commission grant a retroactive waiver of the Regulation for any Solicited Faxes sent by MedTech (or on its behalf) after the effective date of the Regulation. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown.¹³ Generally, the Commission may grant a waiver of its rules in a particular case if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.¹⁴ Furthermore, waiver is appropriate if special

¹¹ See Fax Order para. 30.

¹² See Class Action Complaint, Doc. 1 ¶¶ 8, 9, 14, 20, 34. MedTech also dispute, *inter alia*, whether fax(es) sent to Plaintiff and the proposed class were solicited. However, it is not necessary for the Commission to resolve that dispute in acting on this Petition, and the dispute does not impact the issues raised in this Petition. Indeed, the Commission expressly noted that the granting of such retroactive waivers should not "be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action." See Fax Order para. 31. The two issues are distinct.

¹³ 47 C.F.R. § 1.3; see also 47 C.F.R. § 1.925(b)(3)(i)-(ii).

¹⁴ See *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.¹⁵ As shown, both rationales apply.

First, a grant of the requested waiver is in the public interest. The TCPA and the Commission's TCPA rules are intended "to allow consumers to stop unwanted faxes."¹⁶ That purpose is not served where, as here, the recipient of the fax may have given permission to MedTech to send a fax advertisement, and importantly, was capable of contacting MedTech for purposes of opting out of future fax communications. Indeed, the exemplary fax attached to the *Mauthe* Class Action Complaint provided a number by which recipients can "be removed," and asked the recipient to "leave [their] fax number." (Dkt. No. 1-2.) And as discussed, in light of the Commission's *admitted* lack of clarity as to the scope/applicability of the Regulation, the grant of a waiver would better serve the public interest than the strict adherence to the rule.

Moreover, denial of the waiver would be inequitable and could impose unfair liability on MedTech based upon claims that Congress never intended to create. Such a waiver is also in line with the stated purpose of the Fax Order. Indeed, the Commission made clear that the avoidance of civil liability to businesses that may have inadvertently violated the Regulation trumps the public interest to consumers to recover under the TCPA when it expressly stated that:

The 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[. . .] This confusion or misplaced confidence, in turn, left some businesses potentially subject to significant damage awards under the TCPA's private right of action or possible Commission enforcement. We acknowledge that there is an offsetting public interest to consumers through the private right of action to obtain damages to defray the cost imposed on them by unwanted fax ads. On balance, however, we find it serves the public interest in this instance to grant a

¹⁵ See *Ne. Cellular Tel. Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990).

¹⁶ Junk Fax Order para. 48.

retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward.¹⁷

The public interest would also be harmed by requiring parties like MedTech to divert substantial resources and staff away from its productive medical distribution efforts to resolve unnecessary litigation efforts stemming from confusion over the Commission's regulations. Similarly, the Commission should also seek to disincentivize parties from abusing its rules for private gain. Accordingly, MedTech respectfully submits that the public interest would be served by the granting of its Petition for a retroactive waiver from the effective date of the Regulation.

IV. CONCLUSION.

For the reasons stated above, MedTech respectfully requests that the Commission grant MedTech a retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by MedTech (or on its behalf) after the effective date of the Regulation.

Dated: April 29, 2015

Respectfully submitted,

MEDTECH IMAGING, INC.

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¹⁷ Fax Order para. 27.