

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

In the matter of:

Cochran Wholesale Pharmaceuticals, Inc.

CG Docket No. 02-278

CG Docket No. 05-338

**PETITION OF COCHRAN WHOLESALE PHARMACEUTICALS, INC.
FOR RETROACTIVE WAIVER**

Pursuant to Section 1.3 of the Federal Communications Commission’s (“Commission”) rules,¹ Petitioner Cochran Wholesale Pharmaceuticals, Inc. (“Cochran”) respectfully requests that the Commission grant it a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) (the “Rule”)² with respect to faxes transmitted by Cochran (or on its behalf) with the prior express consent, permission, or invitation of the recipients or their agents, and transmitted after the effective date of the Rule but on or before April 30, 2015. The Commission has now granted more than 130 retroactive waivers to similarly-situated parties³ and, for the reasons stated herein, Cochran seeks the same relief.

¹ 47 C.F.R. § 1.3.

² 47 C.F.R. § 64.1200(a)(4)(iv).

³ *Rules And Regulations Implementing The Telephone Consumer Protection Act Of 1991; Junk Fax Prevention Act of 2005; Application For Review Filed By Anda, Inc.; Petitions For Declaratory Ruling, Waiver, And/Or Rulemaking Regarding Fax Opt-Out Requirements*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rec 13998 (Oct. 2014) (“**October 2014 Order**”); *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 8598 (Aug. 2015) (“**August 2015 Order**”); *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 14057 (2015) (“**December 2015 Order**”).

I. BACKGROUND

A. The Telephone Consumer Protection Act and the Opt-Out Requirement

The Telephone Consumer Protection Act (“TCPA”) prohibits the use of a fax machine to send an “unsolicited advertisement.”⁴ 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.”⁵ The plain language and scope of the TCPA (following the enactment of the Junk Fax Prevention Act) is expressly limited to unsolicited faxes, which the statute defines to exclude faxes sent with prior express invitation or permission from the recipient.⁶ A subsequently-issued Commission rule, however, provided 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,” and thereby appeared to impose an opt-out notice requirement even for *solicited* faxes.⁷ Confusingly, when issuing the Rule, the Commission also issued an accompanying Order (the “Junk Fax Order”) that stated “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”⁸ This apparent conflict led to considerable confusion in the industry.

In the *October 2014 Order*, the Commission recognized that due to the contradictory footnote in the Junk Fax Order, some parties that had sent fax advertisements with the recipients’ prior express permission may have been reasonably uncertain about whether the opt-out

⁴ 47 U.S.C. § 227(b)(1)(C).

⁵ *October 2014 Order*, ¶ 5.

⁶ 47 U.S.C. § 227(a)(5).

⁷ 47 C.F.R. § 64.1200(a)(4)(iv).

⁸ *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 FCC Rcd 3787, 3810 n.154 (2006) (emphasis added).

requirement applied to them.⁹ As a result, in its *October 2014 Order*, the Commission granted a retroactive waiver of the opt-out requirement of the Rule to numerous petitioners facing TCPA lawsuits premised in whole or in part on the failure to include opt-out language in faxes sent with prior express invitation or permission.¹⁰ In the *October 2014 Order*, the Commission also invited similarly situated parties to petition for retroactive waiver of the opt-out requirement.

Since that ruling, dozens of petitioners have sought retroactive waivers. The Commission subsequently granted further retroactive waivers in the *August 2015 Order* and the *December 2015 Order*; still other petitions are pending before the Commission, including many filed in 2016. While the Commission encouraged parties to file waivers by April 30, 2015, it did not fix that date and, indeed, the Commission has granted waivers filed after April 30, 2015.¹¹ Moreover, in the *December 2015 Order*, the Commission expressly declined to reject petitions solely on the grounds that they were filed after April 30, 2015.¹²

B. Cochran

Petitioner Cochran is a small, family-owned pharmaceutical distribution company headquartered in Monroe, GA. It provides drugs at wholesale prices to pharmacies in 17 states around the country. Cochran's salespeople periodically send price lists via fax, many of which are sent to Cochran's existing customers who have provided express invitation or permission to receive such faxes. The faxes typically consist of a one-page sheet showing product prices for

⁹ *October 2014 Order*, ¶¶ 24-26.

¹⁰ *Id.* ¶¶ 22-31.

¹¹ *See generally December 2015 Order* (granting waiver requests filed through September 21, 2015).

¹² *Id.* ¶ 18.

that week. Cochran maintains that its faxes sent with prior express invitation or permission are “solicited” within the meaning of the TCPA.¹³

Good cause exists to grant Cochran a retroactive waiver of the Rule with respect to faxes transmitted by Cochran (or on its behalf) with express consent, permission, or invitation because it is similarly situated to the parties granted retroactive waiver in the *October 2014 Order*, the *August 2015 Order*, and the *December 2015 Order*. Cochran is facing two putative class action lawsuits alleging that it sent faxes in violation of the TCPA during the relevant time period and that the faxes failed to include an appropriate opt-out notice.¹⁴ Although the plaintiffs in these lawsuits allege that the faxes they received from Cochran were unsolicited,¹⁵ each proposes to represent a class that includes *all* persons who received the faxes at issue regardless of whether such faxes were solicited or unsolicited.¹⁶ The public interest would be harmed by requiring parties like Cochran to divert substantial capital and human resources from its economically productive activities to engage in unnecessary (and likely ruinous) litigation because of past confusion over the Commission’s regulations. As such, and as explained in more detail in the following section, a waiver is appropriate here.

Until these lawsuits were filed and Cochran had conducted an initial investigation to determine the facts surrounding the alleged fax transmissions, it was not aware of the need to seek a retroactive waiver. The timing of these lawsuits was such that it was not feasible for

¹³ Cochran also expects to assert other defenses in the lawsuits, none of which it waives through the filing of this Petition.

¹⁴ *ARcare d/b/a Parkin Drug Store & Bald Knob Medical Clinic v. Cochran Wholesale Pharmaceuticals, Inc.*, No. 3:16-CV-41-CDL, Dkt. No. 1 (M.D. Ga. Apr. 19, 2016) (“*ARcare Complaint*”); *Camp Drug Store, Inc. v. Cochran Wholesale Pharmaceutical, Inc.*, No. 16-cv-00488-JPG-SCW, Dkt. No. 1 (S.D. II. May 2, 2016) (“*Camp Complaint*”). As of the date of this Petition, Cochran has not been served with the *Camp Complaint* but is nonetheless aware of it.

¹⁵ *ARcare Complaint* ¶ 13; *Camp Complaint* ¶ 16.

¹⁶ *ARcare Complaint* ¶ 15; *Camp Complaint* ¶ 19.

Cochran to have filed the present Petition for Waiver by April 30, 2015.¹⁷ To date, Cochran has not filed a responsive pleading in either case, no scheduling order has been entered in either case, and no discovery has been conducted in either case. Cochran has made efforts to pursue this Petition as soon as possible. Cochran has also directed an immediate cessation of any transmission of fax advertisements, solicited or unsolicited, unless those transmissions include an opt-out notice.

The present Petition does not request that the Commission resolve the factual or legal questions raised in the two pending lawsuits; those issues remain within the jurisdiction of the federal district courts before whom the cases are pending. Cochran seeks only to obtain the same retroactive waiver of the Rule granted to multiple petitioners in the FCC's preceding Orders.

II. GOOD CAUSE EXISTS TO GRANT COCHRAN A RETROACTIVE WAIVER.

The Commission may waive any provision of its rules “for good cause shown.”¹⁸ Specifically, 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.”¹⁹ Applying these factors to the present Petition, the Commission should grant Cochran a waiver for the same reasons the Commission found a waiver appropriate for the parties in the *October 2014 Order*, the *August 2015 Order*, and the *December 2015 Order*.

First, special circumstances warrant a deviation from the general rule. As the Commission has explained, its Junk Fax Order “caused confusion or misplaced confidence” as to

¹⁷ See *December 2015 Order*, ¶ 18 (granting petitions filed after April 30, 2015 that sought waiver for faxes prior to that date and concluding that “granting waivers to the five parties here does not contradict the purpose or intent of the initial waiver order because these parties are similarly situated to the initial waiver recipients.”).

¹⁸ 47 C.F.R. § 1.3.

¹⁹ *October 2014 Order*, ¶ 23.

whether the opt-out requirement applied to solicited fax advertisements because it stated that the “opt-out notice requirement applies only to communications that constitute *unsolicited* advertisements.”²⁰ The Commission’s notice of intent to adopt the Rule likewise “did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with prior express permission of the recipient,” thereby further contributing to the confusion or misplaced confidence about the contours of the opt-out notice requirement.²¹ The inconsistent statement in the Junk Fax Order, combined with the lack of explicit notice, warrants deviation from the Rule and supports retroactive waiver.²²

Second, granting Cochran a retroactive waiver would serve the public interest. The TCPA and the Commission’s TCPA rules are intended “to allow consumers to stop unwanted faxes.”²³ That purpose is not served where the recipients of the faxes had given Cochran permission to send them. Moreover, the Commission has already determined on three separate occasions that granting a retroactive waiver from the opt-out notice requirement of the Rule serves the public interest for parties in the same posture as Cochran.²⁴ In the *October 2014 Order*, the Commission explained that the “confusion or misplaced confidence . . . left some businesses potentially subject to significant damage awards under the TCPA’s private right of action,”²⁵ and that is precisely the situation that Cochran faces. The Commission further noted in its *October 2014 Order* that the “TCPA’s legislative history makes clear our responsibility to balance legitimate business and consumer interests,” and concluded that, on balance, the public interest was served by “grant[ing] a retroactive waiver to ensure that any such confusion did not

²⁰ *Id.* ¶ 24 (quoting Junk Fax Order) (emphasis in original).

²¹ *Id.* ¶ 25.

²² *Id.* ¶ 26.

²³ *Id.* ¶ 48.

²⁴ See *October 2014 Order*; *August 2015 Order*; *December 2015 Order*.

²⁵ *October 2014 Order*, ¶ 27.

result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward.”²⁶ Based on this finding, the Commission granted retroactive waiver to all of the petitioners and invited similarly situated parties to seek retroactive waivers. The Commission reiterated those concepts and the propriety of granting retroactive waivers to similarly situated parties in both the *August 2015 Order* and the *December 2015 Order*.

Cochran now seeks such a waiver because it is similarly situated to the parties to whom the Commission has previously granted retroactive waivers. Like those petitioners, Cochran is now facing two lawsuits with the potential to subject it to ruinous statutory damages and litigation expenses. The application of the rule is particularly compelling here, where many of Cochran’s fax recipients consented to receiving faxes and knew how to contact Cochran to opt-out of receiving future transmissions. The public interest would also be harmed by requiring productive small businesses like Cochran to divert resources and staff away from ordinary business operations to resolve unnecessary litigation efforts driven by uncertainty over the Commission’s regulations. Accordingly, Cochran respectfully submits that the public interest would be served by granting this Petition for a retroactive waiver.²⁷

III. CONCLUSION

For the foregoing reasons, Cochran respectfully requests that the Commission grant it a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) with respect to faxes transmitted by Cochran (or on its behalf) with the prior express consent, permission, or invitation of the recipients or their agents after the effective date of the Rule but on or before April 30, 2015.

²⁶ *Id.*

²⁷ Because both the plaintiff in the *ARcare* suit and the plaintiff in the *Camp* suit allege that the faxes they received were unsolicited, any waiver by the Commission would not affect the plaintiffs’ individual rights of action. However, because each plaintiff proposes to represent a class comprised of everyone who received a fax advertisement from Cochran, the grant of the waiver would prevent significant monetary damages caused by confusion over the opt-out requirement of the Rule.

Respectfully submitted, this 14th day of June, 2016.

/s/ Cindy D. Hanson
Cindy D. Hanson (GA Bar No. 323920)
Ross D. Andre (GA Bar No. 280210)

**KILPATRICK TOWNSEND
& STOCKTON LLP**

1100 Peachtree St. NE, Suite 2800
Atlanta, GA 30309
Tel: (404) 815-6500
Fax: (404) 815-6555
chanson@kilpatricktownsend.com
randre@kilpatricktownsend.com