

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

In the Matter of)	
)	
Petition for Waiver Of 2217044 Ontario Inc.,)	CG Docket No. 02-278
Hydropool Inc., La-Z-Boy Global Limited and La-Z-)	
Boy Incorporated)	CG Docket No. 05-338
)	
)	

**PETITION FOR WAIVER OF SECTION 64.1200(a)(4)(iv)
OF THE COMMISSION'S RULES**

Eric L. Samore
Molly A. Arranz
Erin A. Walsh
SmithAmundsen LLC
150 N. Michigan Avenue, Suite 3300
Chicago, Illinois 60601
(312) 894-3200 (ph)
(312) 894-3210 (fax)
esamore@salawus.com
marranz@salawus.com
ewalsh@salawus.com

TABLE OF CONTENTS

I. BACKGROUND.....2

 A. The TCPA And Its Implementing Regulations.....3

 B. The Commission’s Waiver Order.....4

II. PETITIONERS SHOULD BE GRANTED A WAIVER OF THE
REGULATION.....5

 A. Petitioners Are Similarly Situated To The Original Parties.....5

 B. Good Cause Exists For Waiving The Regulation6

PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Rules¹ of the Federal Communication Commission (the “Commission”), and the Commission’s Order dated October 30, 2014 (“Waiver Order”),² Petitioners 2217044 Ontario Inc. (“Ontario”), Hydropool Inc. (“Hydropool”), La-Z-Boy Global Limited (“La-Z-Boy Global”) and La-Z-Boy Incorporated (“La-Z-Boy Inc.”) (collectively “Petitioners”) respectfully request that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) of its Rules (“Regulation”), to the extent the Regulation may apply, with respect to faxes transmitted by Petitioners (or on Petitioners’ behalf) with the prior express permission of the recipients or their agents.

In its Waiver Order, the Commission clarified that an opt-out notice is required under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA” or “Act”), and the Commission’s Regulation, 47 C.F.R. § 64.1200(a)(4)(iv), for facsimile advertisements sent with the recipients’ prior express permission or invitation (“solicited fax advertisements”) and must comply with the requirements of 47 U.S.C. § 227(b)(1)(C) and (2)(D) and 47 C.F.R. § 64.1200(a)(4)(iii).³ At the same time, the Commission recognized that “good cause” exists for granting a retroactive waiver of this requirement—specifically, the state of justified, industry-wide confusion, which has given rise to substantial liability for inadvertent violations.⁴ Accordingly, the Commission retroactively waived its Regulation for twenty-seven petitioners and invited similarly situated parties to seek the same relief on or before April 30, 2015.⁵

¹ 47 C.F.R. §§ 1.2, 1.3; 5 U.S.C. § 554 (e).

² *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, FCC 14-164, 29 FCC Rcd 13998 (Oct. 30, 2014) (“Waiver Order”).

³ *Id.* at ¶ 1.

⁴ *Id.* at ¶¶ 23-28, 48, *ref.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 2005, Report and Third Order on Reconsideration*, 21 FCC Rcd 3787, 3812, n. 154 (2006) (“Junk Fax Order”).

⁵ Waiver Order at ¶¶ 30, 48.

Good cause exists for granting Petitioners' request for a retroactive waiver. Petitioners were subject to the same special circumstances addressed in the Waiver Order—including confusion caused by the inconsistent footnote in the Junk Fax Order and lack of explicit notice of the Regulation's adoption. As a result, Petitioners face the possibility of substantial liability, such that waiver is in the public interest.⁶ In short: Petitioners are in the same position as the parties for whom the Commission has already waived the Regulation. For these reasons, and those set forth below, Petitioners respectfully request a retroactive waiver of Section 64.1200(a)(4)(iii).

I. BACKGROUND.

Petitioner Hydropool sells whirlpool, hot tub, pool and spa products. It has been authorized to use the La-Z-Boy trademark to sell certain swim spa products that bear the La-Z-Boy name.

Petitioners are currently facing a putative class action lawsuit by Keith Bunch Associates, LLC ("Bunch" or "Plaintiff"), *Keith Bunch Associates LLC v. La-Z-Boy Incorporated, et al.*, Case No. 13-cv-850, Dkt #1 (M.D.N.C.) (filed on Oct. 7, 2014) (hereinafter cited as "*Bunch*"), for the alleged sending of two fax advertisements in violation of the TCPA and the Commission's Regulation.⁷ Specifically, Plaintiff claims: "Defendants are precluded from asserting any prior express permission or invitation because of the failure to comply with the Opt-Out Notice Requirements."⁸ La-Z-Boy Inc. and La-Z-Boy Global deny any involvement or knowledge of the subject faxing and are pursuing dismissal on this basis.⁹

⁶ Waiver Order at ¶¶ 24-27.

⁷ Complaint, *Bunch*, Dkt #1 at ¶¶ (M.D.N.C.) (filed on Oct. 7, 2014).

⁸ *Id.* at ¶ 35

⁹ See e.g., La-Z-Boy Inc.'s Answer And Affirmative Defenses, *Bunch*, Dkt # 27 at p. 3 (filed on Jan. 7, 2015); La-Z-Boy Global Limited's Answer And Affirmative Defenses, *Bunch*, Dkt. # 28 at p. 3 (filed on Jan 7, 2015).

One of Petitioners' challenges to Plaintiff's claims is that the subject faxes were not "unsolicited."¹⁰ For its part, Bunch denies that it consented to receive advertising faxes from Defendants.¹¹ However, this factual dispute is properly resolved in the underlying litigation and does not impact the instant Petition.¹²

A. The TCPA And Its Implementing Regulations.

The TCPA prohibits the use of a fax machine to send unsolicited advertisements.¹³ The Junk Fax Prevention Act of 2005 ("JFPA") amended the Act and codified the established business relationship ("EBR") defense for fax advertisements sent pursuant to relationships that Congress recognized as implying consent.¹⁴ As a condition of this defense, unsolicited fax advertisements must include an opt-out notice to inform recipients how to contact the sender and stop future faxes.¹⁵ The JFPA makes no mention of the Regulation and does not extend the opt-out requirement to *solicited* fax advertisements.

The Commission adopted the Regulation in the Junk Fax Order along with the EBR exemption.¹⁶ At the same time, the Commission stated, in a footnote, that "the opt-out notice requirement only applies to communications that constitute unsolicited advertisements."¹⁷ The Junk Fax Order is the first articulation of any rule calling for opt-out language on solicited fax

¹⁰ Hydropool, Inc.'s Answer And Affirmative Defenses, *Bunch*, Dkt. #26 at ¶ 15 (filed on Jan 7, 2015); 2217044 Ontario, Inc.'s Answer And Affirmative Defenses, *Bunch*, Dkt. # 29. As stated above, the La-Z-Boy entities had no involvement in the faxing and, thus, lack personal knowledge of whether the faxes were, in fact, unsolicited.

¹¹ Complaint, *Bunch*, Dkt. #1 at ¶ 15.

¹² Waiver Order at ¶ 26.

¹³ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227; 47 U.S.C. § 227 (a)(5) and (b)(1)(C).

¹⁴ Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005), *codified at* 47 U.S.C. § 227, *et seq.*

¹⁵ 47 U.S.C. § 227(b)(2)(D) ("JFPA").

¹⁶ Junk Fax Order, 21 FCC Rcd at 3812.

¹⁷ *Id.* at 3809, n. 154.

advertisements; indeed, the Commission did not explicitly reference any such requirement in its Notice of Proposed Rulemaking.¹⁸

B. The Commission’s Waiver Order.

The Commission issued the Waiver Order in response to numerous petitions challenging Section 64.1200(a)(4)(iii). Declining to invalidate the Regulation, the Commission clarified: “senders of fax ads must include certain information on the fax ads that will allow consumers to opt out, even if they previously agreed to receive fax ads from such senders.”¹⁹ Concurrently, the Commission acknowledged—given the backdrop of the Regulation’s inception and its impact on liability—that requiring retroactive, strict adherence is not in the public interest.

The Commission determined that “good cause” exists for waiving the Regulation.²⁰ First, special circumstances warrant deviation. Specifically, the inconsistent footnote in the Junk Fax Order and lack of explicit notice created “confusion” and engendered “misplaced confidence” that the opt-out rule does not apply to solicited fax advertisements.²¹ Second, waiver is in the public interest. Inadvertent violations—arising after the Junk Fax Order when the industry was afflicted by understandable confusion—could result in substantial, potentially catastrophic, liability.²² Based on this “good cause,” the Commission “grant[ed] retroactive waivers of [the] opt-out notice requirement...to provide...temporary relief from any past obligation to provide

¹⁸ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Protection Act*, Notice of Proposed Rulemaking, 20 FCC Rcd. 19758, 19767-70 (2005)(“Junk Fax NPRM”).

¹⁹ Waiver Order at ¶ 1.

²⁰ *Id.* at ¶¶ 23-28, 48.

²¹ *Id.* at ¶¶ 23-25(“[T]he 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”).

²² *Id.* at ¶ 27.

the opt out notice to such recipients required by our rules.”²³ The Commission also invited “similarly situated” parties to seek the same waiver on or before April 30, 2015.

The Commission explicitly declined to resolve factual disputes in its Order.²⁴ It granted waivers without “confirm[ing] or deny[ing] 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.” Similarly, the Commission did not make any evidentiary rulings regarding whether there was actual confusion on the part of the petitioners.²⁵

II. PETITIONERS SHOULD BE GRANTED A WAIVER OF THE REGULATION.

Petitioners fall squarely within the class of persons for whom the Commission intended to waive retroactively Section 64.1200(a)(4)(iv). They are “similarly situated” to the parties already granted waivers. Waiver, here, is supported by the same good cause. Thus, Petitioners should receive the same retroactive waiver of the Regulation provided in the Waiver Order.

A. Petitioners Are Similarly Situated To The Original Parties.

Like the parties for whom the Regulation has already been waived, Petitioners have been sued in a putative class action lawsuit for alleged violations of the TCPA. They are confronted with potential liability and substantial damages similar to that faced by the original petitioners.

Petitioners deny sending *unsolicited* fax advertisements. Petitioners also face potential, substantial damages and costs for alleged violations that occurred after the Junk Fax Order, when there was reasonable confusion regarding the Regulation. Petitioners were subject to the same “misplaced confidence” that the Commission describes in its Waiver Order; and, consequently,

²³ *Id.* at ¶¶ 24-25.

²⁴ *Id.* at ¶ 31

²⁵ *Id.* at ¶ 26.

had no legal certainty that an opt-out was required for solicited faxes.²⁶ Thus, Petitioners are “similarly situated” to the parties who have already received waivers.

B. Good Cause Exists For Waiving the Regulation.

The Commission’s rules allow it “at any time” to waive requirements for good cause shown.²⁷ “Good cause” exists upon a showing of “special circumstances warranting an exception in the public interest.”²⁸ The Commission has already determined that both elements are present with regard to Section 64.1200(a)(4)(iv) and, accordingly, has granted retroactive waivers to twenty-seven petitioners. The same “special circumstances” and “public interest” concerns exist with regard to Petitioners such that retroactive waiver of the Regulation is warranted.

First, the special circumstances detailed in the Order counsel in favor of deviation from the Regulation with regard to Petitioners.²⁹ The “confusing situation” following the Junk Fax Order—caused by the inconsistent footnote and lack of explicit notice—resulted in “misplaced belief” that the opt-out notice requirement does not apply to solicited fax advertisements.³⁰ Petitioners were affected by this “confusing situation;” lacked certainty regarding the scope of the Regulation; and, are accused of violations that allegedly occurred after the Junk Fax Order.

Second, granting Petitioners a retroactive waiver of the Regulation is in the public interest. As the Commission made clear, public interest favors shielding businesses from substantial liability for inadvertent violations resulting from a generalized state of confusion:

[F]ailure 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...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...³¹

²⁶ *Id.* at ¶¶ 24, 26.

²⁷ 47 C.F.R. § 1.3; *Keller Commc'ns, Inc. v. F.C.C.*, 130 F.3d 1073, 1076 (DC Cir. 1997).

²⁸ *BellSouth v. FCC.*, 162 F.3d 1215 (DC Cir. 1999); *Nat. Ass'n Broadcasters v. FCC*, 569 F.3d 416 (DC Cir. 2009).

²⁹ Waiver Order at ¶¶ 23-26.

³⁰ *Id.* at ¶¶ 15, 24, 27-28.

³¹ *Id.* at ¶ 27.

Waiver in the instant case serves the same public interest concerns that the Commission seeks to ameliorate through its Waiver Order. Petitioners are facing a potential class action lawsuit for alleged violations of the Act and Regulation and have asserted that the subject faxes—sent after the Junk Fax Order—were not “unsolicited.” Yet, despite the Commission’s acknowledgement that “misplaced confidence” on the part of parties, similarly situated to Petitioners, was reasonable, the alleged failure to include a required opt-out notice leaves Petitioners vulnerable to substantial damages. Thus, retroactive waiver of the Regulation, here, is in the public interest.

Draconian application of the Regulation, despite the confusion, could expose Petitioners to substantial costs or class-wide damages for engaging in consensual communications. Consequently, there is “good cause” for granting the requested waiver.

For all of these reasons, Petitioners 2217044 Ontario Inc., Hydropool Inc., La-Z-Boy Global Limited and La-Z-Boy Incorporated, respectfully requests that the Commission grant it the same retroactive waiver of Section 64.1200(a)(4)(iv) granted to the parties in its October 30, 2014 Waiver Order for any solicited faxes sent after the effective date of the Regulation.

Respectfully submitted,

By: /s/ Erin A. Walsh

SmithAmundsen LLC
150 North Michigan Avenue, Suite 3300
Chicago, Illinois 60601
(312) 894-3200 (ph)
(312) 894-3210 (f)

Counsel for Petitioners