PETITION OF MEADOWBROOK INSURANCE GROUP, INC. 
AND MEADOWBROOK, INC. FOR WAIVER

Pursuant to 47 CFR § 1.3, Meadowbrook Insurance Group, Inc. (“MIG”) and Meadowbrook, Inc. (collectively “Meadowbrook”) respectfully request that the Federal Communications Commission (“Commission”) grant a retroactive waiver of 47 CFR § 64.1200(a)(4)(iv) (the “Regulation”) with respect to faxes transmitted by Meadowbrook (or on its behalf) with the prior express permission or invitation of the recipients or their agents (“Solicited Faxes”) after the effective date of the Regulation up to and including April 30, 2015. For the reasons stated, a waiver is appropriate here.¹

I. INTRODUCTION

MIG is the parent of Meadowbrook, which, among other things, offers specialty insurance programs to industry, trade, and professional associations. Meadowbrook enters into agreements with those associations to offer insurance plans to their members; the

¹ In the event the Commission denies this Petition, MIG and Meadowbrook reserve the right to challenge the validity of the Regulation through administrative proceedings. To the extent necessary, Meadowbrook adopts and incorporates herein the arguments made by the parties whose Petitions were addressed in the October 30, 2014 Order, as well as the separate statements issued by Commissioners Pai and O’Rielly.
members provide their contact information directly to Meadowbrook or to their association for the purpose of receiving offers from Meadowbrook.

On April 20, 2015, MIG was served in a lawsuit arising under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”). The lawsuit alleges that Meadowbrook violated the TCPA by sending faxes that did not contain opt-out notices. Because Meadowbrook sends advertisements with the express permission of the recipients or their agents, the case raises the question whether the TCPA requires Solicited Faxes to include the opt-out language.

On October 30, 2014, the Commission released FCC Order 14-164.2 Prior to that Order’s release, various petitioners had challenged the Commission’s authority to issue the Regulation, and alternatively sought retroactive waivers of its opt-out notice requirement for Solicited Faxes. In response to the admitted uncertainty about whether the opt-out notice applied to Solicited Faxes, the Commission granted retroactive waivers to certain fax advertisement senders to provide temporary relief from any past obligation to provide opt-out notices. The waivers granted in the October 30, 2014 Order apply only to the listed petitioners; however, the Commission noted that other, similarly situated entities may also seek such waivers.

Meadowbrook has just recently become a defendant in a class action lawsuit alleging that it has violated the TCPA in failing to include the opt-out notice on its Solicited Faxes. As a result of this very recent lawsuit, Meadowbrook is now similarly situated to the original petitioners as well as the many other petitioners that have recently sought the

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identical waiver. The public interest would be harmed by requiring parties, like Meadowbrook, to divert substantial resources and staff away from its productive efforts to resolve unnecessary litigation efforts stemming from confusion over the Commission’s regulations. A waiver is thus appropriate here.

II. BACKGROUND

A. The Current Statutory and Regulatory Framework

The TCPA, as amended by the Junk Fax Prevention Act of 2005 (“JFPA”), prohibits, under certain circumstances, the use of a fax machine to send an “unsolicited advertisement.” An “unsolicited advertisement” is “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”

In 2005, the Commission promulgated the Regulation, which states 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.” In addition to the Regulation, the Commission also adopted rules implementing the JFPA (referred to by the Commission as the “Junk Fax Order”). As discussed in the October 30, 2014 Order, a footnote in the Junk Fax Order led to industry-wide confusion regarding the Commission’s intent to apply the


4 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).

5 Id. § 227(a)(5) (emphasis added).


7 See generally Junk Fax Order.
opt-out notice to Solicited Faxes, *i.e.*, faxes sent with the prior express permission of the recipient. The Commission clarified this outstanding issue in the October 30, 2014 Order.

Pursuant to the October 30, 2014 Order, the Commission “confirm[ed that] senders of fax ads must include certain information on the fax that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders.” Due to the aforementioned uncertainty, however, the Commission stated it would grant additional retroactive waivers:

> [W]e recognize that some parties who have sent fax ads with the recipient’s prior express permission may have reasonably been uncertain about whether our requirement for opt-out notices applied to them. As such, we grant retroactive waivers of our opt-out requirement to certain fax advertisement senders to provide these parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.

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8 See *Junk Fax Order* ¶ 42 n.154 (“We note that the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.”) (emphasis added).

9 *October 30, 2014 Order* ¶ 1.

10 The Commission detailed the reasons for such uncertainty in the October 30, 2014 Order: “Specifically, there are two grounds that we find led to confusion among affected parties (or misplaced confidence that the opt-out notice rule did not apply to fax ads sent with the prior express permission of the recipient), the combination of which present us with special circumstances warranting deviation from the adopted rule. 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. Specifically, the footnote stated that ‘the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.’ The use of the word ‘unsolicited’ in this one instance 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. We note that all petitioners make reference to the confusing footnote language in the record. Further, some commenters question whether the Commission provided adequate notice of its intent to adopt [the Regulation]. 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.” *Id.* ¶¶ 24-25 (footnotes omitted).
We believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.\textsuperscript{11}

The Commission stated that it “expect[ed] parties making similar waiver requests to make every effort to file within six months of the release of this Order” – that is, by April 30, 2015.\textsuperscript{12} The Commission also stated that any “waiver granted herein shall not apply to such conduct that occurs more than six months after the release date of this Order.”\textsuperscript{13}

B. The TCPA Action Against Meadowbrook

Meadowbrook has been named in a lawsuit based on alleged violations of the TCPA’s fax provisions in the District of New Jersey. The lawsuit, Town & Country Jewelers, LLC v. Meadowbrook Insurance Group, Inc., Case No. 15-cv-02519-PGS-LHG (D. N.J.), was filed on April 8, 2015, but not served until April 20, 2015. The plaintiff alleges that Meadowbrook failed to provide an appropriate opt-out notice in faxes.\textsuperscript{14} The plaintiff had previously provided his fax number to Meadowbrook for the purpose of receiving information regarding available insurance programs.

Meadowbrook was unaware of the October 30, 2014 Order until after it was sued and had a chance to analyze the issues in the lawsuit. Meadowbrook has “ma[de] every effort” to file this Petition as quickly as possible. The Order explicitly did not set a hard

\begin{itemize}
\item \textsuperscript{11} Id. ¶¶ 1, 22.
\item \textsuperscript{12} See id. ¶ 30.
\item \textsuperscript{13} See id. ¶ 29.
\item \textsuperscript{14} The plaintiff in the New Jersey action will likely dispute that the fax(es) were solicited. However, it is not necessary for the Commission to resolve that dispute in acting on this Petition, and the dispute does not impact the issues raised in this Petition. The Commission anticipated that issue, expressly noting that the granting of such retroactive waivers should not “be construed in any way to confirm or deny whether these petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action.” Id. ¶ 31. The two issues are distinct.
\end{itemize}
April 30, 2015, deadline for the filing of petitions for retroactive waiver, and it would be unfair to deny similar relief to Meadowbrook because it was sued later than the other Petitioners. Indeed, the only Petitions submitted to the Commission were filed by defendants in putative class action lawsuits. Moreover, since April 30, 2015, Meadowbrook has not faxed any advertisement – solicited or otherwise – lacking an opt-out notice.

III. DISCUSSION

The Commission Should Grant a Retroactive Waiver of Section 64.1200(a)(4)(iv) for Any Solicited Fax Sent by Meadowbrook or on Its Behalf

Meadowbrook respectfully requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any Solicited Faxes sent by Meadowbrook (or on its behalf) after the effective date of the Regulation up to and including April 20, 2015. Section 1.3 of the Commission’s rules permits it to grant a waiver if good cause is shown.15 Generally, the Commission may grant a waiver of its rules in a particular case if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.16 Furthermore, waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.17 As shown, both rationales apply.

First, a grant of the requested waiver is in the public interest. As the Commission has already acknowledged, the lack of explicit notice and the contradictory footnote in the Junk Fax Order “resulted in a confusing situation for businesses or one that caused

15 See 47 C.F.R. § 1.3; see also 47 C.F.R. § 1.925(b)(3).
businesses mistakenly to believe that the opt-out notice requirement did not apply.” 18 In
light of the Commission’s admitted lack of clarity as to the scope/applicability of the
Regulation, the grant of a waiver would better serve the public interest than the strict
adherence to the rule.

Moreover, denial of the waiver would be inequitable and could impose unfair
liability on Meadowbrook based upon claims that Congress never intended to create. Such
a waiver is also in line with the stated purpose of the October 30, 2014 Order. Indeed, the
Commission made clear that the avoidance of civil liability to businesses that may have
inadvertently violated the Regulation trumps the public interest to consumers to recover
under the TCPA when it expressly stated that:

The record in this proceeding demonstrates that a failure to comply with the rule — which as noted above could be the
result of reasonable confusion or misplaced confidence — could subject parties to potentially substantial damages…. This 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. We acknowledge that there is an offsetting public interest to consumers through the private
right of action to obtain damages to defray the cost imposed on them by unwanted fax ads. On balance, however, we find it
serves the public interest in this instance 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. 19

The public interest would also be harmed by requiring parties like Meadowbrook to
divert substantial resources and staff away from its productive efforts to resolve
unnecessary litigation efforts stemming from confusion over the Commission’s regulations.

18 October 30, 2014 Order ¶ 27.
19 Id. (footnote omitted).
Similarly, the Commission should also reduce incentives for parties to abuse its rules for private gain. Accordingly, Meadowbrook respectfully submit that the public interest would be served by the granting of its Petition for a retroactive waiver from the effective date of the Regulation.

IV. CONCLUSION

For the reasons stated above, Meadowbrook respectfully requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by Meadowbrook (or on its behalf) after the effective date of the Regulation, through April 30, 2015.

Dated: May 29, 2015

Respectfully submitted,

MEADOWBROOK INSURANCE GROUP, INC. and MEADOWBROOK, INC.

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