

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the matter of Weinberg & Associates, Inc.  
Petition for Retroactive Waiver of 47 C.F.R.  
§64.1200(a)(4)(iv)

Docket Nos. CG 02-278; CG 05-338

**PETITION FOR RETROACTIVE WAIVER**

Petitioner, Weinberg & Associates, Inc., (hereafter “Weinberg” or “Petitioners”) by and through counsel and pursuant to the order issued by the Federal Communications Commission (the “Commission”) on October 30, 2014 in Docket Nos. 02-278 and 05-338 and Section 1.3 of the Commission’s rules, hereby respectfully requests the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the “Regulation”) of its rules with respect to the opt-out notice requirement for solicited facsimiles sent to recipients by or purportedly on behalf of, or marking the products or services of petitioner.

**I. BACKGROUND FACTS**

Various Acts, including the Telephone Consumer Protection Act of 1991 (“TCPA”) and the amendment to that Act, the Junk Fax Prevention Act of 2005 (“JFPA”), prohibit the dissemination of most unsolicited facsimile advertisements. These statutes prohibit parties from transmitting fax advertisements without the recipient’s prior express consent or permission. (47 U.S.C. § 227(b)(1)(c)). However, the Act provides an exception to the prohibition for unsolicited fax advertisements. This exception arises when an unsolicited fax advertisement is sent to a recipient with “established business relationships” to the senders provided the faxes contain an opt-out notice which satisfied the criteria set forth within the statute.

Notwithstanding the Act, the Commission appears to require the same opt-out notices on solicited faxes (as distinguished from “unsolicited faxes” defined in 47 U.S.C. § 227(b)) in its creation of 47 CFR Section 64.1200(a)(4)(iv). In order to resolve potential conflicts between the TCPA and 47 CFR Section 64.1200, the Commission, on October 30, 2014, issued an Order (the “Order”) addressing various claims seeking relief from the requirement and penalties associated with opt-out notices on faxes. Now, Weinberg & Associates respectfully submits its petition for retroactive waiver pursuant to the directives found within the October 30, 2014 Commission Order. A true and correct copy of this order is attached hereto and incorporated herein as Exhibit A. Then, on August 28, 2015, the Commission granted 117 petitions for waiver of the Regulation which had been filed by parties similarly situated (see Rules and Regulations implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278; 05-338 attached as Exhibit B.)

## II. ARGUMENT

### A. The October 30 Order’s Directive

The Commission, in the Order, found that good cause exists to grant retroactive waivers based on the reasonable and apparently significant confusion created by the language within the junk fax order in conjunction with the TCPA.

In the Order, the Commission recognized the “...inconsistency between a footnote contained in the ‘Junk Fax Order’ and the rule caus[ing] confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission.” (Exhibit A, pars. 24, 25.) Further, while the Commission found that notice was adequate to satisfy the requirements of the Administrative Procedure Act, the Commission “...acknowledged 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.” (Exhibit A, pars. 24-25.)

In finding that the confusion may leave some businesses subject to significant damage awards under the TCPA’s private right of action, the Commission held that granting retroactive waivers would further the public interests noting that “...the TCPA’s legislative history makes clear our responsibility to balance legitimate business and consumer interests.” (Exhibit A, par. 27.)

Weinberg now files this Petition for Waiver in an attempt to have this Commission waive the rule’s applicability, in the same manner as has done for other parties similarly situated to those that received express retroactive waivers within the October 30, 2014 order. The Commission, in fact, urged other parties in similar situations to submit waiver requests to the Commission to be handled on a case-by-case basis. The Commission specifically did not hold that the October Order would prejudge the outcome of future waiver requests absent such a Petition.

**B. Weinberg is Similarly Situated and Thus Should also Receive a Waiver**

Weinberg & Associates is similarly situated to parties such as those referenced in the October 30, 2014 Order. Thus, in accordance with the order and the Commission’s findings as set forth within that order, Weinberg & Association also should be granted a retroactive waiver of the regulation for the solicited fax transmitted by or on its behalf prior to the Order. The transmittal occurred before the potential conflict between solicited and unsolicited faxes was recognized. The claims set forth in this Petition are consistent with those “special circumstances” acknowledged by the Commission in its October 30, 2014 Order. As the Commission recognized there, the grant of the relief sought here would not threaten the statute’s purpose of avoiding unwanted faxes distributed to the public. As set forth previously, the

Complaint in question alleges Weinberg & Associates, faxed to Larry Turner on May 20, 2013, a solicited document which did not include the alleged express invitation or permission. As a result, Petitioner was named a defendant in a putative class action lawsuit alleging violations of the TCPA (as amended by the Junk Fax Prevention Act of 2005). There, plaintiff's attorney, Brian Wanka, asserted that "other members" may have improperly received faxes which purportedly did not display proper opt-out notices. Because the events in question allegedly occurred in May 2013, before this Commission acknowledged the potential for confusion within the Junk Fax Order, Weinberg & Associates is subject to liability based on a condition under which opt-out notices were not necessarily required on solicited faxes. This is exactly the special circumstances under which the Commission has acknowledged it has the ability to provide relief in such a manner as would not undermine the rules.

The special circumstances justify departing from the Commission's rules is based upon the widespread confusion among affected parties regarding whether opt-out requirements apply to those solicited faxes. As the Commission noted in its Order at paragraph 24, "...the combination of factors, the lack of explicit requirement in the Commission's notice of proposed rule-making and the contradictory language of the Commission's order implementing the Junk Fax Prevention Act..." presumptively establishes good cause for a retroactive waiver of the regulation. (See Exhibit A at paragraph 24.) Here, because of the limited nature of the allegations and the confusion of the rule, public interest would not be advanced by denying Weinberg's request for waiver.

Weinberg & Associates acknowledges the validity of the federal statute and its obligations to comply with federal statutes, specifically the TCPA, and the amendments thereto. However, in this instance, the mistake, as alleged – the sending of a solicited fax without an opt-

out provision, was inadvertent and, the opt-out provisions were unclear, at least in a retroactive prospective.

**C. A Waiver Favors the Public Interest**

Significantly, the public interest would *not* be advanced by denying Petitioner's request for a retroactive waiver. The Commission expressly acknowledged in its October 30 Order that the public interest *favors* offering relief to parties subject to substantial potential exposure in litigation based on objectively confusing circumstances. Specifically, as the Commission is aware, the October 30 Order states, in relevant part, as follows:

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.... 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 form. (Par. 27 October 30, 2014 Order).

Petitioner recognizes the importance of compliance with the Rules of the Commission and will continue all good faith efforts to ensure compliance with TCPA. 47 C.F.R. §1.3 grants the Commission the authority to waive any of its rules upon a showing of good cause, such as Weinberg & Associates has set forth herein.

## CONCLUSION

WHEREFORE, Petitioner, Weinberg & Associates, respectfully requests that the Commission grant its waiver petition and the request for a retroactive waiver for petitioner from all liability which may have been created under 47 CFR Section 64.1200(a)(4)(iv).

Respectfully submitted,

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