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March 22, 2019

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 Federal Communications Commission's ("FCC's") rules, the undersigned counsel hereby provides notice that on March 21, 2019, AmeriFactors Financial Group, LLC ("AmeriFactors") met with Zenji Nakazawa, Public Safety and Consumer Protection Advisor to Chairman Ajit Pai, and, in a separate meeting, with Evan Swarztrauber, Policy Advisor to Commissioner Brendan Carr concerning its Petition of Expedited Declaratory Ruling filed July 13, 2017 in the above-captioned proceedings ("Petition"). In attendance on behalf of AmeriFactors were the company's President and Chief Executive Officer Kevin Gowen (via telephone conference), Senior Vice President and General Counsel Angela Fiorentino (via telephone conference), and Steven Augustino, Avonne Bell, and Jennifer Wainwright of Kelley Drye & Warren LLP.

In the meetings, AmeriFactors urged the Commission to grant its Petition promptly.¹ As AmeriFactors explained in the meetings, technological advances have greatly displaced traditional facsimile machines of the past. This fact has been acknowledged repeatedly

¹ 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. AmeriFactors therefore urged the Commission to provide guidance as soon as possible.

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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 e-mail, texting, instant messaging and other forms of document sharing. Those that maintain a “fax” presence are increasingly relying upon cloud-based online fax services to replace the telephone facsimile machine technology. Indeed, “faxing” a document is almost as much a misnomer these days as “dialing” a telephone number.²

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 urged the Commission to conclude that “faxes” received via online fax services are not received on a “telephone facsimile machine” as defined in the TCPA.³ 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 1991.⁴ 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 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 noted that the question regarding interpretation of the term “capacity” in the context of the TCPA’s telephone facsimile machine definition mirrors the questions before the FCC in the context of the definition of an automated telephone dialing

² 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.

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

⁴ *See* Petition at 16-19.

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system (ATDS). Just as in the *ACA International v. FCC*⁵ remand, the Commission here also faces questions about the extent to which changes in technologies have replaced the equipment identified in the statutory text. The FCC should faithfully interpret the statute consistent with actual language and Congressional intent, and not attempt to modify the definition to address technologies that Congress has not contemplated. AmeriFactors also noted that an interpretation that is faithful to the statute will help combat lawsuit abuse, by clarifying the specific factual information that is relevant to determine consumers harmed by an alleged unsolicited advertisement. The FCC would not be overstepping its role in clarifying the facts that comprise a claim under the unsolicited fax advertisement provisions of the TCPA.

AmeriFactors also noted that, while robocalling is a top consumer complaint to the FCC, junk faxing decidedly is not. In May 2018, 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 nearly 95% from their 2007 peak.⁶ Indeed, faxing complaints between May 2017 and April 2018 averaged only 260 complaints per month.⁷

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. 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 e-mail 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

⁵ See *ACA Int’l. V. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

⁶ Federal Communications Commission, Enforcement Bureau, Report on Unsolicited Facsimile Advertisements, at Appendix (unnumbered page) (May 2, 2018) (“2018 Report on Unsolicited Facsimile Advertisements”).

⁷ *Id.*

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receives through online fax services or on a device other than a "telephone facsimile machine" are not subject to the TCPA.

Respectfully submitted,



Steven A. Augustino

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Group, LLC*

cc: Z. Nakazwa
E. Swarztrauber