

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	CG Docket No. 02-278
Petition of STRYKER LUBRICANT	)	
DISTRIBUTORS, INC. for Retroactive	)	CG Docket No. 05-338
Waiver of 47 C.F.R. § 64.1200(a)(4)(iv)	)	

**PETITION FOR RETROACTIVE WAIVER BY STRYKER LUBRICANT  
DISTRIBUTORS, INC.**

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 No. 05-338, FCC 14-164 (rel. Oct. 30, 2014), Petitioner Stryker Lubricant Distributors, Inc. (“Petitioner”), by its attorneys, Rock Fusco & Connelly, LLC, respectfully request that the Commission grant a retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (the “Regulation” or “2006 Order”) with respect to faxes that have been transmitted by Petitioner with the prior express consent or permission of the recipients or their agents (“Solicited Faxes”) after the effective date of the Regulation. The Commission recently granted a number of such waivers and invited similarly situated parties, such as Petitioner, to file requests for the same relief.

**I. THE COMMISSION’S 2006 AND OCTOBER 30, 2014 ORDERS**

In 2006, the Commission adopted rules concerning opt-out notices to be provided on fax advertisements, the Commission’s 2006 Junk Fax Order, 47 C.F.R. § 64.1200(a)(4)(iv) (“2006 Order”), regardless of whether a fax was solicited, that is, where the recipient had consented to receive it.

After the promulgation of the 2006 Order, plaintiffs and their attorneys have seized on the controversy and uncertainty of 2006 Order, created in part by confusing and conflicting

statements regarding the scope and applicability of such rule, to file numerous class action lawsuits for TCPA violations. Such lawsuits, including the Litigation discussed *infra*, have been brought against legitimate companies for engaging in consensual communications where the fax recipients had provided consent to receive faxes by the senders. Many of these class action lawsuits seek millions of dollars in damages based on the Commission’s conflicting statements pertaining to the Regulation.

On October 30, 2014, the Commission issued Order FCC 1-164 (“Order”) in this docket regarding the requirement that opt-out notices be provided on fax advertisements, conforming to the rules adopted by the 2006 Order. 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 2006 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 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 businesses 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 is expected that within six months all fax senders are “to be aware of and in compliance with the 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.*)

It is not necessary for the Commission to wade into the general dispute between plaintiffs of the various asserted class action lawsuit, nor even into the Litigation to which Petitioner is a part, in acting on this Petition. The Commission expressly noted that granting a waiver should not “be construed in any way to confirm or deny whether the [petitioner], in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.” (Order, ¶ 31).

There is no public interest in strict enforcement of the Regulation that created confusion in its application to fax recipients who had provided “prior express invitation or permission” to be sent faxes. In contrast, public interest would be harmed by requiring parties like Petitioner to divert substantial capital, time and human resources from its lawful business to engage in unnecessary litigation because of past confusion over the Commission’s Regulation. A waiver is thus appropriate here.

## **II. PETITIONER RESPECTFULLY REQUESTS A RETROACTIVE WAIVER PURSUANT TO THE ORDER**

### **A. The Commission Should Grant Petitioner A Waiver.**

Petitioner respectfully requests that the Commission grant a limited retroactive waiver of the Regulation for any Solicited Facsimiles sent by Petitioner 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. Generally, the Commission may grant a waiver of its rules in a particular case if the waiver would not undermine the policy objective of the pertinent rule and would otherwise serve the public interest. Further, 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 general rule. As shown, both rationales apply and Petitioner is entitled to a waiver under this standard for the same reasons the parties granted waivers in the 2006 Order received them.

**A. The Allegations in the TCPA Lawsuit Against Petitioner**

Petitioner is a defendant in a putative class action lawsuit alleging violations of the TCPA, which is currently pending in the United States District Court for the Northern District of Illinois, *Urban Elevator Service, LLC v. Stryker Lubricant Distributors Inc., et al.*, Case No. 1:15-cv-02128 (the “Litigation”). The plaintiff in the Litigation seeks to recover damages on behalf of itself and others similarly situated in part on grounds that Petitioner sent faxes in violation of the TCPA and has taken the position that consent is not an available affirmative defense if the alleged faxes did not include a proper opt-out notice. (Complaint, Dkt. 1, ¶ 48 (“Moreover, Defendants are liable to Plaintiff and the other class members under the TCPA for not including an opt-out notice even if Defendants ultimately prove that they obtained prior express permission to send advertisements by fax or prove that they had an established business relationship with some class member(s).”) Plaintiff seeks to recover on behalf of all persons who received faxes that did not contain the compliant opt-out notice, regardless of whether the recipients had provide prior express permission to receive such faxes. (Dkt. 1, ¶¶48 and 50)

Petitioner has not yet filed a responsive pleading to the Litigation. However, Petitioner will

assert in the Litigation that it is not liable under the TCPA because, among other reasons, the plaintiff and/or members of the putative class consented to receive the alleged facsimiles in their prior dealings and/or sales interactions with Petitioner. It expects to produce in discovery of that lawsuit documentation evincing the established relationship between it and the fax recipients, and the recipients' consent to receive faxes from Petitioner and, in most cases, explicit requests *for* faxes from Petitioner.

**B. Petitioner Is Similarly Situated to Parties Granted Waivers By the Order**

Petitioner is similarly situated to the parties that were granted retroactive waivers by the Order. In the Litigation, Petitioner is alleged to have sent faxes that did not contain proper opt-out notices. But Petitioner will contend, if the plaintiff's complaint is not dismissed, that faxes were sent with the prior express permission of the recipients and Petitioner did not understand the opt-out requirement to apply to solicited faxes. In short, as with the parties that were granted waivers by the Order, Petitioner finds itself potentially subject to massive liability, as well as the costs of litigation, based on the application of a provision of the 2006 Order over which the Commission has recognized there was confusion.

**C. A Limited Retroactive Waiver is Appropriate**

The Commission may grant a waiver where, as here, the underlying purpose of the rule(s) would not be served 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.F.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 potentially massive

liability for faxes that did not contain proper opt-out notices where the recipients had provided prior express permission to receive such faxes and there was confusion over the rules relating to such faxes. Accordingly, the grant of a limited and retroactive waiver to Petitioner would serve the public interest in that the factors that weighed in favor of the grant of retroactive waivers to the parties addressed by the Order are similarly applicable here, and good cause exists for the grant of a retroactive waiver to Petitioner.

Petitioner therefore respectfully requests a 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).

Petitioner understands the importance of compliance with the Commission's rules, including the 2006 Order as clarified by Order FCC 1-164, and have implemented procedures to ensure compliance, including working with counsel to develop TCPA-compliant opt-out language to be included with all soliciting faxes.

Date: April 30, 2015

Respectfully submitted,

STRYKER LUBRICANT DISTRIBUTORS, INC.

By: /s/ Patrick W. Chinnery

Matthew P. Connelly  
Patrick W. Chinnery  
Rock Fusco & Connelly LLC  
321 N. Clark St., Ste. 2200  
Chicago, Illinois 60654  
312-494-1000  
Counsel for Petitioners