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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
	)	
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338
	)	
Petitions for Reconsideration and/or Declaratory Ruling and Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv) Regarding the Commission's Opt-Out Notice Requirement for Faxes Sent with the Recipient's Prior Express Permission	)	

ORDER

Adopted: November 14, 2018 **Released: November 14, 2018**

By the Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this *Order*, we eliminate the Commission's rule requiring opt-out notices on faxes sent with the recipients' prior permission or consent.[1] We take this action in response to the decision of the Court of Appeals for the D.C. Circuit finding that the rule "is unlawful to the extent that it requires opt out notices on solicited faxes."[2] We also dismiss as moot ten pending petitions for retroactive waiver of the rule and two petitions for reconsideration of orders enforcing the rule.

II. BACKGROUND

A. The Telephone Consumer Protection Act

2. In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA).[3] In relevant part, the TCPA prohibits the use of any telephone facsimile (fax) machine, computer, or other device to

[1] *See* 47 CFR § 64.1200(a)(4)(iv) (the "2006 Solicited Fax Rule").

[2] *Bais Yaakov of Spring Valley, et al. v. Federal Communications Commission*, 852 F.3d 1078, 1083 (D.C. Cir. 2017).

[3] The TCPA is codified as Section 227 of the Communications Act of 1934, as amended, 47 U.S.C. § 227.

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send an "unsolicited advertisement" to a telephone fax machine.[4] In 1992, the Commission adopted rules implementing the TCPA, including restrictions on the transmission of unsolicited fax ads.[5]

3. In 2005, Congress enacted the Junk Fax Prevention Act, which amended the fax advertising provisions of the TCPA.[6] Among other things, the law: (1) codified an established business relationship (EBR) exemption to the prohibition on sending unsolicited fax ads;[7] (2) provided a definition of EBR to be used in the context of unsolicited fax ads;[8] (3) required the sender of an unsolicited fax ad to provide specified notice and contact information on the fax that allows recipients to "opt out" of any future fax transmissions from the sender;[9] and (4) specified the circumstances under which a request to "opt out" complies with the Act.[10]

4. In 2006, the Commission adopted the *Junk Fax Order* amending the rules concerning fax transmissions as required by the Junk Fax Prevention Act and addressing certain issues raised in petitions for reconsideration.[11] As part of the *Junk Fax Order*, the Commission adopted the 2006 Solicited Fax Rule requiring that fax advertisements "sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice."[12]

B. The Anda Proceeding

5. In 2010, Anda, Inc. (Anda) sought a declaratory ruling on the 2006 Solicited Fax Rule as applied to fax ads sent with recipient consent. Specifically, Anda asked the Commission to find: (1) that it lacked any authority to adopt a rule requiring an opt-out notice on fax ads sent with the recipient's consent; or (2) in the alternative, that Section 227(b) of the Act is not the statutory basis for the rule.[13] In 2012, the Consumer and Governmental Affairs Bureau (CGB or Bureau) dismissed Anda's petition,[14] finding that the Commission had the authority to adopt the rule and that Section 227(b) had been cited as

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[4] 47 U.S.C. § 227(b)(1)(C). As the legislative history explained, because fax machines "are designed to accept, process, and print all messages which arrive over their dedicated lines," fax advertising imposes burdens on unwilling recipients that are distinct from the burdens imposed by other types of advertising. *See* H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991).

[5] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*1992 TCPA Order*); *see also* 47 CFR § 64.1200(a)(4).

[6] *See* Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) (Junk Fax Prevention Act).

[7] *See id.* § 2(a).

[8] *See id.* § 2(b).

[9] *See id.* § 2(c).

[10] *See id.* § 2(d).

[11] *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 (2006) (*Junk Fax Order*).

[12] 47 CFR § 64.1200(a)(4)(iv); *see also Junk Fax Order*, 21 FCC Rcd at 3812, para. 48.

[13] *See generally* Petition of Anda, Inc. for Declaratory Ruling to Clarify that 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rules Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent, CG Docket No. 05-338 (filed Nov. 30, 2010), https://ecfsapi.fcc.gov/file/7021715222.pdf.

[14] *See Junk Fax Prevention Act of 2005, Petition for Declaratory Ruling to Clarify that 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rules Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent*, CG Docket No. 05-338, Order, 27 FCC Rcd 4912 (CGB 2012) (*2012 Anda Order*).

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authority for adopting the rule.[15] The Bureau also found that the Commission had clearly set forth the rule's requirement and found no controversy to terminate or uncertainty to remove.[16]

6. Anda sought Commission review of the Bureau decision, reiterating its earlier arguments that the Commission lacked authority to adopt the rule or, alternatively, that the TCPA was not the basis for the rule.[17] In 2014, the Commission denied Anda's Application for Review but granted limited retroactive waivers to petitioners[18] in light of record evidence that a footnote in the *Junk Fax Order* caused confusion regarding the applicability of the opt-out notice requirement to solicited faxes.[19]

7. The Commission has ruled on 163 petitions seeking waiver of the rule.[20] Of the petitions for retroactive waiver filed, 144 petitions were granted and nine were denied. Ten petitions for retroactive

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[15] *See id.* at 4914, para. 5.

[16] *See id.*

[17] *See* Application for Review of Anda, Inc., CG Docket No. 05-338, at 10-13 (filed May 14, 2012), https://ecfsapi.fcc.gov/file/7021918714.pdf.

[18] *See generally 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, 29 FCC Rcd 13998, 14002, para. 10 (2014) (*2014 Anda Commission Order*).

[19] *See id.* at 14008-12, paras. 22-31. The Commission emphasized that full compliance with the 2006 Solicited Fax Rule would be required within six months from the release of the Order (*i.e.*, by April 30, 2015). *See id*. at 14011, para. 29. The Commission stated that similarly situated parties could seek similar waivers. *See id*. at 14011-12, para. 30.

[20] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Petitions for Declaratory Ruling and Retroactive Waiver of 47 CFR § 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 (CGB 2015) (*August 2015 Order*); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Petitions for Declaratory Ruling and Retroactive Waiver of 47 CFR § 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 (CGB 2015) (*December 2015 Order*); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Petitions for Declaratory Ruling and Retroactive Waiver of 47 CFR § 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, 31 FCC Rcd 11943 (CGB 2016) (*November 2016 Order*).

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waiver remain pending before the Commission.[21] Two parties whose petitions for retroactive waivers

[21] *See Petition of Safemark Systems, LP for Retroactive Waiver of 47 CFR § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (filed Oct. 6, 2016), https://ecfsapi.fcc.gov/file/10061200910192/Safemark%20Petition%20for%20Retroactive%20Waiver.pdf (Safemark Petition); *Petition of Cynosure, Inc. for Waiver of Section 64.1200(a)4)(iv) of the Commission's Rules, or in the Alternative, for A Declaratory Ruling*, CG Docket Nos. 02-278, 05-338 (filed Oct. 26, 2016), https://ecfsapi.fcc.gov/file/1026008520205/Cynosure%20-%20FCC%20-%20Petition%20FINAL.pdf (Cynosure Petition); *Petition of United Auto Credit Corporation for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (filed Oct. 28, 2016), https://ecfsapi.fcc.gov/file/1028229378794/UACC%20Retroactive%20Waiver%20Petiton.pdf (UACC Petition); *Petition of Brigadoon Fitness Inc. and Brigadoon Financial Inc. for Waiver of Section 64.1200(a)4)(iv) of the Commission's Rules,* CG Docket Nos. 02-278, 05-338 (filed Nov. 7, 2016), https://ecfsapi.fcc.gov/file/11071811900027/Brigadoon%20FCC%20Petition%20for%20Waiver.docx (Brigadoon Petition); *Petition of Renue Systems Development Corp., Inc., et al. for Retroactive Waiver of Section 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (filed Jan. 4, 2017), https://ecfsapi.fcc.gov/file/10104097725837/Renue%20-%20petition%20for%20retroactive%20waiver.pdf (Renue Petition); *Petition of Chester Limited, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (filed Jan. 23, 2017), https://ecfsapi.fcc.gov/file/10206114019817/Petition-for-Waiver(4).pdf (Chester Petition); *Petition of Foot Levelers, Inc. for Retroactive Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (filed Feb. 2, 2017), https://ecfsapi.fcc.gov/file/10202091367227/FL%20FCC%20Petition.PDF (Foot Levelers Petition); *Petition for Waiver of M3 USA Corporation*, CG Docket Nos. 02-278, 05-338 (filed Feb. 14, 2017), https://ecfsapi.fcc.gov/file/10214102331446/M3%20Petition%20for%20Waiver.pdf (M3 Petition); *Petition of Lane Labs-USA, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (filed Feb. 24, 2017), https://ecfsapi.fcc.gov/file/1022418465669/PetitionWaiver22017.doc (Lane Petition); *Petition of Getaway Seminars, Inc. for Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (filed Feb. 28, 2017), https://ecfsapi.fcc.gov/file/1022819830028/PetitionWaiver22017GET.doc (Getaway Petition) (collectively, Petitioners). The Commission sought comment on these petitions. *See Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice, 31 FCC Rcd 11911 (CGB 2016); *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice, 31 FCC Rcd 12786 (CGB 2016); *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice, 32 FCC Rcd 1069 (CGB 2017); *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice, 32 FCC Rcd 1196 (CGB 2017); *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice, 32 FCC Rcd 1410 (CGB 2017); *Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice, 32 FCC Rcd 1528 (CGB 2017).

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were denied filed petitions for reconsideration of those denials.[22] These petitions remain pending before the Bureau.

8. In March 2017, the Court of Appeals for the D.C. Circuit held that the Commission did not have authority to require opt-out notices on solicited faxes and held that the 2006 Solicited Fax Rule was unlawful.[23] Specifically, the court held that "the [Junk Fax Prevention] Act does not require . . . [an] opt-out notice on *solicited* fax advertisements . . . [n]or does the Act grant the FCC authority to require opt-out notices on solicited fax advertisements."[24] The court concluded that "the FCC's 2006 Solicited Fax Rule is unlawful to the extent that it requires opt-out notices on solicited faxes."[25]

III. DISCUSSION

9. We eliminate the Commission's 2006 rule requiring opt-out notices on fax advertisements sent with the recipient's prior express permission or consent. Specifically, in light of the court's decision that the rule is unlawful, we eliminate section 64.1200(a)(4)(iv) from Title 47 of the Code of Federal Regulations.[26] We find good cause to eliminate the rule without notice and comment because the rule has been vacated by the court in an order that has become final and nonreviewable.[27] As such, seeking notice and comment before implementing the court's non-discretionary mandate would serve no purpose and is thus contrary to the public interest.

10. We also dismiss as moot the ten pending petitions for retroactive waiver,[28] as well as the two pending petitions for reconsideration.[29] The Court of Appeals for the D.C. Circuit declared unlawful and vacated the 2006 Solicited Fax Rule and we have accordingly eliminated the rule as described above. Therefore, we find no need to consider the remaining pending petitions seeking temporary waiver of the rule or seeking reconsideration of the Commission's application of the rule.

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[22] *See Petition of Fetch, Inc., d/b/a Petplan Petition for Reconsideration*, CG Docket Nos. 02-278, 05-338 (filed Nov. 29, 2016), https://ecfsapi.fcc.gov/file/11293091521499/2016.11.29%20Petplan%20Petition%20for%20Reconsideration.pdf; *Petition of Ohio National Mutual, Inc., for Reconsideration*, CG Docket Nos. 02-278, 05-338 (filed Jan. 8, 2016), https://ecfsapi.fcc.gov/file/60001402741.pdf. One additional petition for reconsideration was filed but subsequently withdrawn. *See Petition of Morgan & Curtis Associates Inc. for Reconsideration*, CG Docket Nos. 02-278, 05-338 (filed Jan. 4, 2016), https://ecfsapi.fcc.gov/file/60001399323.pdf. In addition, ten applications for review of waiver decisions have been filed but will not be addressed herein.

[23] *See Bais Yaakov*, 852 F.3d at 1078.

[24] *Id*. at 1082 (emphasis in original).

[25] *Id*. at 1083. The court's mandate became effective on July 6, 2017. *See Bais Yaakov of Spring Valley, et al. v. FCC*, No. 14-1234 (July 6, 2017) (notifying mandate issuance).

[26] 47 CFR § 64.1200(a)(4)(iv).

[27] *See* 47 U.S.C. § 553(b)(3)(B); *Federal-State Joint Board on Universal Service, Access Charge Reform*, Sixteenth Order on Reconsideration in CC Docket No. 96-45 *et al*., 15 FCC Rcd. 1679, 1686, para. 16 (1999), *rev'd in part on other grounds*, *Comcast Corp. v. FCC*, 250 F.3d 931 (5th Cir. 2001) (dispensing with notice and comment to satisfy court mandate); *see also Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, para. 647 (2011) (deleting obsolete rules without notice or comment pursuant to the good cause exception).

[28] *See supra*. n.21 (listing pending petitions for retroactive waiver covered by this *Order*).

[29] *See supra* n.22 (listing pending petitions for reconsideration covered this *Order*).

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IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 227, and the authority delegated in sections 0.141 and 0.361 of the rules, 47 CFR §§ 0.141, 0.361, that this Order IS ADOPTED and that section 64.1200 of the Commission's rules, 47 CFR § 64.1200, is amended as set forth in the Appendix. The rule changes in the Appendix SHALL BE EFFECTIVE upon publication of this Order in the Federal Register.[30]

12. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 227, and section 1.3 of the Commission's rules, 47 CFR § 1.3, and the authority delegated in sections 0.141 and 0.361 of the rules, 47 CFR §§ 0.141, 0.361, that the petitions for retroactive waiver of section 64.1200(a)(4)(iv) of the Commission's rules, 47 CFR § 64.1200(a)(4)(iv), filed by Safemark Systems, LP, Cynosure, Inc., United Auto Credit Corporation, Brigadoon Fitness Inc and Brigadoon Financial Inc., Renue Systems Development Corp., Inc., *et al*., Chester Limited, Inc., Foot Levelers, Inc., M3 USA Corporation, Lane Labs-USA, Inc., and Getaway Seminars, Inc. ARE DISMISSED as moot.

13. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 227, and section 1.3 of the Commission's rules, 47 CFR § 1.3, and the authority delegated in sections 0.141 and 0.361 of the rules, 47 CFR §§ 0.141, 0.361, that the petitions for reconsideration filed by Fetch, Inc., d/b/a Petplan and Ohio National Mutual, Inc. ARE DISMISSED as moot.

FEDERAL COMMUNIATIONS COMMISSION

Patrick Webre
Chief
Consumer and Governmental Affairs Bureau

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[30] *See* 47 U.S.C. § 553(d)(1) (stating that substantive rule changes that "relieve[] a restriction" can become effective less than 30 days following Federal Register publication); *Amendment of Section 73.624(g) of the Commission's Rules Regarding Submission of Form 2100, Schedule G, Used to Report TV Stations' Ancillary or Supplementary Services, Modernization of Media Regulation Agenda*, MB Docket Nos. 17-264, 17-105, Report and Order, FCC 18-41, para. 12 n.29 (rel. Apr. 12, 2018). Separately, "good cause" exists to dispense with the 30-day notice period to update the rules as soon as practicable for the benefit of the public. *See* 5 U.S.C. § 553(d)(3).

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APPENDIX

Final Rules

The Federal Communications Commission amends 47 CFR Part 64 as set forth below:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

Subpart L—Restrictions on Telemarketing, Telephone Solicitation, and Facsimile Advertising

§ 64.1200 - Delivery restrictions.

1. Remove § 64.1200(a)(4)(iv)

§ 64.1200(a)(4)(iv) **[Removed]**

2. Re-number sections 64.1200(a)(4)(v), (vi), and (vii) as sections 64.1200(a)(4)(iv), (v), and (vi).