

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

In the Matter of:

Petition of Legal & General America, Inc., for
Waiver of Section 64.1200(a)(4)(iv) of the
Commission's Rules

CG Docket No. 02-278

CG Docket No. 05-338

**PETITION OF LEGAL & GENERAL AMERICA, INC.
FOR RETROACTIVE FAX OPT-OUT WAIVER**

Pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules,¹ Petitioner Legal & General America, Inc., on behalf of itself and its subsidiaries (collectively "Legal & General America" or "Petitioner"), respectfully requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) (the "Rule") with respect to opt-out notices on faxes transmitted on or before April 30, 2015, by Petitioner or on behalf of Petitioner with the prior express consent or invitation of the recipients or their agents.

On October 30, 2014, the Commission issued FCC Order 14-164 (the "Fax Order") in Docket Nos. 02-278 and 05-338. The Fax Order granted a retroactive waiver of the Rule to a group of petitioners facing lawsuits that alleged, in part, that the petitioners had violated the Rule by failing to include specific opt-out language in their faxes even when the faxes were sent with the recipient's prior express invitation or permission. Based on confusion surrounding the Rule, the Commission determined that good cause supported a retroactive waiver and that a waiver

¹ 47 C.F.R. § 1.3.

was in the public interest. The Commission also authorized other similarly situated entities to seek retroactive waivers.²

Petitioner Legal & General America is similarly situated to the petitioners that have received a retroactive waiver because it is facing two putative class action lawsuits alleging that its agents sent faxes in violation of the Telephone Consumer Protection Act (“TCPA”), as amended by the Junk Fax Protection Act (“JFPA”), and specifically alleging that the faxes failed to include an appropriate opt-out notice.

The Fax Order requested that parties make “every effort” to pursue a retroactive waiver on or prior to April 30, 2015. More recently, the Commission has granted a number of waivers requested after April 30, 2015 and has indicated that granting waiver requests filed after April 30, 2015 is consistent with the Fax Order where the petitioner is similarly situated to the initial waiver recipients.³

Here, Petitioner was only recently served with two lawsuits, filed in December 2015 and January 2016, respectively. Petitioner is still preparing responsive pleadings in these lawsuits and is still investigating the allegations. Petitioner is filing this waiver request as soon as practicable following the filing of these lawsuits.

I. BACKGROUND

A. Pending Litigation Against Petitioner

Petitioner Legal & General America is a financial services company offering life insurance and annuities. Petitioner’s life insurance and annuity products are underwritten and issued by its subsidiaries and distributed primarily through independent insurance agents.

² See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 14-164 (rel. Oct. 30, 2014).

³ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-1402 (rel. Dec 9, 2015).

Petitioner was recently named as a defendant in two putative class action lawsuits, both filed by serial TCPA litigators Anderson + Wanca, who have filed dozens (if not hundreds) of junk fax lawsuits throughout the country. These two cases are pending in federal courts in Florida and New Jersey, respectively. Copies of the respective complaints are attached as Exhibits 1 and 2: (1) *JWD Automotive, Inc. d/b/a Napa Auto Care of Cape Coral v. DJM Advisory Group LLC et al.*, Case No. 2:15-cv-793 (M.D. Fla., filed December 21, 2015), and (2) *Russell M. Holstein, PHD, LLC v. Banner Life Ins. Co. et al.*, Case No. 3:16-cv-462 (D.N.J., filed January 27, 2016) (the “Litigation”).

The Complaints allege that agents of Petitioner sent unsolicited fax solicitations to the plaintiffs and putative class members that did not include the precise opt-out notice required by the Rule, among other claims. Each Complaint focuses on one facsimile advertisement allegedly sent before April 2015. In the first case, filed in Florida, the fax was allegedly sent between October 2014 and January 2015. In the second case, filed in New Jersey, the fax was allegedly sent in February 2013. Petitioner disputes that the faxes were unsolicited and that any class treatment of these claims are proper.⁴ In addition, although the Complaints purport to challenge unsolicited faxes, the class definition and claims apparently also seek to impose liability for any fax that did not display a proper opt-out notice, even for those faxes that were authorized by the recipient.⁵

Petitioner is not asking the Commission to resolve the factual and legal issues raised in the pending Litigation, as those issues remain within the jurisdiction of the courts.⁶ Instead, Petitioner seeks the same retroactive waiver that the Commission granted to the petitioners in the

⁴ By submitting this application for waiver, Petitioner does not waive any defenses it may assert in the Litigation.

⁵ See Exs. 1 and 2.

⁶ The Commission declared that granting a waiver should not “be construed in any way to confirm or deny whether the petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.” See Fax Order. ¶ 31.

Fax Order because the plaintiffs in the Litigation allege that faxes sent with the express permission of the recipient(s) failed to include an opt-out notice that complied precisely with the Rule.

B. The Current Statutory and Regulatory Framework

The TCPA, as codified in 47 U.S.C. § 227 *el seq.*, and amended by the JFPA, prohibits under certain circumstances the use of a fax machine to send an “unsolicited advertisement.”⁷ An “unsolicited advertisement” is “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”⁸

The Rule states that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.”⁹ In 2006, the FCC issued its 2006 Junk Fax Order setting forth additional rules and guidance on fax advertisements.¹⁰ As the FCC has recently acknowledged, a footnote in the 2006 Junk Fax Order created uncertainty regarding the Commission’s intent to apply the opt-out notice requirement to Solicited Faxes.¹¹ In addition, the Commission acknowledged that its guidance was unclear regarding the opt-out requirement on fax ads sent with the prior express permission of the recipient, which also created confusion.

In the Fax Order, the Commission “confirm[ed] that senders of fax ads must include certain information on the fax that will allow consumers to opt out even if they previously agreed

⁷ 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).

⁸ *Id.* § 227(a)(5).

⁹ See 47 C.F.R. § 64.1200(a)(4)(iv)

¹⁰ *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 at 3812. para. 48 (2006) (the “2006 Junk Fax Order”).

¹¹ See Junk Fax Order, 21 FCC Rcd at 3818. para. 42 n. 154 (“We note that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”) (emphasis added).

to receive fax ads from such senders.”¹² Due to the confusion acknowledged by the FCC, however, the Commission granted retroactive waivers to parties who had not included the opt out language on solicited faxes. As explained by the Commission:

[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.¹³

The Commission has afforded other affected parties similarly situated to the petitioners to seek a waiver.¹⁴ The Commission has continued to grant retroactive waivers beyond April 30, 2015 to similarly situated entities and should do the same for Petitioner herein.¹⁵

II. THE COMMISSION SHOULD GRANT A LIMITED RETROACTIVE WAIVER OF THE RULE FOR ANY SOLICITED FAX SENT BY PETITIONER OR ON ITS BEHALF.

As a result of the Litigation, Petitioner is similarly situated to the petitioners that received retroactive waivers by the Fax Order, making the granting of a waiver appropriate here. Section 1.3 of the Commission’s rules permits the Commission to grant a waiver if good cause is shown.¹⁶ Generally, the Commission may grant a waiver if it would not undermine the policy objective of the pertinent rule and would otherwise serve the public interest.¹⁷ Further, a waiver

¹² See Fax Order, ¶ 1.

¹³ Fax Order, ¶¶ 1, 22.

¹⁴ See Fax Order, ¶ 30.

¹⁵ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 15-1402 (rel. Dec 9, 2015).

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

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

is appropriate if special circumstances warrant a deviation from the general rule, and the deviation would better serve the public interest than would strict adherence to the general rule.¹⁸

Here, special circumstances favor deviation from the general rule—rather than strict adherence. As detailed in the Fax Order, good cause has been established due to the confusing footnote in the Junk Fax Order, which indicated that the opt-out notice requirement applies only to unsolicited advertisements.¹⁹ The Commission stated that this could reasonably be read to mean that a company like Petitioner need not include an opt-out notice when sending solicited faxes.²⁰ In addition, the Commission’s notice of proposed rulemaking also failed to provide explicit notice that the it was planning to require the opt-out notice for solicited faxes.²¹ The Commission has already determined that “this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.”²² This is especially true here, given that the faxes at issue in the Litigation contained information allowing recipients to opt-out of receiving future faxes.

The Commission also determined that granting a waiver under these circumstances would serve the public interest.²³ In this instance, granting a waiver to Petitioner would not undermine the policy objective of the TCPA, which is “to allow consumers to stop unwanted faxes.”²⁴

Petitioner has every incentive not to send unwanted faxes and risk offending potential customers who may file additional litigation. Absent a waiver, companies like Petitioner may be subject to substantial expense and monetary damages for failing to comply with a rule the Commission has already determined caused significant confusion. Denial of waiver could

¹⁸ *Id.*

¹⁹ *See* Fax Order, ¶¶ 26-27.

²⁰ *Id.* at ¶ 24.

²¹ *Id.* at ¶ 26.

²² *Id.*

²³ *Id.* at ¶ 27.

²⁴ Junk Fax Order ¶ 48.

subject Petitioner to significant money damages—the bulk of which would go to plaintiffs’ lawyers rather than furthering the TCPA’s policy objective of preventing unwanted faxes. The public interest will be harmed by requiring parties like Petitioner to divert substantial capital and human resources from its economically productive activities to defend litigation brought on the basis of confusing regulations.

III. CONCLUSION

Petitioner Legal & General America is similarly situated to the entities that received a waiver from the Fax Order. For the reasons stated above, Petitioner respectfully requests that the Commission grant a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by Petitioner or on behalf of Petitioner (or any of its subsidiaries) prior to April 30, 2015.

March 31, 2016

Respectfully submitted,

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