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March 8, 2019

**VIA ECFS**

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

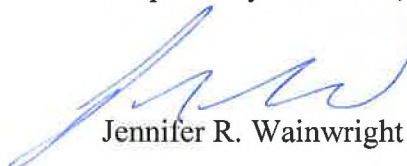
Re: Erratum to Written *Ex Parte* Presentation by AmeriFactors Financial  
Group, LLC; CG Docket Nos. 02-278 and 05-338

Dear Ms. Dortch:

On February 22, 2019, counsel for AmeriFactors Financial Group, LLC (“AmeriFactors”) submitted a letter (“Letter”) concerning AmeriFactors’ Petition of Expedited Declaratory Ruling filed July 13, 2017 in the above-captioned proceedings. The Letter stated that the Enforcement Bureau’s 2018 Report on Unsolicited Facsimile Advertisements (“Report”) was attached as Exhibit A to the Letter. However, the Report was inadvertently omitted from the original submission. Accordingly, we are resubmitting the Letter with the Report attached.

Kindly contact the undersigned should you have any questions regarding this submission. Thank you for your assistance.

Respectfully submitted,



Jennifer R. Wainwright

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February 22, 2019

**VIA ECFS**

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

Re: Written *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 Federal Communications Commission's ("FCC's" or "Commission's") rules, the undersigned counsel for AmeriFactors Financial Group, LLC ("AmeriFactors") hereby submits this letter concerning AmeriFactors' Petition of Expedited Declaratory Ruling filed July 13, 2017 in the above-captioned proceedings ("Petition"). The Commission received comment on the AmeriFactors Petition in August and September of 2017, and the Petition is ripe for resolution.

By this submission, AmeriFactors urges the Commission to grant the Petition and declare that "fax" advertisements the recipient receives through online facsimile services or on a device other than a "telephone facsimile machine" are not subject to the Telephone Consumer Protection Act of 1991 ("TCPA"). As explained further herein, the ruling by the D.C. Circuit in *ACA International v. FCC* underscores the importance of acknowledging the limitations of the scope of the TCPA and the need for the FCC to set forth clear rules of the road for parties to avoid needless and costly litigation. Moreover, the FCC's own empirical evidence demonstrates that it is high time for the FCC to acknowledge that technological advances have greatly displaced traditional facsimile machines of the past, and that "online fax services" such as those

Ms. Marlene H. Dortch  
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described in the Petition<sup>1</sup> do not cause the types of harm to consumers that the TCPA and Junk Fax Prevention Act of 2005 (“JFPA”) were intended to address. Finally, the district court hearing the complaint against AmeriFactors has granted a stay through March 28, 2019 to allow for FCC input on this important question.<sup>2</sup> AmeriFactors urges the Commission to provide guidance as soon as possible.

**The Commission Should Acknowledge the Limits of the TCPA in Light of Advances in Facsimile Technology**

In 2018, the U.S. Court of Appeals for the D.C. Circuit overturned much of the FCC’s 2015 TCPA Declaratory Ruling<sup>3</sup> as arbitrary and capricious.<sup>4</sup> While the decision did not address facsimile issues, several of the issues in *ACA International* parallel questions that are present in the facsimile provisions of the TCPA. In particular, the D.C. Circuit was appropriately skeptical of the suggestion that the FCC may “update” the TCPA to address equipment not covered by the statute’s text. In its discussion of the FCC’s interpretation of the term “automatic telephone dialing system,” the court astutely observed:

Congress need not be presumed to have intended the term automatic telephone dialing equipment to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time. After all, the statute also generally prohibits nonconsensual calls to numbers associated with a ‘paging

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<sup>1</sup> Online fax services offer users the ability to both send and receive “faxes” using cloud-based servers. Users access the fax services via the Internet or a dedicated IP connection. For outbound faxes, the user can send a document from many common software programs, including email, word processing programs, presentation programs, and scanning equipment such as digital scanners or digital copy machines. For inbound faxes, the user can acquire a new number or port its existing fax number for such purpose. Inbound faxes are held in digital form at the cloud-based server, where the user accesses the document via the online portal or via an email attachment sent to the user’s email account. Either way, the user does not automatically print the fax, and need not ever print a fax.

<sup>2</sup> See Text Order, *Career Counseling, Inc. v. AmeriFactors Fin. Grp., LLC et al.*, No. 3:16-cv-03013 (D.S.C. Sept. 28, 2018), ECF No. 88.

<sup>3</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“2015 TCPA Declaratory Ruling”).

<sup>4</sup> *ACA Int’l. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

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service' or 'specialized mobile radio service,' ... yet those terms have largely ceased to have practical significance.<sup>5</sup>

This logic is equally applicable to facsimile technology. As AmeriFactors explained in its Petition – and as multiple commenters confirmed – technological advances have largely replaced the “telephone facsimile machine” and rendered that term in the TCPA obsolete. Few people today even engage in “faxing” and when they do, the term is largely used to describe an exchange that does not involve the equipment of 1991. Rather, the traditional, stand-alone fax machine – complete with its dedicated lines, slow transmission speeds and mandatory printing capabilities – has been replaced for all but a small number of consumers. Today’s consumers receive “faxes” not on a traditional telephone facsimile machine but via a computer, as an email service. “Faxing” continues as a term despite this technological change much as telephone users “dial” a number despite the long-ago retirement of rotary dial telephones and of analog telephone service.<sup>6</sup>

This substitution is not news to the Commission. Indeed, the FCC has repeatedly acknowledged in its reports to Congress that technological advances have greatly displaced traditional facsimile machines of the past, and has provided the following explanation of the demise of the “telephone facsimile machine:”

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.<sup>7</sup>

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<sup>5</sup> *ACA Int’l.* at 699.

<sup>6</sup> 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 Yohana Desta, “9 Old-Fashioned Tech Terms You Still Use Today,” Mashable (Mar. 4, 2014), *available at* <https://mashable.com/2014/03/04/old-tech-terms/#5cKLGWYg9Eqw>. Increasingly, “receiving a fax” falls into the same category.

<sup>7</sup> See, e.g., Federal Communications Commission, Enforcement Bureau, Report on Unsolicited Facsimile Advertisements, at 2 (May 2, 2018) (“2018 Report on Unsolicited Facsimile Advertisements”) (attached hereto as **Exhibit A**); see also Federal Communications Commission, Enforcement Bureau, Report on Unsolicited Facsimile Advertisements, at 2 (May 12, 2016).

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Therefore, just as the D.C. Circuit cautioned the FCC in *ACA International*, the FCC cannot presume that “telephone facsimile machines” will exist in perpetuity. When technology has changed, the FCC must acknowledge that change. As Chairman Pai noted in his dissent in the 2015 TCPA Declaratory Ruling, when discussing the changes in automated dialing equipment:

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.**<sup>8</sup>

The FCC should 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.<sup>9</sup> 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 facsimile machine technology.

With this technological displacement has come the disappearance of the harms that underlie the fax advertising restrictions of the TCPA. As explained in the Petition, “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.<sup>10</sup> These 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. AmeriFactors asks the FCC 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<sup>11</sup> by declaring that the TCPA means

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<sup>8</sup> 2015 TCPA Declaratory Ruling, 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.”).

<sup>9</sup> 47 U.S.C. § 227(a)(3) (definition of “telephone facsimile machine”); *See* Petition at 12-16.

<sup>10</sup> *See* Petition at 16-19.

<sup>11</sup> Indeed, the Seventh Circuit aptly observed in 2016 “the pervasive nature of junk-fax litigation is best explained this way: it has blossomed into a national cash cow for plaintiff’s attorneys specializing in TCPA disputes. ... We doubt that Congress intended



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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 submits 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 2018 Report on Unsolicited Facsimile Advertisements are likely to continue to erode the use of facsimile technology, even if the FCC acknowledges that some services are not within the scope of the TCPA. 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 statute are available to consumers.

AmeriFactors appreciates that robocalling is a top consumer complaint to the FCC, and that the TCPA is a key tool for the FCC to address this issue. However, available FCC data makes clear that junk faxing is *not* a part of that concern with robocalling. Indeed, in the 2018 Report on Unsolicited Facsimile Advertisements, the FCC noted that *junk fax complaints had declined by nearly 95% from their peak during 2007-2008*.<sup>12</sup> In fact, faxing complaints between May 2017 and April 2018 averaged only 260 complaints per month.<sup>13</sup> Put simply, junk faxing is being relegated to a minor nuisance, a problem solved by the advance of technology and migration of consumer preferences. In short, in Chairman Pai’s words from 2015, “the TCPA has accomplished the precise goal Congress set out for it” in this instance.<sup>14</sup> All that is left is for the Commission to acknowledge this transformation by clarifying that the TCPA means what it says when it defines a “telephone facsimile machine.”

\* \* \*

For the reasons discussed above, AmeriFactors respectfully requests that the FCC 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

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the TCPA, which it crafted as a consumer-protection law, to become the means of targeting small businesses. Yet in practice, the TCPA is nailing the little guy, while plaintiffs’ attorneys take a big cut.” *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (internal citations and quotations omitted).

<sup>12</sup> 2018 Report on Unsolicited Facsimile Advertisements, at Appendix (unnumbered page).

<sup>13</sup> *Id.*

<sup>14</sup> 2015 TCPA Declaratory Ruling, Dissenting Statement of Commissioner Ajit Pai.

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subject to the TCPA. The court in the AmeriFactors case has temporarily halted the case, pending input from the FCC. With the court's initial stay set to expire next month, AmeriFactors urges the Commission to act promptly on its July 2017 Petition.

Sincerely,

A handwritten signature in black ink, appearing to read 'S.A. Augustino', with a long horizontal flourish extending to the right.

Steven A. Augustino

*Counsel for AmeriFactors Financial Group,  
LLC*

cc: Z. Nakazawa  
K. Schroeder  
N. Stevenson

# EXHIBIT A





FEDERAL COMMUNICATIONS COMMISSION  
Enforcement Bureau  
445 12th Street, S.W.  
Washington, DC 20554

## REPORT ON UNSOLICITED FACSIMILE ADVERTISEMENTS

EB-TCD-18-00026339

MAY 2, 2018

Pursuant to the Junk Fax Prevention Act of 2005,<sup>1</sup> this report provides data regarding complaints received and enforcement activities undertaken by the Federal Communications Commission (FCC or Commission) from May 1, 2017, through April 30, 2018, with respect to unsolicited facsimile advertisements, often referred to as "junk faxes."

In 1991, Congress enacted the Telephone Consumer Protection Act (TCPA)<sup>2</sup> to add Section 227 to the Communications Act of 1934 (Communications Act). In addition to addressing unsolicited telemarketing and robocalls, this section prohibits the use of any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.<sup>3</sup> In 2005, Congress enacted the Junk Fax Prevention Act to amend Section 227 by adding an exception to the prohibition to allow fax advertisements to be sent in cases where the sender has an established business relationship with the recipient.<sup>4</sup>

The Junk Fax Prevention Act requires the Commission to provide certain information to Congress periodically about the agency's junk fax enforcement activities.<sup>5</sup> The attached appendix sets forth our current report of the required information and shows that between May 1, 2017, and April 30, 2018, the Commission rejected a petition for reconsideration of a 2016 forfeiture order that imposed a monetary forfeiture of \$1.84 million against a junk faxer whose unsolicited advertisements disrupted business activities and patient care at numerous health care offices.<sup>6</sup>

The Communications Act prescribes the type and sequence of actions that the Commission may take against those sending unsolicited facsimile advertisements. For an entity—such as most senders of junk faxes—that does not hold, or is not an applicant for, a

<sup>1</sup> Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005).

<sup>2</sup> Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991).

<sup>3</sup> 47 U.S.C. § 227(b)(1)(C). Section 64.1200(a)(4) of the Commission's rules implements restrictions on the delivery of unsolicited advertisements to telephone facsimile machines. See 47 CFR § 64.1200(a)(4).

<sup>4</sup> Junk Fax Prevention Act, sec. 2(a). See also 47 CFR § 64.1200(f)(6) (defining an "established business relationship").

<sup>5</sup> Junk Fax Prevention Act, sec. 3; 47 U.S.C. § 227(g).

<sup>6</sup> *Scott Malcolm, DSM Supply, LLC, Somaticare, LLC*, Order on Reconsideration, FCC 18-14 (Feb. 15, 2018).

license or other authorization issued by the Commission (and is not engaged in activities for which an authorization is necessary), the Communications Act requires that the Commission issue a "citation" before proposing a penalty. The purpose of the citation is to alert the sender that sending a junk fax is illegal, and to warn that a future violation could lead to a civil forfeiture.

If the Commission finds that a cited party appears to have engaged in a subsequent junk fax violation, Section 503 of the Act authorizes the Commission to propose a forfeiture penalty, with a current upper limit of \$19,639 per violation for entities that do not hold, or are not applicants for, a Commission license or authorization.<sup>7</sup> The specific amount of the proposed forfeiture against a particular violator depends on the application of certain factors set forth in the Communications Act and the Commission's rules.<sup>8</sup> The Commission must set forth the proposed monetary forfeiture in a Notice of Apparent Liability for Forfeiture (NAL) that describes the violation and the underlying facts. By statute, the alleged violator has an opportunity either to pay the forfeiture or to argue for a reduction or rescission of the forfeiture. If the subject of an NAL argues against the forfeiture proposed, the Commission considers the arguments raised and then issues an order either upholding all or part of the forfeiture proposed, or rescinding it. If the subject of a forfeiture order fails to pay the final forfeiture, the Communications Act requires the Commission to refer the matter to the U.S. Department of Justice (DOJ) to enforce the order for the payment of money. DOJ must file a complaint in federal district court seeking a trial *de novo* (i.e., a trial where the court considers the underlying facts anew). DOJ, therefore, makes the final decision on whether to enforce the forfeiture.

Over the past several years, the number of junk fax complaints received by the Commission has dropped dramatically. Annual complaint totals have declined by more than 90 percent from the high levels reported for 2006 to 2009. 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 percent 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.

With respect to TCPA enforcement (which includes not only junk fax cases, but also do-not-call, unwanted texts, and robocall cases), the Enforcement Bureau selects its cases strategically by focusing on the cases that affect large numbers of American consumers, or that

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<sup>7</sup> The Communications Act specifies a maximum forfeiture in such cases of \$10,000, subject to periodic adjustments for inflation. 47 U.S.C. § 503(b)(2)(D). The current adjusted maximum is \$19,639. *Amendment of Section 1.80(b) of the Commission's Rules: Adjustment of Civil Monetary Penalties to Reflect Inflation*, Order, 33 FCC Red 46 (EB 2018).

<sup>8</sup> Section 503(b)(2)(E) of the Communications Act states that "[i]n determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. § 503(b)(2)(E). The Commission's forfeiture guidelines identify additional criteria the Commission applies to determine whether to apply a higher or lower forfeiture. For example, the Commission may assess a higher forfeiture for egregious misconduct or repeated violations, while it may assess a lower forfeiture for a minor violation or where the violator has a history of overall compliance. 47 CFR § 1.80.

may prevent harms in the first place. In cases of demonstrated consumer harm, the Commission does not hesitate to bring enforcement actions, including assessment of penalties, such as the \$1.84 million penalty, referenced above, against a persistent and egregious junk faxer.

We hope this report is informative to Congress. We will continue to collaborate with the Commission's other Bureaus and Offices, and with outside stakeholders, to evaluate our enforcement activities on an ongoing basis in order to maximize our effectiveness in this area.

Submitted by:

A handwritten signature in black ink, appearing to read "Rosemary C. Harold". The signature is fluid and cursive, with a large initial "R" and "H".

Rosemary C. Harold  
Chief, Enforcement Bureau

## **APPENDIX— Data for May 1, 2017 through April 30, 2018**

### **1. Complaints**

During this reporting period, the Commission's Consumer and Governmental Affairs Bureau (CGB) received 3124 junk fax complaints, a rate of 260 complaints per month. This continues the steep decline in junk fax complaint receipts, showing a decline of nearly 95 percent from the peak of junk fax complaints during 2007 – 2008. CGB has responded to each consumer who filed a complaint, acknowledging receipt and emphasizing that although the Commission does not adjudicate individual complaints, these filings are crucial to the Commission's efforts to effectively enforce junk fax requirements and protect consumers against unwanted fax advertisements. The Enforcement Bureau reviews complaints to facilitate identification of the most serious violators although positive identification may ultimately not be possible for a number of reasons.

### **2. Citations, Notices of Apparent Liability for Forfeiture, Consent Decrees, Forfeiture Orders, and Orders on Reconsideration**

From May 1, 2017 through April 30, 2018, the Commission dismissed, and in the alternative denied, a petition for reconsideration seeking to overturn or reduce a \$1.84 million forfeiture for junk fax violations by an individual whose advertisements for chiropractic equipment disrupted the operations of numerous health care offices.

The Commission did not issue any citations, notices of apparent liability for forfeiture, or forfeiture orders, and did not enter into any consent decrees, during the period covered by this report.

### **3. Referrals to the Department of Justice of Unpaid Forfeiture Penalties**

When the FCC issues a forfeiture order, it generally gives the subject thirty days to pay the penalty. As with any order issued by the Commission, the Communications Act also gives the subject thirty days after the Commission gives public notice of any forfeiture order to seek reconsideration of that order.<sup>9</sup> If the subject neither pays the penalty nor seeks reconsideration, the FCC then, at the request of DOJ as a prerequisite for referral, issues a demand letter, requiring payment within thirty days. If the subject still does not pay the forfeiture, the FCC prepares the pleadings for DOJ to file in court to enforce the forfeiture, and formally refers the matter to DOJ.

The length of time between the FCC's issuance of a forfeiture order and referral to DOJ may be slowed by a number of factors. If the FCC has issued, or foresees that it may issue, more than one forfeiture order against the same subject, it may defer referral of the first order until it has issued the subsequent orders. In addition, the subject of a forfeiture order may express interest in settlement at any point in the process, and consideration and

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<sup>9</sup> 47 U.S.C. § 405(a).

negotiation of terms affects referral timing. The Commission typically will not refer a case to DOJ while a petition for reconsideration is pending.

During the reporting period, the Commission referred one unpaid forfeiture penalty for junk fax violations to the Department of Justice for collection. This case, referenced above, seeks collection of a \$1.84 million penalty. The Department of Justice filed a complaint on February 21, 2018, and the case is pending before the U.S. District Court for the Northern District of Texas.