

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

In the Matter of	)	
	)	
	)	CG Docket No. 02-278
Petition of Roche Diagnostics Corporation	)	
and Roche Diabetes Care, Inc.	)	CG Docket No. 05-338
for Waiver of Section 64.1200(a)(4)(iv)	)	
of the Commission’s Rules	)	

**PETITION OF ROCHE DIAGNOSTICS CORPORATION  
AND ROCHE DIABETES CARE, INC.  
FOR WAIVER OF SECTION 64.1200(a)(4)(iv) OF THE COMMISSION’S RULES**

Pursuant to the Order issued by the Commission on October 30, 2014, in the above-referenced dockets<sup>1</sup> and in accordance with Section 1.3 of the Commission’s rules,<sup>2</sup> Roche Diagnostics Corporation and Roche Diabetes Care, Inc. (“Roche”), hereby respectfully request that the Commission grant Roche a waiver of Section 64.1200(a)(4)(iv) of its rules<sup>3</sup> (the “Solicited Fax Rule” or “Rule”) with respect to faxes that were transmitted by or on behalf of Roche, with the recipient’s prior express invitation or permission, on or before April 30, 2015. Roche is similarly situated to others that have received waivers from the Commission of the Solicited Fax Rule, and, as explained more fully herein, the public interest would be served by grant of this petition.

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<sup>1</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 29 FCC Rcd 13998 (2014) (“*Anda Order*”).

<sup>2</sup> 47 C.F.R. § 1.3.

<sup>3</sup> *Id.* at § 64.1200(a)(4)(iv).

## I. Background

The Telephone Consumer Protection Act of 1991 (“TCPA”),<sup>4</sup> as amended by the Junk Fax Prevention Act of 2005 (“JFPA”),<sup>5</sup> prohibits the transmission of most unsolicited advertisements via facsimile — that is, most fax advertisements sent without the recipient’s prior express invitation or permission.<sup>6</sup> The TCPA provides a narrow exception to this prohibition for unsolicited advertisements faxed pursuant to an Established Business Relationship (“EBR”) between the sender and the recipient, so long as the fax includes an opt out notice that meets certain statutory standards and complies with other requirements.<sup>7</sup> The Solicited Fax Rule purports to impose the *same* opt out notice requirement on faxes sent *with* the recipient’s prior express invitation or permission — that is, for *solicited* faxes<sup>8</sup> — even though the relevant statutory prohibition, codified at 47 U.S.C. § 227(b), authorizes the FCC to regulate only “unsolicited advertisements,” which are defined by the TCPA’s plain language to *exclude* faxes that are transmitted with a person’s “prior express invitation or permission, in writing or otherwise.”<sup>9</sup>

As the Commission is well aware, plaintiffs’ attorneys have filed countless putative class action lawsuits against companies for alleged violations of the TCPA’s fax provisions and related Commission regulations. Such suits can be highly lucrative for plaintiffs and their counsel because the TCPA authorizes statutory damages for a violation of Section

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<sup>4</sup> Pub. L. No. 102-243, 105 Stat. 2394, § 3(a) (1991), *codified at* 47 U.S.C. § 227.

<sup>5</sup> Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified at* 47 U.S.C. § 227.

<sup>6</sup> 47 U.S.C. § 227(b)(1)(C).

<sup>7</sup> *Id.*

<sup>8</sup> 47 C.F.R. § 64.1200(a)(4)(iv).

<sup>9</sup> 47 U.S.C. § 227(a)(5)

227(b) of the Communications Act “or the regulations prescribed under” that subsection.<sup>10</sup> It is not uncommon for class action lawsuits to seek millions of dollars or more in statutory damages for alleged violations that, as a practical matter, have a negligible to non-existent effect on consumers and businesses. Such is the case with respect to suits filed in recent years targeting *solicited* faxes based on alleged violations of the Solicited Fax Rule.

In the *Anda Order*, the Commission recognized that the process by which it promulgated the Solicited Fax Rule may have resulted in inadvertent violations of the Rule based on justifiable confusion among fax senders regarding the Rule’s application, and that the public interest is not served if such inadvertent violations leave “businesses potentially subject to significant damage awards under the TCPA’s private right of action or possible Commission enforcement.”<sup>11</sup> Accordingly, although the Commission reaffirmed its assertion that Section 227(b) is the proper statutory basis for the Solicited Fax Rule, the Commission waived the rule with respect to solicited faxes that petitioning parties sent through April 30, 2015.<sup>12</sup>

Furthermore, although the *Anda Order*’s waivers applied only to faxes sent by the petitioners named in the *Anda Order*, the Commission noted that “[o]ther, similarly situated parties, may also seek waivers such as those granted in this Order.”<sup>13</sup> Subsequently, the Consumer and Governmental Affairs Bureau has granted similar waivers to numerous similarly

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<sup>10</sup> *Id.* at § 227(b)(3) (“A person or entity may . . . bring in an appropriate court of that State—(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to . . . receive \$500 in damages for each such violation . . . , or (C) both such actions”). Section 227(b)(3) goes on to state that “[i]f the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award” available under Section 227(b)(3)(B) by three times, so up to \$1,500 for each violation.

<sup>11</sup> *See Anda Order*, 29 FCC Rcd at 14010-11 ¶ 27.

<sup>12</sup> *Id.* at 14004-05 ¶ 14, 14013 ¶ 36.

<sup>13</sup> *Id.* at 14011 ¶ 30.

situated parties with respect to any solicited faxes those parties sent through April 30, 2015.<sup>14</sup>

Roche is a similarly situated party, and this petition seeks such a waiver.

## **II. Roche is Similarly Situated to Prior Recipients of Waivers Under the *Anda Order***

Roche currently is facing a putative class action lawsuit under the TCPA based on the same basic claims discussed in the *Order*. Roche offers a broad portfolio of tools that assist healthcare providers in the prevention, diagnosis and management of diseases and medical conditions. Roche frequently communicates with these healthcare providers, including by fax, on a range of matters such as changes in Roche's products, insurance reimbursement procedures, and safety information.

In April 2016, Econo-Med Pharmacy, Inc. ("Econo-Med") filed a putative TCPA class action lawsuit against Roche, alleging that Roche sent Econo-Med an unsolicited fax advertisement that did not contain an opt-out notice in full compliance with the Commission's rules, as well as unspecified other "similar" faxes.<sup>15</sup> Notably, the fax that Econo-Med attached to its Complaint does contain an opt-out notice, which states: "If you would prefer to opt out from receiving these faxes or have further questions, please respond to rid.dcfax@roche.com

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<sup>14</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 30 FCC Rcd 8598, 8608 ¶ 11 (CGB 2015) ("*August 2015 Order*"); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, 30 FCC Rcd 14057, 14062 ¶ 10 (CGB 2015) ("*December 2015 Order*").

<sup>15</sup> See *Econo-Med Pharmacy, Inc. v. Roche Diagnostics Corp.*, Complaint, No. 1:16-cv-00789, at ¶¶ 11, 13-17 (S.D. Ind. filed April 11, 2016) ("*Complaint*"). Econo-Med also brings a claim under an Indiana statutory provision that incorporates 47 U.S.C. § 227 and its implementing regulations by reference. See Complaint ¶ 39. As Roche has noted in its Answer to the Complaint, Roche Diagnostics Corporation is not the proper party; the proper party is Roche Diabetes Care, Inc. See *Econo-Med Pharmacy, Inc. v. Roche Diagnostics Corp.*, Defendant's Answer and Defenses to Complaint, No. 1:16-cv-00789, at 1 (S.D. Ind. filed June 1, 2016). Out of an abundance of caution, this petition seeks a waiver of the Solicited Fax Rule on behalf of both entities.

with your fax and phone number.”<sup>16</sup> Roche is still assessing Econo-Med’s factual allegations, including its allegation that the fax it received was unsolicited. Nonetheless, Econo-Med asserts that, “regardless of whether the fax is unsolicited, a faxed advertisement is illegal unless it includes an opt-out notice on its first page that complies with” each detail of the Solicited Fax Rule.<sup>17</sup> Accordingly, Econo-Med seeks to represent a class consisting of:

All persons and entities who hold telephone numbers that received a facsimile transmission from Defendant at any time during the Statute of Limitations to present (the “Class Period”) that 1) promotes Defendant’s products and 2) contains an opt-out notice identical or substantially similar to that contained on the facsimile advertisement attached as Exhibit A to the Complaint.<sup>18</sup>

Thus, under the proposed class definition, even if Econo-Med or other class members expressly consented to receive a fax from Roche, those same recipients could collect statutory damages of \$500 or more from Roche if the fax did not display the opt-out notice Congress mandated for unsolicited, EBR-based faxes.

For the same reasons set forth in the petitions addressed by the *Anda Order*, Roche maintains that the Commission had — and has — no authority under Section 227(b) to promulgate the Solicited Fax Rule.<sup>19</sup> Assuming *arguendo*, however, that the Solicited Fax Rule is valid, the Commission should grant Roche a waiver like the waivers granted in the *Anda Order* and in the subsequent Bureau-level decisions. As the *Anda Order* noted, the Notice of Proposed Rulemaking in the Commission’s proceeding to implement the JFPA “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior

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<sup>16</sup> Complaint at Exhibit A.

<sup>17</sup> See Complaint ¶ 30.

<sup>18</sup> Complaint ¶ 18.

<sup>19</sup> See *Anda Order*, 29 FCC Rcd at 14001-03 ¶¶ 6, 9-10 and pleadings cited therein.

express permission of the recipient.”<sup>20</sup> In addition, the *Anda Order* acknowledged that contradictory language contained in the Commission’s order implementing the JFPA “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.”<sup>21</sup> This “combination of factors presumptively establishes good cause for retroactive waiver” of the Solicited Fax Rule.<sup>22</sup> Such waivers are in the public interest in part because, without the waivers, parties could be subject to substantial damages as a result of inadvertent violations resulting from the confusion surrounding the requirements for solicited faxes.<sup>23</sup>

This Petition does not ask the Commission to resolve specific questions regarding the faxes Roche sent to Econo-Med or to any other particular recipient, such as whether the recipient consented to receive Roche’s faxes or whether the recipient at any point revoked any such consent. Those factual determinations are properly left for the District Court. Nor does Roche seek a waiver for any faxes sent after April 30, 2015. Thus, granting the waiver Roche requests “does not contradict the purpose or intent of the initial waiver order as the parties involved are similarly situated to the initial waiver recipients.”<sup>24</sup> Like the parties who were granted waivers in the *Order*, Roche may face substantial damages if solicited faxes sent during a period of justifiable confusion over the requirements applicable to such faxes inadvertently

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<sup>20</sup> *Id.* at 14009-10 ¶ 25.

<sup>21</sup> *Id.* at 14009 ¶ 24.

<sup>22</sup> *Id.* at 14010 ¶ 26.

<sup>23</sup> *Id.* at 14010-11 ¶ 27.

<sup>24</sup> *August 2015 Order*, 30 FCC Rcd at 8611 ¶ 20; *see also December 2015 Order*, 30 FCC Rcd at 14064 ¶ 18 (same).

failed to comply with those requirements. As the *Anda Order* acknowledged, such a result would be unjust and inequitable.<sup>25</sup>

**Conclusion**

For the reasons stated above, the Commission should grant Roche a waiver of Section 64.1200(a)(4)(iv) of the Commission's rules with respect to any faxes transmitted by or on behalf of Roche prior to April 30, 2015, pursuant to the recipient's prior express invitation or permission. Such a waiver would serve the public interest by avoiding an unjust and inequitable application of a confusingly-promulgated rule.

Respectfully submitted,

ROCHE DIAGNOSTICS CORPORATION  
AND ROCHE DIABETES CARE, INC.

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<sup>25</sup> See *Anda Order*, 29 FCC Rcd at 14011 ¶ 28.