

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of:

CG Docket No. 02-278

Management Information Technology Corp.,
Linda Graham and John Graham's

CG Docket No. 05-338

Petition for Retroactive Waiver of
47 C.F.R. §64.1200(a)(4)(iv)

PETITION FOR RETROACTIVE 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, 05-338, FCC 14-164, 61 Communications Reg. (P&F) 671 (October 30, 2014), Petitioners Management Information Technology Corp., John Graham and Linda Graham respectfully request the Commission grant them a retroactive waiver of Section 64.1200(a)(4)(iv) of its Rules.

I. THE COMMISSION'S OCTOBER 30, 2014 ORDER CLARIFYING THE JUNK FAX ORDER

On October 30, 2014, the Commission issued Order FCC 14-164 (the "Order") regarding the requirement that opt-out notices be provided on fax advertisements, confirming the rules adopted by the Commission's 2006 Order, 47 C.F.R. § 64.1200(a)(4)(iv) (the "Junk Fax Order"), regardless of whether a fax was *in fact* solicited, that is, where the recipient had actually requested or consented to receive it. In its Order, the Commission granted retroactive waivers of the opt-out requirement to the petitioners to provide "temporary relief from any past obligation to provide the opt-out notice to such recipients required by [the Commission's] rules." Order, ¶ 1.

The Commission found good cause to grant the retroactive waivers based on potential confusion in the interpretation of the Junk Fax Order:

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.

Order, ¶¶ 24, 25 (citations omitted).

The Commission found that granting the requested retroactive waivers would serve the public interest, noting that the "TCPA's [the Telephone Consumer Protection Act's] legislative history makes clear our responsibility to balance legitimate business and consumer interests." Order, ¶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 business potentially subject to significant damage awards under the TCPA's private right of action or possible Commission enforcement." *Id.* (citations omitted).

The Commission stated that "(o)ther, similarly situated parties may also seek waivers such as those granted in this Order[.]" although it expected that within six months all fax senders were "to be aware of and in compliance with U1e requirement." Order, ¶30. The Commission directed that parties making similar waiver requests make every effort to file within six months of the release of the Order. *Id.*

II. PETITIONERS ARE SIMILARLY SITUATED AND RESPECTFULLY REQUEST RETROACTIVE WAIVER PURSUANT TO THE ORDER

A. The Allegations in the Illinois Litigation Against Petitioners

Petitioners have been defendants in a putative class action lawsuit alleging violations of the TCPA, brought before the Circuit Court of Cook County, Illinois titled *Proex Janitorial, Inc. v. Management Information Technology Corp., et al.*, Case 10 CH 5159 (the "Illinois Litigation"). The plaintiff in the Illinois Litigation seeks to recover damages on behalf of itself and others purportedly similarly situated on the grounds that Petitioners allegedly sent faxes in violation of the TCPA and in particular, alleged that the faxes did not contain an opt-out notice that complied with the TCPA. Plaintiff seeks to recover on behalf of all persons who received faxes that did not contain an opt-out notice, regardless of whether the recipients had provided prior express permission to receive such faxes. Petitioners assert in the Illinois Litigation that they are not liable under the TCPA.

B. Petitioners Are Similarly Situated to Parties Granted Retroactive Waiver by the Order

Petitioners are similarly situated to the parties that were granted retroactive waivers by the Order. In the Illinois Litigation, Petitioners are alleged to have sent faxes that did not contain proper opt-out notices. As with the parties that were granted waivers by the Order, Petitioners finds itself potentially subject to liability, as well as the costs of litigation, based on the application of a provision of the Junk Fax Order over which the Commission has acknowledged reasonable confusion.

C. A Retroactive Waiver Is Appropriate

The Commission may grant a waiver where, as here, the underlying purpose of the rule would not be served and/or the factual circumstances mandate a waiver to avoid application of the rule that would be inequitable, unduly burdensome or contrary to the public interest. 47

C.F.R. §1.925(b)(3)(i)(ii); *see also* 47 C.P.R. § 1.3 (the Commission may waive any provision of its rules for good cause shown when it concludes that a waiver would serve the public interest, considering all relevant factors). The stated purpose of Section 64.1200 is to allow consumers to stop unwanted faxes. This purpose would not be furthered by subjecting Petitioners to jeopardy for faxes that did not contain proper opt-out notices where the recipients had provided prior express permission to receive (or invited) such faxes, and there was reasonable confusion over the rules relating to such faxes. Accordingly, the grant of a limited and retroactive waiver to Petitioners would serve the public interest in that the factors that weighed in favor of the grant of retroactive waiver to the parties addressed by the Order are similarly applicable here, and good cause exists for the grant of a retroactive waiver to Petitioners.

III. CONCLUSION

Petitioners understand the importance of compliance with the Commission's rules, including the Junk Fax Order, as confirmed and clarified by the Order, and have implemented procedures to ensure compliance. In light of the matters set forth above, Petitioners respectfully request retroactive waiver from liability under the TCPA and the FCC's regulations and orders relating to faxes sent to recipients who had provided prior express invitation or permission to receive such faxes but where such faxes did not contain opt-out notices in compliance with Section 64.1200(a)(4)(iii) and (iv).