

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

In the Matter of Humana Insurance Company,	)	
Humana Inc., HumanaDental Insurance	)	
Company, Humana Health Plan, Inc.,	)	
CompBenefits Insurance Company,	)	CG Docket No. 02-278
CompBenefits Dental, Inc., American	)	
Dental Plan of North Carolina, Inc., The Dental	)	CG Docket No. 05-338
Concern, LTD and Golden West Dental and Vision	)	
Petition for Retroactive Waiver of 47 C.F.R.	)	
§ 64.1200(a)(4)(iv)	)	

**REPLY COMMENT IN FURTHER SUPPORT OF  
PETITION FOR RETROACTIVE WAIVER**

Petitioners, Humana Insurance Company, Humana Inc., HumanaDental Insurance Company (“HDIC”), Humana Health Plan, Inc., CompBenefits Insurance Company, CompBenefits Dental, Inc., American Dental Plan of North Carolina, Inc., The Dental Concern, LTD, and Golden West Dental and Vision, submit this Reply Comment<sup>1</sup> in support of their Petition for Retroactive Waiver, filed on December 18, 2015 (the “Petition”) pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, and paragraph 30 of the Commission’s October 30, 2014 Order<sup>2</sup> in CG Docket Nos. 02-278, 05-338 (the “October 30 Order”).

**I. Introduction**

Commenter Lawrence S. Brodsky (“Brodsky”), who sued HDIC in the United States District Court for the Northern District of Illinois alleging faxes sent to him by one of the petitioners, HDIC, violated the TCPA because they did not include the required opt-out notice,

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<sup>1</sup> The Consumer & Governmental Affairs Bureau allowed until February 19, 2016 for Reply Comments. *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, CG Docket nos. 02-278 , 05-338 (Jan. 29, 2016).

<sup>2</sup> *Petition for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 (2014) (“October 30 Order”).

submitted his comment in opposition to the Petition on February 12, 2016 (the “Brodsky Comment”).<sup>3</sup> Brodsky asserts three arguments in opposition to the Petition: (1) the Commission has no authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action; (2) Petitioners did not file their petition by April 30, 2015, and; (3) HDIC “sent its faxes pursuant to an ‘established business relationship’ not ‘prior express invitation or permission’ and are thus not subject to a waiver under the *October 30 Order*.” Brodsky’s arguments are meritless. Accordingly, the Commission should grant the requested retroactive waivers of Section 64.1200(a)(4)(iv) of the Commission’s rules for alleged fax advertising sent by Petitioners prior to April 30, 2015, to recipients who provided prior express permission or invitations to send such faxes.

## **II. Argument**

### **(1) Brodsky is wrong – the Commission has authority to grant retroactive waivers in a private right of action.**

Brodsky argues, without support, that the Commission does not have authority to “waive” violations of TCPA regulations in a private right of action. Brodsky Comment, p. 13. Brodsky is wrong and the Commission has held repeatedly that it has the authority to grant retroactive waivers, and has continued to do so since issuing the *October 30 Order*. The Commission reiterated this point when it issued its order on August 28, 2015,<sup>4</sup> and specifically held:

[W]e dismiss arguments that by granting waivers while litigation is pending violates the separation of powers as several commenter have suggested. As the Commission has previously noted, by addressing requests for declaratory ruling and/or waiver, we are interpreting a statute, the TCPA, over which Congress provided the Commission authority as the expert agency. Likewise, the mere fact

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<sup>3</sup> This Reply Comment will not address the arguments or issues in the Brodsky Comment which relate to JT’s Frame, Inc. or Weinberg & Associates, Inc. which are part of the *Petition for Retroactive Waiver by Weinberg & Assoc.* filed on December 8, 2015, which was filed by different counsel involving a different suit.

<sup>4</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, et al.*, CG Docket 02-278, 05-338, Order, DA 15-976, 30 FCC Rcd 8598 para. 11 (2015) (“*August 28 Order*”).

that the TCPA allows for private rights of action to enforce rule violations, does not undercut our authority, as the expert agency, to define the scope of when and how our rules apply.

*August 28 Order*, ¶13.

The Commission made the same ruling on December 9, 2015, when it granted additional retroactive waivers to petitions similarly situated to Petitioners here. *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, GC Docket Nos. 02-278, 05-338 (CGAB Dec. 9, 2015) (“*December 9 Order*”). In fact, in the *December 9 Order*, the Commission repeated the above explanation and quoted language from *October 30 Order*. *December 9 Order*, ¶12. Accordingly, Brodsky’s argument that the Commission cannot grant retroactive waivers fails and Petitioners’ request for a retroactive waiver of the Commission’s opt-out notice requirements should be granted.

**(2) Brodsky is wrong – Petitioners were never required to offer reasoning for the timing of the Petition and the Petition is not too late.**

Brodsky argues the Petition should be rejected because Petitioners did not file their request by April 30, 2015, and because Petitioners did not explain why it was not filed before that date.<sup>5</sup> Brodsky Comment, p. 14. Brodsky engages in extended speculation and conjecture about what Petitioners knew and when they knew it (Brodsky Comment, pp. 16-20), all of which is irrelevant. The Commission never described the April 30, 2015 date as a “deadline” beyond which waiver requests would be barred. Nor was Brodsky prejudiced by the fact that Petitioners filed their waiver request on December 18, 2015, as opposed to April 30, 2015.

Brodsky’s argument also ignores the Commission’s very recent refusals to deny petitions

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<sup>5</sup> The Petition was filed on December 18, 2015.

filed after April 30, 2015.<sup>6</sup> The Commission, in its *October 30 Order*, rejected the timing argument Brodsky makes here, making the point that what matters is not the timing of a waiver request but whether a petitioner is similarly situated to the petitioners granted waivers in the *October 30 Order*:

We examined these petitions, as we did each petition filed, independently. These petitions sought waiver for faxes sent prior to the April 30, 2015 deadline imposed by the *2014 Anda Commission Order*. As such, granting waivers to these parties does not contradict the purpose or intent of the initial waiver order as the parties involved were similarly situated to the initial waiver recipients.

*August 28 Order*, ¶20.

Then, in its *December 9 Order*, the Commission reiterated its position that petitions for retroactive waiver would be granted, even when filed after April 30, 2015: “Finally, we decline to reject petitions solely on the basis that they were filed after April 30, 2015. We observe that all of the petitions resolved by this Order were filed after the six-month date (April 30, 2015) referenced in the *2014 Anda Commission Order*.” *December 9 Order*, ¶18.

The Commission made clear in its *August 28 Order* and *December 9 Order* that the date by which a request for a retroactive waiver is filed is not relevant to the granting or denying of a petition. *August 28 Order*, ¶ 20; *December 9 Order*, ¶18. There is no dispute that the faxes for which Petitioners seek a retroactive waiver were sent before April 30, 2015, and that the Petitioners are similarly situated to the initial waiver recipients. As a result, the Commission should grant Petitioners’ retroactive waiver request.

**(3) Brodsky is wrong – Petitioners sent the faxes at issue pursuant to the express invitation and consent of the recipients.**

Brodsky is playing games with Petitioners’ contract language. The TCPA and the Commission’s regulations permit the transmission of an unsolicited fax advertisement sent without

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<sup>6</sup> Brodsky also admits that the Commission never determined that petitions submitted after April 30, 2015, would be denied. Brodsky Comment, p. 15.

a recipient's express invitation or consent *if* the fax was sent pursuant to an "established business relationship" ("EBR").<sup>7</sup> 74 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(4)(i)-(iv). The *October 30 Order* declared that faxes sent pursuant to that EBR exception were not eligible for retroactive waivers. *October 30 Order*, ¶ 2 n.2 and ¶ 27 n.99. Rather, waivers were only available for fax ads "sent to a recipient that ha[d] provided prior express invitation or permission to the sender." *October 30 Order*, ¶ 2 n.2 and ¶ 27 n.99.

Petitioners' contracts with the fax recipients acknowledged the *existence* of an established business relationship between the parties, but nothing in the faxes (or HDIC's pleadings) states the faxes were sent *pursuant to* that relationship. Rather, the faxes were sent pursuant to the recipients' express invitation and consent in their contracts with Petitioners.

GPA [the fax recipient] understands and agrees that the Company and GPA through the established business relationship by this agreement may choose to communicate with GPA through the use of mail, email or facsimile to the address(es) and facsimile number(s) of the GPA. In addition, Company may begin immediately using any changes to such contact information.

Brodsky cherry-picks the phrase "established business relationship" from Petitioners' contracts and argues that, that Petitioners *sent* the faxes at issue *pursuant to* an "established business relationship" and, therefore, Petitioners are not eligible for a retroactive waiver. Brodsky's argument ignores the plain (and complete) language used in Petitioners' contracts with the fax recipients. The consent and permission the fax recipients give Petitioners to send them faxes could hardly be stated more plainly. Because Petitioners sent the faxes at issue pursuant to that consent and permission, Petitioners are entitled to the requested retroactive waiver.

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<sup>7</sup> "The term established business relationship for purposes of ... the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with our without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party." 47 C.F.R. § 64.1200(f)(6).

Second, Brodsky is wrong that the *December 9 Order* supports his argument. The *December 9 Order* states that it denied the request of a single petitioner who alleged that it sent faxes “to those parties with whom it had an existing business relationship[.]” *December 9 Order*, ¶¶2, 21. Neither HDIC, nor any of the other Petitioners have ever suggested they sent faxes pursuant to an “Existing Business Relationship” as that term is defined in the regulations. To the contrary, they have always maintained that they sent the faxes at issue pursuant to the express invitation and consent of the fax recipients and, thus, Petitioners are similarly situated to the petitioners granted waivers in the *October 30 Order*. Petition, pp. 5, 6. The contractual language makes the fax recipients’ consent clear enough and, in any case, the trier of fact in underlying cases will ultimately determine whether express permission was ever given, not the Commission. *December 9 Order*, ¶16.

### **III. Conclusion**

Nothing in the Brodsky Comment supports rejecting Petitioners’ waiver request. For the reasons stated herein and in their Petition filed on December 18, 2015, Humana Insurance Company, Humana Inc., HumanaDental Insurance Company, Humana Health Plan, Inc., CompBenefits Insurance Company, CompBenefits Dental, Inc., American Dental Plan of North Carolina, Inc., The Dental Concern, LTD, and Golden West Dental and Vision, respectfully request that the Federal Communications Commission grant each of them a retroactive waiver from the opt-out notice requirements of 47 C.F.R. § 64.1200(a)(4)(iv) for faxes sent prior to April 30, 2015 with the permission of the requestor and from any liability under 47 C.F.R. § 64.1200(a)(4)(iv) for such faxes sent prior to April 30, 2015.

*February 19, 2016*

Respectfully submitted,

**HUMANA INSURANCE COMPANY,  
HUMANA INC., HUMANADENTAL  
INSURANCE COMPANY, HUMANA  
HEALTH PLAN, INC., COMPBENEFITS  
INSURANCE COMPANY, COMPBENEFITS  
DENTAL, INC., AMERICAN DENTAL PLAN  
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CONCERN, LTD AND GOLDEN WEST  
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