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January 26, 2018

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation
by Amerifactors Financial Group, LLC
CG Docket Nos. 02-278 and 05-338

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, the undersigned counsel hereby provides notice that Amerifactors Financial Group, LLC ("Amerifactors") met with representatives of the Federal Communications Commission ("FCC") concerning its Petition of Expedited Declaratory Ruling filed July 13, 2017 in the above-captioned proceedings ("Petition"). On January 23, 2018, Amerifactors met with Kurt Schroeder, Nancy Stevenson and Nellie Foosener of the Consumer & Governmental Affairs Bureau. On January 24, 2018, Amerifactors met with Zenji Nakazawa, Legal Advisor to Chairman Pai. In attendance on behalf of Amerifactors in both meetings was Steven A. Augustino of Kelley Drye & Warren LLP. Jennifer R. Wainwright of Kelley Drye & Warren LLP attended the meeting with Mr. Nakazawa.

In the meetings, Amerifactors urged the Commission to grant its Petition promptly. As Amerifactors explained in the meetings, technological advances have greatly displaced traditional facsimile machines of the past. This fact has been acknowledged repeatedly by the Commission in reports made to Congress under the Junk Fax Protection Act of 2005. At this point, most Americans have migrated away from facsimile transmissions in favor of email, texting, instant messaging and other forms of document sharing. Those that maintain a "fax" presence are increasing relying upon cloud-based online fax services to replace the telephone

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facsimile machine technology. Indeed, “faxing” a document is almost as much a misnomer these days as “dialing” a telephone number.¹

With this technological displacement has come the disappearance of the harms that underlie the fax advertising restrictions of the Telephone Consumer Protection Act of 1991 (“TCPA”). Amerifactors asks the Commission to respond to those changes and to stem the expansion of the TCPA being carried out by a small but determined cadre of professional TCPA plaintiffs and class action law firms by declaring that the TCPA means what it says when it limits its scope to transmissions received on a “telephone facsimile machine” and does not reach transmissions received by online fax services that only mimic the old facsimile capability.

Amerifactors argued that its Petition is consistent with Chairman Pai’s regulatory philosophy as explained on his FCC bio. Notably, Chairman Pai explained that, “Particularly given how rapidly the communications sector is changing, the FCC should do everything it can to ensure that its rules reflect the realities of the current marketplace and basic principles of economics.”² Moreover, Chairman Pai emphasized that, “As a creature of Congress, the FCC must respect the law as set forth by the legislature.”³ Both principles counsel toward grant of the Amerifactors Petition.

Amerifactors also noted that, while robocalling is a top consumer complaint to the FCC, junk faxing decidedly is not. In May 2017, the FCC noted in its Report on Unsolicited Advertisements, sent to Congress pursuant to the Junk Fax Prevention Act of 2005, that junk fax complaints had declined by 93% from their 2007 peak.⁴ Indeed, faxing complaints through April 2017, the most recent month in the FCC Report, averaged only 348 complaints per month⁵ and have declined even more in the nine months since then. As the FCC explained in its Report the year prior:

¹ There are a great many terms which have become overtaken by technology, but which are still used in common language, such as “tuning” to a radio station, “taping” movies or shows, and “carbon copying” or “cc’ing” someone on a message. See, <https://mashable.com/2014/03/04/old-tech-terms/#5cKLGWYg9Eqw>. Increasingly, “receiving a fax” falls into the same category.

² FCC Bio of Chairman Ajit Pai, available at https://www.fcc.gov/about/leadership/ajit-pai?qt=leadership_tabs=0#qt=leadership_tabs (last visited Jan. 26, 2018).

³ *Id.*

⁴ Federal Communications Commission, Enforcement Bureau, Report on Unsolicited Facsimile Advertisements, May 10, 2017, at Appendix (unnumbered page).

⁵ *Id.*

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The decline in fax complaints follows in lockstep with Americans' shift away from fax transmission to other forms of document sharing via the Internet; some estimate that as few as 3% of American households have a device capable of receiving faxes. Moreover, as Americans abandon landline telephone service for wireless-only service, consumer use of fax machines will probably continue to decline.⁶

In the meetings, Amerifactors asked the Commission to take note of these changes in technology and rule that the modern replacements for facsimile transmissions are not within the scope of the TCPA. As Chairman Pai noted in his dissent in the 2015 TCPA Declaratory Ruling (speaking of another provision of the TCPA that arguably has become overcame by technological advances),

[W]hat the Commission deems defeat is in fact a victory for consumers. Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it. And **if the FCC wishes to take action against newer technologies beyond the TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along.**⁷

Amerifactors urged the Commission to follow Chairman Pai's guidance in this matter. As explained in the Petition, "faxes" received via online fax services are not received on a "telephone facsimile machine" as defined in the TCPA.⁸ Moreover, Amerifactors emphasized that "faxes" received via online fax services do not impose the cost of ink or paper on recipients and do not "tie up" telephone lines, as was the case with facsimile equipment in 1991.⁹ These

⁶ Federal Communications Commission, Enforcement Bureau, Report on Unsolicited Facsimile Advertisements, May 12, 2016, at 2.

⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015), Dissenting Statement of Commissioner Ajit Pai (emphasis added); *cf. id.*, Dissenting Statement of Commissioner Michael O'Rielly ("The Commission should have had gone back to Congress for clear guidance on the [whether the TCPA applies to text messages] rather than shoehorn a broken regime on a completely different technology.").

⁸ 47 U.S.C. § 227(a)(3) (definition of "telephone facsimile machine"); *See* Petition at 12-16.

⁹ *See* Petition at 16-19.

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services also do not use a “regular telephone line” as part of the transmission. Therefore, modern fax services do not fit within the scope of the TCPA.

Finally, Amerifactors noted in the meetings that this conclusion will not increase the incidence of unwanted facsimile advertisements, nor would it leave consumers of online fax services without remedies to police unwanted communications. The trends noted by the FCC in the 2016 Report on Unsolicited Facsimile Advertisements are likely to continue to erode the use of facsimile technology, even if the Commission acknowledges that some services are not within the scope of the TCPA. Indeed, counsel for Amerifactors noted that many business cards these days don’t even list a fax number for the person. With respect to users of online facsimile services, if the FCC concludes that the CAN-SPAM Act applies to such communications, then remedies under that Act are available to consumers. In addition, customers of online fax services are capable of blocking unwanted messages themselves, without the prohibitions of the TCPA. Most online fax services allow “blacklisting” of incoming numbers and other methods to address unwanted communications. Even if an unwanted message makes it through, its “harm” is akin to email spam – the customer need just ignore the message.

For the reasons discussed above, Amerifactors respectfully requests that the Commission move quickly to grant its petition and declare that fax advertisements the recipient receives through online fax services or on a device other than a “telephone facsimile machine” are not subject to the TCPA.

Sincerely,



Steven A. Augustino

Counsel for Amerifactors Financial Group, LLC

cc: Z. Nakazawa
K. Schroeder
N. Stevenson
N. Foosener