

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

In the Matter of	)	
Petition of Henry Schein Practice Solutions, Inc.	)	CG Docket No. 02-278
for Retroactive Waiver of	)	
47 C.F.R. § 64.1200(a)(4)(iv)	)	CG Docket No. 05-338
	)	

**PETITION FOR WAIVER**

Pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, and Paragraph 30 of the Commission’s *Order*, CG Docket Nos. 02-278 and 05-338, FCC 14-164 (rel. Oct. 30, 2014), Petitioner Henry Schein Practice Solutions, Inc. (“Henry Schein Practice Solutions”) respectfully requests that the Commission grant it a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) (the “Rule”) insofar as it may have sent facsimile advertisements before April 30, 2015 without opt-out notices that repeated verbatim the language specified in the Rule to recipients that had provided prior express invitation or permission.

**I. The FCC’s October 30, 2014 Order**

On October 30, 2014, the Commission issued Order FCC 14-164 (“FCC Order”) in these dockets finding that opt-out notices conforming to the rules adopted by the Commission’s 2006 Junk Fax Order, 47 C.F.R. § 64.1200(a)(4)(iv) (“Junk Fax Order”), be included on fax advertisements, regardless of whether a fax was sent with the recipient’s prior express invitation or permission. The Commission, however, granted retroactive waivers of the opt-out requirement to twenty-four senders of fax advertisements to provide “temporary relief from any past obligation to provide the opt-out notice to such recipients required by [the Commission’s]

rules.” FCC Order, ¶ 1. It also expressly allowed other similarly-situated businesses to seek their own retroactive waivers. *Id.*, ¶ 22.

As noted in the FCC Order, the Commission is permitted to waive any of its rules for good cause shown. *See* 47 C.F.R. § 1.3. In its October 30 Order, the Commission found good cause to grant the retroactive waivers because, among other factors, there was confusion in the interpretation of the Junk Fax Order, and misplaced confidence on the part of businesses that an opt-out notice was not required on faxes that were “solicited.” Specifically, the Commission noted that:

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.

\* \* \*

Further, some commenters question whether the Commission provided adequate notice of its intent to adopt section 64.1200(a)(4)(iv). 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. *FCC Order*, ¶¶ 24-25 (citations omitted).

The Commission found that granting the requested retroactive waivers would serve the public interest. *Id.*, ¶ 27. Because there may have been a mistaken belief by some parties that the opt-out notice requirement did not apply, the “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.” *Id.* (citations omitted). The Commission further found that these “factual circumstances ma[de] enforcing the rule unjust or inequitable.” *Id.*, ¶ 28.

The Commission directed other similarly-situated parties seeking their own retroactive waivers to “make every effort to file within six months of the release of this Order.” *Id.*, ¶ 30.

## II. Henry Schein Practice Solutions Should be Granted a Waiver

Henry Schein Practice Solutions is entitled to a retroactive waiver because it is similarly situated to the twenty-four other petitioners granted waivers by the FCC Order. As explained in the FCC Order, the Commission may grant a waiver where “(1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.” *Id.*, ¶ 22. Here, Henry Schein Practice Solutions meets both requirements for the same reasons that the parties who were granted waivers in the FCC Order received them.

First, the “special circumstances” that warrant a deviation from the Rule here are the same as those explained in the FCC Order. Henry Schein Practice Solutions, too, was confused by the footnote contained in the Junk Fax Order stating that the opt-out notice requirement only applied to communications that constituted *unsolicited* advertisements. *See* Junk Fax Order, 21 FCC Rcd at 3810, n. 154. Henry Schein Practice Solutions did not believe that the opt-out notice requirements of 47 CFR 64.1200(a)(4)(iii) were applicable to those faxes sent with the prior express invitation or permission of the recipients. Also, the fact that the notice of proposed rulemaking issued in advance of adopting the regulation at issue “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient” applies here too. FCC Order, ¶ 25. By virtue of these factual circumstances, Henry Schein Practice Solutions was confused about the applicability of the regulation at issue.

Second, granting Henry Schein Practice Solutions a retroactive waiver would serve the public interest. As explained in the FCC Order, this requirement is satisfied when “failure to comply with the rule—which ... could be the result of reasonable confusion or misplaced

confidence—could subject parties to potentially substantial damages.” *Id.*, ¶ 27. As discussed above, Henry Schein Practice Solutions, like the other petitioners who were granted waivers, was confused by the footnote contained in the Junk Fax Order, and could be subject to substantial liability under the TCPA.

As with the twenty-four petitioners who have already been granted limited retroactive waivers, the above discussion demonstrates that Henry Schein Practice Solutions should be granted a waiver.

### CONCLUSION

For all the foregoing reasons, Henry Schein Practice Solutions respectfully requests a retroactive waiver from liability under the TCPA for all faxes that it sent with the recipient’s prior express invitation or permission.

Dated: April 30, 2015

Respectfully Submitted,

HENRY SCHEIN PRACTICE SOLUTIONS, INC.

By: /s/ Judith L. Harris  
Judith L. Harris  
REED SMITH LLP  
1301 K Street, NW  
Suite 1100 – East Tower  
Washington, DC 20005  
Telephone: 202 414 9276

Counsel for Petitioner Henry Schein Practice Solutions, Inc.