

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

In the Matter of	)	
Petition of Synchrony Bank d/b/a CareCredit	)	CG Docket Nos. 02-278 & 05-338
and Synchrony Financial For Retroactive Waiver	)	
of 47 C.F.R. § 64.1200(a)(4)(iv)	)	

**SYNCHRONY BANK AND SYNCHRONY FINANCIAL’S PETITION FOR WAIVER**

Pursuant to Section 1.3 of the Commission’s rules, 47 C.F.R. § 1.3, and Paragraphs 22-30 of the Commission’s Orders, CG Docket Nos. 02-278 and 05-338, FCC 14-164 (rel. Oct. 30, 2014) and DA 15-976 (rel. Aug. 28, 2015), Petitioners Synchrony Bank d/b/a CareCredit and Synchrony Financial (collectively, “Synchrony”) respectfully request that the Commission grant them a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) (the “Rule”) to the extent they or their vendors are alleged to have sent facsimile advertisements to recipients who had provided their prior express invitation or permission but which did not include opt-out notices or which included opt-out notices that did not repeat verbatim the language specified in the Rule.

**I. The FCC’s October 30, 2014 and August 28, 2015 Orders.**

On October 30, 2014, the Commission issued Order FCC 14-164 (“2014 FCC Order”) finding that opt-out notices conforming to the rules adopted by the Commission’s 2006 Junk Fax Order, 47 C.F.R. § 64.1200(a)(4)(iv) (“Junk Fax Order”), be included on fax advertisements, regardless of whether a fax was sent with the recipient’s prior express invitation or permission. The Commission, however, granted retroactive waivers of the opt-out language requirement to 24 senders of fax advertisements to provide “temporary relief from any past obligation to provide the opt-out notice to such recipients required by [the Commission’s] rules.” 2014 FCC Order at

¶ 1. The FCC also expressly allowed other similarly situated businesses to seek their own retroactive waivers. *Id.* at ¶ 28.

As noted in the FCC Order, the Commission is permitted to waive any of its rules for good cause shown. *See* 47 C.F.R. § 1.3. In the 2014 FCC Order, the Commission found good cause to grant the retroactive waivers because, among other factors, there was confusion in the interpretation of the Junk Fax Order, and misplaced confidence on the part of businesses that an opt-out notice was not required on faxes that were “solicited.” Specifically, the Commission noted that:

The record indicates that inconsistency between a footnote contained in the Junk Fax Order and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission.

\* \* \*

Further, some commenters question whether the Commission provided adequate notice of its intent to adopt section 64.1200(a)(4)(iv). Although we find the notice adequate to satisfy the requirements of the Administrative Procedure Act, we acknowledge 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.

2014 FCC Order at ¶¶ 24-25 (citations omitted).

The Commission found that granting the requested retroactive waivers would serve the public interest, noting that the “TCPA’s legislative history makes clear our responsibility to balance legitimate business and consumer interests.” *Id.* at ¶ 27. Because there may have been a mistaken belief by some parties that the opt-out notice requirement did not apply, the “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.” *Id.* (citations omitted). The Commission further found that these “factual circumstances ma[de] enforcing the rule unjust or inequitable.” *Id.* at ¶ 28.

On August 28, 2015, the Consumer and Governmental Affairs Bureau (the “Bureau”) issued Order DA 15-976 (“2015 FCC Order”) granting more than 117 additional petitions for a retroactive waiver of the Junk Fax Order for solicited faxes sent prior to April 30, 2015. *Id.* at ¶ 11-20. The Bureau specifically “reject[ed] arguments that the Commission made actual, specific claims of confusion a requirement to obtain the waiver.” *Id.* at ¶ 19. Rather, the Bureau emphasized the Commission’s findings “that petitioners who referenced the confusing, contradictory language at issue are entitled to a presumption of confusion. The Commission did not require petitioners to plead specific, detailed grounds for individual confusion and we cannot impose those here.” *Id.* The Bureau also determined that Petitions filed after April 30, 2015, were entitled to retroactive waivers of the opt-out language requirement for solicited faxes sent prior to that date. *Id.* at ¶ 20. On December 9, 2015, the Bureau granted five additional petitions for retroactive waiver. *See* Order, CG Docket Nos. 02-278 and 05-338, FCC 15-1402 (rel. Dec. 9, 2015).

## **II. Synchrony Should be Granted a Retroactive Waiver.**

Synchrony is entitled to a retroactive waiver on faxes sent prior to April 30, 2015 because it is similarly situated to the 146 other petitioners granted waivers by the 2014 and 2015 FCC Orders. As explained in those orders, the Commission may grant a waiver where (1) special circumstances warrant a deviation from the general rule, and (2) the waiver would better serve the public interest than would application of the rule. 2014 FCC Order at ¶ 22; 2015 FCC Order at ¶ 14. Here, Synchrony meets both requirements for the same reasons that the parties who were granted waivers in the FCC Orders received them.

First, the “special circumstances” that warrant a deviation from the opt-out language requirement here are the same as those explained in the FCC Order. The footnote contained in

the Junk Fax Order stated that the opt-out notice requirement only applied to communications that constituted *unsolicited* advertisements. *See* Junk Fax Order, 21 FCC Rcd at 3810, n. 154. Likewise, the notice of proposed rulemaking issued in advance of adopting the regulation at issue “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.” 2014 FCC Order at ¶ 25; 2015 FCC Order at ¶ 14. Thus, Synchrony and its vendors received confusing information about the applicability of the opt-out requirement to solicited faxes and they did not know they had to abide by those requirements for solicited faxes.

Second, granting Synchrony a retroactive waiver would serve the public interest. As explained in the FCC Orders, this requirement is satisfied when “failure to comply with the rule—which . . . could be the result of reasonable confusion or misplaced confidence—could subject parties to potentially substantial damages.” 2014 FCC Order at ¶ 27. Here, Synchrony faces potential liability as the defendant in a putative class action lawsuit currently pending in the United States District Court for the Northern District of Illinois, *Michael W. Kincaid, DDS, Inc. d/b/a Riverside Family Dental Group v. Synchrony Financial*, Case No. 1:16-cv-00796. A copy of the Plaintiff’s Complaint is attached hereto as **Exhibit A**. The Complaint, filed on January 20, 2016, alleges that Synchrony violated the TCPA by failing to include an “Opt Out Notice” that complies with the TCPA. Ex. A, Compl. at ¶¶ 37, 54-55. The Complaint further alleges that this “Opt Out Notice” requirement applied to *solicited* faxes: “To the extent facsimile advertisements were transmitted by Defendant to those *who had given consent*, or had an established business relationship with it, the Junk Faxes still violate the TCPA, as they did not contain the Opt Out Notice required by law.” *Id.* at ¶ 41 (emphasis added). The Complaint seeks to certify a nationwide class of persons to whom faxes allegedly were sent promoting CareCredit’s goods or

services within four years of the filing the Complaint, and seeks \$500 to \$1,500 for each fax. *Id.* at ¶ 42 & Prayer for Relief at ¶ 4.

Although Synchrony disputes liability and will assert multiple defenses to the plaintiff's claims – including that the faxes at issue are not fax “advertisements” under the TCPA – Synchrony and its vendors could be subject to potential liability if the court rejects Synchrony's defenses and holds it liable for sending “solicited” faxes. Synchrony also would be subject to the significant cost of defending against class action litigation for these solicited faxes. As with the 146 petitioners who have already been granted retroactive waivers, Synchrony should be granted a waiver for its alleged failure to comply with the Rule for those persons or entities who gave their prior express invitation or permission to receive faxes.

### CONCLUSION

For all the foregoing reasons, Synchrony Bank d/b/a CareCredit and Synchrony Financial respectfully request a retroactive waiver from complying with the opt-out language requirement in the Junk Fax Order for all alleged advertising faxes sent prior to April 30, 2015, that they or their vendors may have sent with the recipient's prior express invitation or permission.

Dated: June 13, 2016

Respectfully Submitted,

SYNCHRONY BANK d/b/a  
CARECREDIT and SYNCHRONY  
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