

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

In the Matter of

Saratoga Aesthetics, LLC for Waiver of Section
64.1200(a)(4)(iv) of the Commission's Rules

CG Docket No. 02-278
CG Docket No. 05-338

**PETITION OF SARATOGA AESTHETICS, LLC FOR RETROACTIVE
WAIVER**

Pursuant to Section 1.3 of the Federal Communications Commission's ("Commission") rules Saratoga Aesthetics, LLC ("Saratoga Aesthetics") respectfully requests that the Commission grant it a retroactive waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) (the "Regulation") with respect to faxes that have been transmitted by Saratoga Aesthetics with the prior express consent or permission of the recipients or their agents ("Solicited Faxes") after the effective date of the Regulation. The Commission recently granted a number of such waivers and invited similarly situated parties, such as Saratoga Aesthetics, to file requests for the same relief.

I. INTRODUCTION

Saratoga Aesthetics is a small privately owned company. Founded in 1997, Saratoga Aesthetics is a distributor of aesthetic medical equipment. Saratoga Aesthetics has received demand letters and been named as a defendant in TCPA class action lawsuits authored or filed by plaintiffs and their TCPA attorneys. The plaintiffs' letters and Complaints included allegations that these plaintiffs and unknown putative classes of recipients received facsimile advertisements from Saratoga Aesthetics without a compliant opt-out notice. The allegations and any future similar allegations subject Saratoga Aesthetics to potentially substantial monetary damages for alleged violations of the opt-out notice requirement for faxes allegedly sent at the request of the recipients. Saratoga Aesthetics consistently disputed and denied the facsimiles these plaintiffs allegedly received

were unsolicited facsimile advertisements or were not sent by Saratoga Aesthetics. The basis for the demand letters and lawsuits is the TCPA. Saratoga Aesthetics believes the facsimiles it sent were solicited (i.e. sent with prior express invitation or permission).

Saratoga Aesthetics communicates with its customers and prospective customers, including those who make inquiries to Saratoga Aesthetics, in person, by mail and email, on the telephone and by sending facsimiles. Saratoga Aesthetics uses facsimiles to gather information from these recipients on some occasions and on other occasions to market and advertise its goods and services.

Since the adoption of Section 64.1200(a)(4)(iv), plaintiffs and their attorneys have seized on the controversy and uncertainty of the Regulation and Commission rule created in part by confusing and conflicting statements regarding the scope and applicability of such rule to Solicited Faxes to bring numerous class action lawsuits for TCPA violations. Such lawsuits have been brought against legitimate companies for engaging in consensual communications where the fax recipients had provided consent to receive faxes. Many of these class action lawsuits seek millions of dollars in damages based on the Commission's conflicting statements pertaining to the Regulation.

However, it is not necessary for the Commission to consider a particular dispute in acting on this Petition, and a dispute does not impact the sole issue raised in this Petition. The Commission expressly noted that granting a waiver should not "be construed in any way to confirm or deny whether the petitioners, in fact, had the prior express permission of the recipients to be sent the faxes at issue in the private rights of action."¹

¹ See Fax Order, para. 31.

On October 30, 2014, the Commission released FCC Order 14-164 (the “Fax Order”).² Prior to the 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 Fax Order apply only to the identified petitioners, and the Commission made clear that other similarly situated parties, like Saratoga Aesthetics, may also seek such waivers.

There is no public interest in strict enforcement of the Regulation against businesses that were confused by the Regulation and therefore did not include compliant opt-out notices to fax recipients who had provided “prior express invitation or permission” to be sent faxes. In contrast public interest would be harmed by requiring parties like Saratoga Aesthetics to divert substantial capital, time and human resources from its lawful business to engage in unnecessary (and possibly business ending) litigation because of past confusion over the Commission’s Regulation. A waiver is thus appropriate here.

II. BACKGROUND

A. The Current Statutory and Regulatory Framework.

The TCPA, as codified in 47 U.S.C. Section 227 *et seq.*, and amended by the Junk Fax Prevention Act of 2005 (“JFPA”),³ prohibits, under certain circumstances, the use of a fax machine

² See Petitions 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, FCC 14-164 (rel October 30, 2014).

³ See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); see also Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

to send an “unsolicited advertisement.”⁴ 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.”⁵

As relevant to this Petition, the Regulation states a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.”⁶ In addition to the Regulation, the Commission also adopted rules implementing the JFPA.⁷ As explained in the Fax Order, a footnote in the Junk Fax Order led to industry-wide confusion regarding the Commission’s intent to apply the opt-out notice requirement to Solicited Faxes.⁸ The Commission clarified this important issue in the Fax Order.

Pursuant to the Fax Order, the Commission “confirmed 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.”⁹ Due to the confusion,¹⁰ however, the Commission

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

5 Id. Section (a)(5).

6 See 47 C.F.R. Section 64.1200(a)(4)(iv); see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration, 21 FCC Rcd at 3812, para. 48 (2006) (the “Junk Fax Order”).

7 See generally Junk Fax Order.

8 See Junk Fax Order, 21 FCC Rcd at 3818, para. 42 n. 154 (“We note that the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”) (emphasis added).

9 See Fax Order, para. 1.

10 The Commission detailed the reasons for such confusion in the Fax Order: “Specifically, there are two grounds that we find led to confusion among affected parties that the opt-out notice did not apply to fax ads sent with the prior express permission of the recipient, the combination of

decided to grant retroactive waivers to parties affected by the confusion. Affected parties are those, like Saratoga Aesthetics, who have sent faxes with the recipient's prior express permission and may reasonably have been uncertain about the opt-out notice requirements for such faxes. The Commission stated:

“We recognize that some parties who have sent fax ads with the recipient's prior express permission may have reasonably been uncertain about whether our requirements 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 those parties with temporary relief from any past obligation to provide the opt-out notice to such recipients required by our rules.

“We believe the public interest is better served by granting such a limited retroactive waiver than through strict application of the rule.”

Fax Order, para. 1.

The Commission stated that other affected parties similarly situated as the petitioners, like Saratoga Aesthetics, have six months from the release of the Fax Order (October 30, 2014) to seek a waiver.¹¹ Thus, Saratoga Aesthetics' Petition is timely.

III. DISCUSSION

A. The Commission Should Grant Saratoga Aesthetics A Waiver.

Saratoga Aesthetics respectfully requests that the Commission grant a limited retroactive waiver of the Regulation for any Solicited Facsimiles sent by Saratoga Aesthetics (or on its behalf)

which presents us with special circumstances warranting deviation from the rule. The record indicates that inconsistency between a footnote contained in the Junk Fax Order (only unsolicited advertisements) and the rule (all advertisements) caused confusion regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission. Further, the notice of intent to adopt the Regulation did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with prior express permission of the recipient.” Fax Order, para. 24-25 (emphasis in original).

¹¹ Junk Fax Order, para. 48.

after the effective date of the Regulation. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown. Generally, the Commission may grant a waiver of its rules in a particular case if the waiver would not undermine the policy objective of the pertinent rule and would otherwise serve the public interest. Further, a 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. As shown, both rationales apply and Saratoga Aesthetics is entitled to a waiver under this standard for the same reasons the parties granted waivers in the Fax Order received them.

B. Waiver Would Not Undermine the TCPA Policy Objective.

Granting a waiver to Saratoga Aesthetics would not undermine the TCPA's policy objective "to allow consumers to stop unwanted faxes."¹² This policy is not undermined where Saratoga Aesthetics sent Solicited Faxes to customers, prospective customers and others who made inquiries and who all gave their permission or invitation to receive facsimile advertisements from Saratoga Aesthetics.

C. Special Circumstances Warrant Deviation from the General Rule.

The Commission explained in the Fax Order that special circumstances counsel in favor of deviation from the general rule rather than strict adherence. The Fax Order found there was "industry-wide confusion" as to whether Solicited Faxes must include an opt-out notice, based in part on the special circumstance of the confusing footnote in the Junk Fax Order. Saratoga Aesthetics, like many other companies, was reasonably confused as to whether Solicited Faxes must include an opt-out notice. Saratoga Aesthetics is not relying on simple ignorance of the TCPA or the FCC's attendant regulations as grounds for this waiver. For Saratoga Aesthetics, a waiver is

¹²Fax Order, para. 27.

particularly in the public interest because denial of a waiver could subject Saratoga Aesthetics to potentially millions of dollars in monetary damages and force it out of business. In the Fax Order the Commission made it clear that the public interest favors not subjecting businesses that understandably were confused by the Regulation and inadvertently may not have fully complied with the Regulation and are now the subject of TCPA class action lawsuits seeking millions of dollars in monetary damages.

The Commission stated “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 upon 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.”

To summarize, Saratoga Aesthetics sent Solicited Faxes to its customers, prospective customers and others who made inquiries to Saratoga Aesthetics about its products and services and who also consented to receive such fax ads and was reasonably uncertain about whether the opt-out notices were required on such faxes. Therefore, Saratoga Aesthetics is similarly situated to the petitioners who were granted waivers in the Fax Order and equally entitled to the same limited retroactive waiver. Due to the nature and extent of Saratoga Aesthetics’ Solicited Faxes, the waiver will not undermine the TCPA policy objective and the public interest will be better served by the Commission granting the waiver instead of subjecting Saratoga Aesthetics to a further diversion of

time, capital and other resources defending any TCPA demands and lawsuit and potentially millions of dollars in monetary damages that would put it out of business.

D. Other Matters.

Saratoga Aesthetics supports and agrees with the Commission's finding in the Fax Order that good cause exists due to the special circumstances (i.e. the footnote, the explicitness of the notice, enforcing the rule would be unjust or inequitable, etc.), that the public interest is better served (i.e. the confusion subjects the parties to potentially substantial damages for inadvertent violations and by balancing the legitimate business and consumer interests) by the granting of an individual limited retroactive waiver of this rule for any prior conduct, and that confusion was created in the Junk Fax Order adopting this requirement, so that several parties face liability exposure in private rights of action. Saratoga Aesthetics is a part of this industry-wide confusion for businesses that mistakenly believed the opt-out notice did not apply to Solicited Faxes. The confusion or misplaced confidence does warrant some relief from its potentially substantial consequences; and the rule is not waived indefinitely, so consumers will not be deprived of the rule's value.

This request for a waiver is not an acknowledgement or admission by Saratoga Aesthetics that it sent any facsimile advertisements, or any facsimile advertisements in violation of the TCPA, including any facsimile advertisements that failed to comply with the Regulation's opt-out notice requirement. The granting of the waiver should not be construed in any way to confirm or deny whether Saratoga Aesthetics, in fact, had the prior express permission of any recipients to be sent faxes, including the faxes at issue in the prior demand letters and private rights of action.

This Petition does not contest the protections afforded by the opt-out notice requirement going forward, the statutory authority to require opt-out information on fax ads (or, alternatively, that Section 227(b) of the Act was not the statutory basis of that requirement), or seek a repeal of the rule or a finding of substantial compliance. Saratoga Aesthetics does not believe the

Commission has violated the separation of powers vis-a-vis the judiciary and is interpreting the TCPA as the expert agency. Saratoga Aesthetics now fully understands how the two rules – one requiring the fax sender to include opt-out information and the other requiring the recipient to use that information when making an opt-out request are intended to work in concert and will include an opt-out notice on any fax ads it may send in accordance with the TCPA and its Regulation and rule.

IV. CONCLUSION

Saratoga Aesthetics is similarly situated to those parties who were granted waivers in the Fax Order and is seeking the same retroactive waiver of the Regulation in order to provide Saratoga Aesthetics with the same temporary relief other petitioners were granted. For these reasons, Saratoga Aesthetics respectfully requests that the Commission grant it a limited retroactive waiver of Section 64.1200(a)(4)(iv) for any Solicited Faxes sent by Saratoga Aesthetics (or on its behalf) after the effective date of the Regulation.

April 27, 2015

Respectfully submitted,

William B. Hayes
257 Jackson Street
Denver, Colorado 80206
303 514 0658

Counsel to Saratoga Aesthetics, LLC