

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

In the Matter of	)	
Petition for Waiver Of UBM LLC	)	
	)	CG Docket No. 02-278
	)	
	)	CG Docket No. 05-338
	)	

**REPLY OF UBM LLC IN SUPPORT OF ITS  
PETITION FOR RETROACTIVE WAIVER**

Pursuant to 47 C.F.R. § 1.3 and the Commission’s Order, CG Docket Nos. 02-278, 05-338, FCC 14-164, 29 FCC Rcd 13998 (Oct. 30, 2014) (the “Waiver Order”), Petitioner UBM LLC (“UBM”) respectfully submits the following reply in support of its Petition for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules, 47 C.F.R. § 64.1200(a)(4)(iv) (the “Regulation”), to the extent the Regulation might apply to any faxes transmitted by UBM (or on its behalf) with the prior express permission of the recipients or their agents.<sup>1</sup>

The Commission has clarified that an opt-out notice is required under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA” or “Act”), and the Regulation, 47 C.F.R. § 64.1200(a)(4)(iv), for facsimile advertisements sent with the recipients’ prior express permission or invitation and that the opt-out notice must comply with the requirements of 47 U.S.C. § 227(b)(1)(C) and (2)(D) and 47 C.F.R. § 64.1200(a)(4)(iii). Waiver Order at ¶ 1. Simultaneously, the Commission recognized that “good cause”—specifically, the state of justified, industry-wide confusion that gave rise inadvertent violations, potentially resulting in substantial liability or costs—exists for granting a retroactive waiver of this requirement. *Id.* at ¶¶ 23-28, 48, *ref., Rules and Regulations Implementing the Telephone Consumer Protection Act*

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<sup>1</sup> UBM has denied, and continues to deny, that it faxed advertisements or that the alleged faxes were unsolicited.

of 2005, Report and Third Order on Reconsideration, 21 FCC Rcd 3787, 3812, n. 154 (2006) (“Junk Fax Order”). Accordingly, the Commission retroactively waived its Regulation for twenty-seven petitioners and invited “similarly-situated” parties to seek the same relief.

UBM is similarly situated to the original parties who were already granted retroactive waivers. UBM currently is facing a putative class action lawsuit in which the plaintiff (“Grind Lap”) contends that UBM violated the TCPA and the Commission’s regulations by not including opt-out notices certain faxes—faxes which the plaintiff claims, but UBM denies, were “advertisements.” *Grind Lap Services, Inc. v. UBM LLC*, No. 14-cv-06448 (N.D.Ill.) (filed Aug. 21, 2014) (“*Grind Lap*”); Answer And Affirmative Defenses, *Grind Lap*, Dkt. # 39 (filed Mar. 30, 2015). One of the UBM’s defenses is that the alleged recipients of the faxes at issue—who subscribed to one of its publications—provided their prior express invitation or permission to receive such faxes. Answer And Affirmative Defenses, *Grind Lap*, Dkt. # 39 at p. 16.

Only one party submitted comments in opposition to the Petition: the named plaintiff in the putative class action pending against UBM. See *Grind Lap Services, Inc.’s Comments On The Petition Of UBM LLC For Retroactive Waiver* (“Comments”). For the reasons set forth below, and in UBM’s Petition, the Commission should reject Grind Lap’s arguments and grant the retroactive waiver sought by UBM.

**I. UBM Is Similarly Situated To The Parties To Whom The Commission Has Already Granted Retroactive Waivers.**

UBM is in the same position as those who were granted waivers in the Commission’s Order. First, like the petitioners to whom retroactive waivers have already been granted, UBM has been accused of sending faxes without the requisite opt-out notice prior to April 30, 2015 and after the Junk Fax Order. Petition at 2, n 8; see also Waiver Order at ¶ 1. Second, UBM has asserted that the subject fax, a subscription renewal notice, was sent with the recipients’ prior

express permission. Petition at n. 27; Waiver Order at ¶ 11. Third, but-for a retroactive waiver of the Regulation, UBM could face costs or liability—that are potentially substantial and class-wide—for sending faxes after obtaining the recipients’ prior express permission. Petition at 2, n. 8, 5, n. 27; Waiver Order at ¶ 27. Fourth, given that UBM sent the subject faxes after the Junk Fax Order, it was subject to the same confusion and “misplaced confidence” as the original petitioners; and, consequently, lacked legal certainty that an opt-out notice is required for solicited faxes. Petition at 6; Waiver Order at ¶¶ 24-26.

Contrary to Grind Lap’s argument, the Commission has already determined that these factors are sufficient to render UBM similarly situated to the petitioners who have already received waivers. Waiver Order at ¶¶ 1-2, 11, 22-31; *cf.*, Comments at 4.

The Commission did not require the original petitioners to make any showing that they had “in fact” obtained prior express permission to send faxes. Indeed, the Commission expressly declined to “confirm or deny whether petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.” Waiver Order at ¶ 31. Similarly, the Commission did not assess—and the original petitioners did not provide—information regarding the parties’ “business practices, faxing activity or how consumers’ faxing information was obtained.” *Id.* at ¶¶ 22-31; *see also e.g.*, Petition For Declaratory Ruling And/Or Waiver Of Unique Vacations, Inc., Petition of UnitedHealth Group Incorporated For Declaratory Ruling and/or Waiver, Petition of Carfax, Inc. for Declaratory Ruling and/or Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules, Petition of Stericycle, Inc. for Declaratory Ruling and/or Waiver Regarding 47 C.F.R. §64.1200(a)(4)(iv); *cf.* Comments at 4.<sup>2</sup>

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<sup>2</sup> However, the record in the underlying case demonstrates that UBM had a system in place for contacting consumers in an attempt to obtain express permission to send faxes. *E.g.*, *Grind Lap*, Dkt #44 (filed Apr. 1, 2015).

Simply: UBM is “similarly situated” to the original petitioners and, as such, should be granted a retroactive waiver of the Regulation.

## **II. Good Cause Exists To Grant UBM’s Petition.**

Grind Lap’s Comments do nothing rebut the good cause which exists for granting UBM’s petition.

First, as UBM previously asserted: the special circumstances detailed in the Order counsel in favor of waiver in its case. Petition at 6. Specifically, the “confusing situation” following the Junk Fax Order—caused by the inconsistent footnote and lack of explicit notice—left UBM with “no legal certainty that an opt-out notice is required for solicited faxes.” Petition at 5. In other words: UBM was “confused” as to whether, and in which specific situations, it was required to include an opt-out notice on faxes sent with prior express permission. *Id.* at 5-6.

Second, the public interest favors waiving the Regulation. UBM’s alleged failure to include an opt-out notice on the subject fax—sent after the Junk Fax Order—might leave it vulnerable to substantial costs or liability despite its reasonable confusion regarding the Regulation. Moreover, fairness counsels in favor of granting UBM the same waiver as the original petitioners. Unlike those who have already received waivers—who are similarly situated to UBM—without the waiver UBM could still face the potential for substantial liability or costs for alleged violations arising out of reasonable confusion and lack of legal certainty. Granting UBM’s Petition, and waiving the Regulation in its case, will ensure just and equal treatment.

In short: there is good cause for granting UBM a retroactive waiver of the Regulation.

## **III. Individualized Evidence of Subjective Confusion Is Not Required.**

Actual confusion—and evidence thereof—is not required to obtain a retroactive waiver of the Regulation. The Commission has made explicit that confusion is *presumed* based on the

contradictory footnote and lack of clear notice. The Order is not unclear in this regard. *Cf.*, Comments at p. 6. Therefore, discovery into “actual confusion” is unnecessary.

The Commission clearly articulated the sole basis of its decision to grant the original petitioners a retroactive waiver of the Regulation: that the “lack of explicit notice...and the ensuing contradictory footnote...resulted in a confusing situation for businesses,” generally. Waiver Order at ¶ 27. The combination of these factors “*presumptively* establishes good cause for retroactive waiver of the rule.” *Id.* at ¶ 26 (emphasis added). That “confusing situation”—not individualized evidence of particular petitioners’ confusion—warrants the grant of a waiver. *Id.*

Moreover, the Commission did not make any factual findings concerning individual, subjective confusion on the part of the original petitioners at issue in the Waiver Order, nor did it require or describe any evidence concerning the state of mind of the original petitioners. Waiver Order at ¶¶ 22-31. To the contrary, the Commission pointed primarily to the fact that “all petitioners make reference to the confusing footnote language” in their petitions, *id.* at ¶ 24, and to the fact that “we find nothing in the record here demonstrating that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so.” *Id.* at ¶ 26.

Evidence of actual, subjective confusion is not required. As such, discovery into this issue is unnecessary. To require a more burdensome showing from UBM—such as discovery—would be unfair and might implicate due process concerns with regard to this waiver process.

For all of these reasons, Petitioner UBM LLC, respectfully requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) granted to the parties in the Waiver Order, dated October 30, 2014.

Respectfully submitted,

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