

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

In the Matter of)	
)	CG Docket No. 02-278
)	
Petition of EatStreet, Inc.)	CG Docket No. 05-338
for Waiver of Section 64.1200(a)(4)(iv))	
of the Commission’s Rules)	

**PETITION OF EATSTREET, INC. FOR WAIVER
OF SECTION 64.1200(a)(4)(iv) OF THE COMMISSION’S RULES**

Pursuant to the *Order* issued by the Commission on October 30, 2014, in the above-referenced dockets¹ and Section 1.3 of the Commission’s rules,² EatStreet, Inc. (“EatStreet”) respectfully requests that the Commission grant EatStreet a waiver of Section 64.1200(a)(4)(iv) of its rules³ (the “Solicited Fax Rule”) with respect to faxes that have been transmitted by or on behalf of EatStreet pursuant to a recipient’s prior express invitation or permission.

I. Background

The Telephone Consumer Protection Act of 1991 (“TCPA”),⁴ as amended by the Junk Fax Prevention Act of 2005 (“JFPA”),⁵ prohibits the transmission of most unsolicited advertisements via facsimile — that is, most fax advertisements sent without the recipient’s prior

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Order, CG Docket Nos. 02-278, 05-338, FCC 14-164 (rel. Oct. 30, 2014) (“*Order*”).

² 47 C.F.R. § 1.3.

³ 47 C.F.R. § 64.1200(a)(4)(iv).

⁴ Pub. L. No. 102-243, 105 Stat. 2394, § 3(a) (1991), *codified at* 47 U.S.C. § 227.

⁵ Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified at* 47 U.S.C. § 227.

express consent.⁶ The TCPA provides a narrow exception to this prohibition for unsolicited advertisements faxed pursuant to an Established Business Relationship (“EBR”) between the sender and the recipient, so long as the fax includes an opt out notice that meets certain statutory standards and complies with other requirements.⁷ The Solicited Fax Rule purports to impose the *same* opt out notice requirement on faxes sent *with* the recipient’s prior express consent — that is, for *solicited* faxes⁸ — even though the relevant statutory prohibition, codified at 47 U.S.C. § 227(b), authorizes the FCC to regulate only “unsolicited advertisements,” which are defined by the TCPA’s plain language to exclude faxes that are transmitted with a person’s “prior express invitation or permission, in writing or otherwise.”⁹

As the Commission is well aware, plaintiffs’ attorneys have filed countless putative class action lawsuits against companies for alleged violations of the TCPA’s fax provisions and related Commission regulations. Such suits can be highly lucrative because the TCPA authorizes statutory damages for a violation of Section 227(b) of the Communications Act “or the regulations prescribed under” that subsection.¹⁰ It is not uncommon for class action lawsuits to seek millions of dollars or more in statutory damages for alleged violations that, as a practical matter, have a negligible to non-existent effect on consumers and businesses. Such is

⁶ 47 U.S.C. § 227(b)(1)(C).

⁷ *Id.*

⁸ 47 C.F.R. § 64.1200(a)(4)(iv).

⁹ 47 U.S.C. § 227(a)(5)

¹⁰ 47 U.S.C. § 227(b)(3) (“A person or entity may . . . bring in an appropriate court of that State—(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, (B) an action to . . . receive \$500 in damages for each such violation . . . , or (C) both such actions”). Section 227(b)(3) goes on to state that “[i]f the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award” available under Section 227(b)(3)(B) by three times, so up to \$1,500 for each violation.

the case with respect to suits filed in recent years targeting *solicited* faxes based on alleged violations of the Solicited Fax Rule.

Recently, in an order addressing numerous petitions for relief from the Solicited Fax Rule, the Commission found that the process by which it promulgated the Solicited Fax Rule caused justifiable confusion among fax senders regarding the rule's application.¹¹ Accordingly, although the Commission reaffirmed its assertion that Section 227(b) is the proper statutory basis for the Solicited Fax Rule, the Commission waived the rule with respect to solicited faxes that petitioning parties sent or will send through April 30, 2015.¹² Furthermore, although the *Order's* waivers applied only to faxes sent by the petitioners named in the *Order*, the Commission noted that "[o]ther, similarly situated parties, may also seek waivers such as those granted in this Order."¹³ EatStreet is one such similarly situated party, and this petition seeks such a waiver.

II. EatStreet is Similarly Situated to the Parties Recently Granted Waivers of the Solicited Fax Rule.

EatStreet currently is facing a putative class action lawsuit under the TCPA based on the same basic claims discussed in the *Order*. EatStreet, which is based in Madison, Wisconsin, provides an online platform for placing orders at local restaurants in cities across the country. North Branch Pizza and Burger Company ("North Branch" or "Plaintiff") filed a putative TCPA class action lawsuit against EatStreet in October 2014¹⁴ and is represented by a serial TCPA plaintiffs' counsel who has filed numerous such actions against other parties. In the EatStreet litigation, North Branch claims that EatStreet sent it a single fax without North

¹¹ *Order*, *supra* note 1, at ¶ 15.

¹² *Id.* ¶¶ 14, 36.

¹³ *Id.* ¶ 30.

¹⁴ *See North Branch Pizza & Burger Co. v. EatStreet, Inc.*, Complaint, No. 1:14-cv-07957 (N.D. Ill. filed Oct. 13, 2014) ("Complaint").

Branch’s prior express invitation or permission, and that EatStreet’s fax lacked “a proper opt-out notice as required by 47 C.F.R. § 64.1200.”¹⁵ Based on that allegation, North Branch seeks to sue on behalf of

[a]ll persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability of any property, goods, or services by or on behalf of Defendants, and (3) which did not display a proper opt-out notice.¹⁶

Notably, North Branch’s proposed class definition makes no reference to whether a fax recipient consented to receive faxes from EatStreet. This is because North Branch asserts — in clear contravention of common sense and the TCPA’s text — that EatStreet is “precluded from asserting any prior express permission or invitation” with respect to any fax that lacked a proper opt-out notice.¹⁷ In other words, North Branch’s theory is that under the Solicited Fax Rule, even if a fax recipient expressly consents to receive a fax, that same recipient may collect statutory damages of \$500 or more from the sender if the fax does not display the opt-out notice Congress mandated for unsolicited, EBR-based faxes.

For the same reasons set forth in the petitions addressed by the *Order*, EatStreet maintains that the Commission had — and has — no authority under Section 227(b) to promulgate the Solicited Fax Rule.¹⁸ Assuming *arguendo*, however, that the Solicited Fax Rule is valid, the Commission should grant EatStreet a waiver like the waivers granted in the *Order*. As the *Order* noted, the Notice of Proposed Rulemaking in the Commission’s proceeding to implement the JFPA “did not make explicit that the Commission contemplated an opt-out

¹⁵ See Complaint at ¶¶ 11, 14, 17.

¹⁶ *Id.* at ¶ 18.

¹⁷ *Id.* at ¶ 30.

¹⁸ See *Order* ¶¶ 6, 9-10 and pleadings cited therein.

requirement on fax ads sent with the prior express permission of the recipient.”¹⁹ In addition, the *Order* acknowledged that contradictory language contained in the Commission’s order implementing the JFPA “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.”²⁰ This “combination of factors presumptively establishes good cause for retroactive waiver” of the Solicited Fax Rule.²¹ Such waivers are in the public interest in part because, without the waivers, parties could be subject to substantial damages as a result of inadvertent violations resulting from the confusion surrounding the requirements for solicited faxes.²²

This Petition does not ask the Commission to resolve specific questions regarding the faxes EatStreet sent to North Branch or to any other particular recipient, such as whether the recipient consented to receive EatStreet’s faxes or whether the recipient at any point revoked any such consent. Those factual determinations are properly left for the District Court. However, like the parties who were granted waivers in the *Order*, EatStreet may face substantial damages if an inadvertent failure to comply with the Commission’s confusingly-promulgated requirements for solicited faxes precludes EatStreet from even asserting that any recipient of EatStreet’s faxes consented to receive the fax. As the *Order* acknowledged, such a result would be unjust and inequitable.²³

¹⁹ *Order* ¶ 25.

²⁰ *Id.* ¶ 24.

²¹ *Id.* ¶ 26.

²² *Id.* ¶ 27.

²³ *See id.* ¶ 28.

Conclusion

For the reasons stated above, the Commission should grant EatStreet a waiver of Section 64.1200(a)(4)(iv) of the Commission's rules with respect to any faxes EatStreet has transmitted in the past pursuant to the recipient's prior express invitation or permission and with respect to any such faxes EatStreet may transmit prior to April 30, 2015. Such a waiver would serve the public interest by avoiding an unjust and inequitable application of a confusingly-promulgated rule while affording EatStreet the same opportunity the Commission has afforded to similarly situated parties to bring their faxes into full compliance with the Commission's rules.

Respectfully submitted,

EATSTREET, INC.

By:  _____

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Dated: December 12, 2014

Declaration of EatStreet Officer

I have read the foregoing Petition, and I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief, formed after reasonable inquiry.

Executed on December 12, 2014

A handwritten signature in black ink, appearing to read "Matthew Howard", is written over a horizontal line.

Matthew Howard
CEO