

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

In the Matter of)	CG Docket No. 02-278
)	
Petition for Waiver)	CG Docket No. 05-338
of Amatheon, Inc.)	

PETITION FOR WAIVER

Pursuant to Section 1.3 of the Federal Communications Commission’s (“FCC” or the “Commission”) regulations, 47 C.F.R. § 1.3, Amatheon, Inc. (“Amatheon”) respectfully requests the Commission grant it a retroactive waiver of Section 64.1200(a)(4)(iv) of the Commission’s regulations, 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-Out Rule”) with respect to any solicited facsimiles that have been transmitted by or on behalf of Amatheon prior to April 30, 2015.

This request for waiver is being submitted pursuant to the Commission’s Order granting a number of retroactive waivers of the Opt-Out Rule and inviting “similarly situated parties” to seek similar waivers.¹ As the Commission has already determined that good cause exists for such retroactive waiver requests and that granting the waiver would serve the public interest, Amatheon respectfully requests that the Commission expeditiously grant its petition for waiver.²

I. BACKGROUND

Amatheon distributes so-called “cross-over medications,” which are pharmaceutical products designed for use as animal medications as well as pharmaceuticals designed for human consumption that have also been approved for use in animals. As part of its offerings, Amatheon

¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; 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, FCC 14-164, ¶ 30 (rel. Oct. 30, 2014) (“*Fax Order*”).

² See *Fax Order* at ¶ 22; see also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

provides important information about its products via facsimile to veterinarians who have consented to receive such communications.

The Telephone Consumer Protection Act of 1991 (“TCPA”) prohibits the use of a fax machine to send an “unsolicited advertisement.”³ In 2005, Congress enacted the Junk Fax Prevention Act to “require the sender of an *unsolicited* fax advertisement to provide specified notice and contact information on the fax that allows recipients to ‘opt out’ of any future fax transmissions from the sender.”⁴ Further, as a result of confusion regarding the FCC’s treatment of opt-out language on solicited faxes, Amatheon did not believe any of their solicited facsimiles required opt-out notices. However, as a consequence of this regulatory uncertainty, Amatheon – like so many other companies – now finds itself as a defendant in putative class action lawsuits filed in federal court which allege violations of the TCPA.⁵

The named plaintiffs in those cases, along with the putative class, seek damages for alleged violations of the TCPA on the grounds that, among other things, Amatheon allegedly sent facsimile transmissions to the named plaintiffs and the putative class which did not bear the opt-out notice required by the Opt-Out Rule.⁶ This petition for waiver does not ask the Commission to resolve the factual and legal questions raised in the pending litigation; these issues properly remain within the jurisdiction of the federal district court. By this filing,

³ Pub. L. No. 102-243, 105 Stat. 2394, *codified at* 47 U.S.C. §§ 227 *et seq.*

⁴ 47 C.F.R. § 64.1200(a)(4)(iv) (emphasis added); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 F.C.C. Rcd. 3787, 3810 n.154 (“*Junk Fax Order*”) (2006) (stating that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements” (emphasis added)).

⁵ *See Dr. Mark W. Sturdy d/b/a Rochester Veterinary Clinic v. Amatheon, Inc.*, No. 16-cv-03053 (C.D. Ill. filed Mar. 11, 2016); *Dairyland Animal Clinic, S.C. v. Amatheon, Inc.*, No. 16-cv-00090 (W.D. Wis. filed Feb. 10, 2016). Plaintiffs Sturdy and Dairyland are serial TCPA litigants, having filed over fifteen TCPA cases collectively in federal court alone.

⁶ *See Sturdy*, No. 16-cv-03053, DE 1 ¶¶ 15-17; *Dairyland*, No. 16-cv-00090, DE 1 ¶¶ 16-18.

Amatheon seeks only to obtain the same retroactive waiver of the Opt-Out Rule that the Commission granted to multiple petitioners in the Fax Order and to over 100 applicants that subsequently filed waiver petitions.⁷

II. GRANT OF THE AMATHEON RETROACTIVE WAIVER REQUEST IS IN THE PUBLIC INTEREST.

As the Commission concluded in the Fax Order, good cause exists for a retroactive waiver of the Opt-Out Rule insofar as it relates to the failure to comply with the Opt-Out Rule's opt-out notice requirements for facsimile transmissions sent with the prior express invitation or permission of recipients.⁸

The Commission recognized that this good cause is based, first, on the "inconsistency" between a footnote to the Junk Fax Order and the Opt-Out Rule; the Commission stated that this inconsistency has "caused confusion or misplaced confidence" regarding the applicability of the Opt-Out Rule to facsimiles sent with prior express permission.⁹ This acknowledged inconsistency has contributed to substantial uncertainty surrounding the opt-out notice requirements for *solicited* fax advertisements. Like the petitioners that were granted retroactive waivers in the Fax Order, there is "nothing in the record here demonstrating that the petitioners understood that they did, in fact, have to comply with the opt-out notice requirement for fax ads sent with prior express permission but nonetheless failed to do so."¹⁰ As a "similarly situated party" – *i.e.*, an entity that sent solicited fax transmissions that lacked an opt-out notice – good cause exists to resolve this inconsistency by granting Amatheon's request for a retroactive

⁷ See *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 8598 (2015) [hereinafter Waiver Petition Order] (granting 117 waiver petitions); *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 14057 (2015) (granting 5 petitions).

⁸ *Fax Order* at ¶ 22.

⁹ *Junk Fax Order* at n.154; see also *Fax Order* at ¶ 24.

¹⁰ *Fax Order* at ¶ 26.

waiver.

Grant of the retroactive waiver request would also be in the public interest. Amatheon notes that the Commission has already decided that such retroactive waivers will serve the public interest because the “confusion or misplaced confidence . . . left some businesses potentially subject to significant damage awards” and that “on balance . . . it serves the public interest . . . 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.”¹¹ Based on this finding, the FCC granted a retroactive waiver to all of the petitioners explicitly referenced in the Order and further invited other “similarly situated parties” to seek retroactive waivers as well.¹²

Though Amatheon is filing this waiver petition outside of the April 30, 2015 cutoff date in the Fax Order, it seeks a retroactive waiver pertaining *only* to solicited faxes it transmitted prior to the April 30, 2015 cutoff. The putative class actions Amatheon is presently facing both concern putative class time periods reaching back as early as February of 2012.¹³ Importantly, the Commission’s April 30, 2015 date was not a hard cutoff date for *filing petitions*—indeed, the Commission noted simply that “we expect that parties will make every effort to file within six months of the release of this Order.”¹⁴ The Commission subsequently granted waiver petitions filed as late as June of 2015 on the basis that “[t]hese petitions sought waiver for faxes sent prior to the April 30, 2015 deadline” and “[a]s such, granting waivers to these parties does not contradict the purpose or intent of the initial waiver order as the parties involved are similarly

¹¹ *Fax Order* at ¶ 27.

¹² *Id.* at ¶ 30.

¹³ *See Sturdy*, No. 16-cv-03053, DE 1 ¶ 26; *Dairyland*, No. 16-cv-00090, DE 1 ¶ 19.

¹⁴ *Fax Order* at ¶ 2.

situated to the initial waiver recipients.” Given that the faxes at issue in this petition were sent before April 30, 2015, Amatheon is similarly situated to the initial waiver recipients.¹⁵

The FCC’s rationale in granting retroactive waivers to the petitioners referenced above applies equally to Amatheon because the uncertainty surrounding the Opt-Out Rule could potentially expose it to frivolous lawsuits and monetary damage awards. The Commission has acknowledged that substantial confusion previously existed with respect to the opt-out requirements for solicited fax advertisements. Thus, not only does good cause exist to grant Amatheon a waiver of the Opt-Out Rule, but such a grant would be in the public interest.

¹⁵ See *Waiver Petition Order* ¶ 20.

III. CONCLUSION

For the foregoing reasons, Amatheon respectfully requests that the Commission grant a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) effective through April 30, 2015.

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Respectfully Submitted,

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