

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

In the Matter of:)	
)	GC Docket No. 02-278
Petition of Ivoclar Vivadent, Inc. for Retroactive)	
Waiver of 47 C.F.R. § 64.1200(a)(4)(iv))	GC Docket No. 05-338
)	
)	

PETITION OF IVOCLAR VIVADENT, INC. FOR RETROACTIVE WAIVER

Pursuant to the Federal Communications 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. October 30, 2014) (“Order”), Petitioner Ivoclar Vivadent, Inc. (“Ivoclar Vivadent”), respectfully requests that the Commission grant it a retroactive waiver of 47 C.F.R. §64.1200(a)(4)(iv) (the “Regulation”) with respect to any alleged advertising faxes sent by Ivoclar Vivadent with the recipient’s prior express invitation or permission but without the opt-out notice identified in the Regulation.

I. Introduction

Ivoclar Vivadent, Inc. is a global leader in innovative materials and processes for quality, esthetic dentistry and its North American headquarters is located in Amherst, New York. The company serves dentists and dental laboratory professionals across the country. While Ivoclar Vivadent does not engage in facsimile marketing activities at the corporate level, on May 29, 2015 it was named as a defendant in a putative class action law suit¹ (the "Law Suit") alleging that it violated the Telephone Consumer Protection Act ("TCPA") by sending unsolicited facsimile advertisements.

¹ *G. Neil Garrett, D.D.S., P.C. v. Ivoclar Vivadent, Inc.*, No. 15 CV 4747 (USDC N.D. Ill).

It appears that a sales representative of Ivoclar Vivadent may have sent sales information and materials via facsimile to certain dentists and/or dealers who requested the information from the sales representative and who provided permission to the sales representative to send the materials via facsimile. Since the sales representative only sent materials via facsimile to recipients who requested the materials and provided permission to send the materials via facsimile, the sales representative believed the transmission of the materials via facsimile was permissible. The sales representative was not aware of the opt-out requirement under the Regulation and did not include the opt-out notice, which the Regulation requires, on the faxes sent to the recipients who requested the information.

Ivoclar Vivadent recently retained counsel to defend it in the Law Suit and as a result it now brings this Petition seeking a retroactive waiver of compliance with the Regulation. Until the Law Suit was filed and it engaged counsel to defend it, Ivoclar Vivadent was not aware of the Commission's October 30, 2014 Order or the need to seek a waiver from compliance with the Regulation or it would have filed this Petition seeking a retroactive waiver of the Regulation at an earlier date.

Since the adoption of the Regulation, plaintiffs and their attorneys have seized on the controversy and uncertainty surrounding the scope and applicability of the rules regarding solicited faxes, to bring numerous class action lawsuits under the TCPA. As a result, various petitioners sought clarification on the Regulation, challenged the Commission's authority to issue the Regulation, and alternatively sought retroactive waivers of its opt-out notice requirement for solicited faxes. On October 30, 2014, the Commission released the Order addressing this confusion.² In response to the admitted uncertainty about whether the opt-out

² See *Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Old 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).

notice 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. Since the waivers granted in the Order were limited to the listed petitioners, the Commission agreed to permit other, similarly situated entities, like Ivoclar Vivadent, to also seek such waivers.

The Commission determined that, because of potential confusion regarding whether the opt-out language was required in solicited fax advertisements, good cause supported a retroactive waiver, and that a waiver was in the public interest.³ Specifically, there is good cause to waive the Regulation with respect to recipients who have provided “prior express invitation or permission” to receive fax advertisements and where the sender was confused by the applicability of the opt-out notice requirement.⁴ Also, the waiver serves the public interest because it would be “unjust or inequitable” to subject parties, like Ivoclar Vivadent to “potentially substantial damages” stemming from confusion over the Commission’s regulations.⁵ The Commission invited “similarly-situated parties” to seek retroactive waivers of the opt-out requirement with respect to solicited advertising faxes.⁶ Accordingly, a waiver is appropriate here.

II. The Current Statutory and Regulatory Framework

The TCPA and the Junk Fax Prevention Act of 2005 (“JFPA”),⁷ prohibits, under certain circumstances, the use of a fax machine to send an “unsolicited advertisement.”⁸ An “unsolicited advertisement” is “any material advertising the commercial availability or quality of any

³ See Order ¶¶ 26-28.

⁴ See Order ¶¶ 24, 28.

⁵ See Order ¶¶ 27-28.

⁶ See Order ¶30.

⁷ 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. 5 227 *et seq.*

property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.”⁹

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 notice.”¹⁰ In addition to the Regulation, the Commission also adopted rules implementing the JFPA.¹¹ A footnote in the Junk Fax Order states that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”¹² This footnote 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. The Commission clarified this outstanding issue in the Order.

Specifically, in the Order, the Commission “confirm[ed] 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.”¹³ The Commission indicated in the Order that it is now prepared to grant additional retroactive waivers due to the previous uncertainty¹⁴:

⁸ 47 U.S.C. 55 227(a)(5) and (b)(1)(C).

⁹ *Id.* § 227(a)(5).

¹⁰ See 47 C.F.R. 5 64.1200(a)(4(iv)); see also Junk Fax Order, 21 FCC Rcd at 3812, para. 48.

¹¹ 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”).

¹² *Junk Fax Order*, 21 FCC Rcd at 3810 n.154 (emphasis added).

¹³ See Order ¶ 1.

¹⁴ The Commission detailed the reasons for such uncertainty in the 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

[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.

[W]e believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule)¹⁵

As noted above, Ivoclar Vivadent was not aware of the Commission's October 30, 2014 Order until recently when it retained counsel to defend it in the Law Suit. Otherwise Ivoclar Vivadent would have filed this Petition at an earlier date.

III. The Commission Should Grant a Retroactive Waiver of Section 64.1200(a)(4)(iv) for Any Solicited Faxes Sent by Ivoclar Vivadent.

As demonstrated below, Ivoclar Vivadent is similarly-situated to the parties who were granted retroactive waivers under the Order. As such, the Commission similarly should grant Ivoclar Vivadent a retroactive waiver of the opt-out notice requirement of 47 C.F.R. § 64.1200(a)(4)(iv) as applied to alleged advertising faxes sent to recipients who had provided prior express invitation or permission for such faxes.

The Commission may suspend, revoke, amend, or waive any of the Commission's rules if good cause is shown.¹⁶ 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.¹⁷ Furthermore, waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve

[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 Order ¶¶ 24-25 (internal footnotes omitted).

¹⁵ See Order ¶¶ 1 and 22.

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

¹⁷ See Order ¶23; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

the public interest than would strict adherence to the general rule.¹⁸ 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."¹⁹ That purpose is not served where, as here, the recipients of the faxes had given permission to Ivoclar Vivadent to send sales materials via facsimile, and importantly, were capable of contacting Ivoclar Vivadent for purposes of opting out of future fax communications. The recipients of the sales materials had a direct relationship with the Ivoclar Vivadent sales representative who they requested the materials from and thus knew how to contact the sales representative to stop the receipt of sales materials via facsimile if they wanted to do so. Ivoclar Vivadent's sales representative only sent faxes after receiving verbal consent from the customer to do so. Its marketing practices do not include purchasing fax lists from third-party vendors in order to send unsolicited faxes. 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 Ivoclar Vivadent based upon confusion as to the meaning of the Regulation, claims that Congress never intended to create. Such a waiver is also in line with the stated purpose of the Order. The Commission made it 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[. . .]

¹⁸ See Order ¶23; *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁹ Junk Fax Order ¶ 48.

. .] 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 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.²⁰

The public interest would also be harmed by requiring parties like Ivoclar Vivadent to divert substantial resources and staff away from ordinary business operations to resolve unnecessary litigation efforts stemming only from uncertainty over the Commission's regulations. Further, absent a waiver, Ivoclar Vivadent could be subjected to substantial statutory damages for allegedly failing to comply with a rule that the Commission has determined was the subject of confusion. Accordingly, Ivoclar Vivadent respectfully submits that the public interest would be served by the granting of its Petition for a retroactive waiver of the Regulation.

IV. Conclusion.

For the reasons stated above, Ivoclar Vivadent respectfully requests that the Commission grant it a retroactive waiver from compliance with 47 C.F.R. 64.1200(a)(4)(iv) for any solicited fax or fax sent with the consent or permission of the recipient, which it sent (or which was sent on its behalf) after the effective date of the Regulation.

²⁰ Order ¶ 27 (internal footnotes omitted).

Dated: June 24, 2015

Respectfully submitted,

IVOCLAR VIVADENT, INC.

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By one of its attorneys

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