

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

In the Matter of)	
)	CG Docket No. 02-278
)	
Petition of Akin Grump Strauss Hauer & Feld)	CG Docket No. 05-338
LLP for Clarification)	
)	

**AMERIFACTORS FINANCIAL GROUP LLC COMMENT ON
AKIN GUMP STRAUSS HAUER & FELD PETITION FOR EXPEDITED
CLARIFICATION OR DECLARATORY RULING**

AmeriFactors Financial Group, LLC (“AmeriFactors”), by and through its undersigned counsel, pursuant to Section 1.2 of the Commission’s rules,¹ hereby files comments in response to Akin Gump Strauss Hauer & Feld’s Petition for Expedited Clarification or Declaratory Ruling² regarding the definition of “sender” related to the unsolicited fax advertisement (sometimes colloquially referred to as “junk fax”) rules under the Telephone Consumer Protection Act of 1991 (“TCPA”).³ Akin Gump asks the Federal Communications Commission (“Commission”) to clarify that “a fax broadcaster is the sole liable ‘sender,’ when it both commits TCPA violations and engages in deception or fraud against the advertiser (or

¹ 47 C.F.R. § 1.2.

² Akin Gump Strauss Hauer & Feld LLP, Petition for Expedited Clarification or Declaratory Ruling, GC Docket Nos. 02-278, 05-338 (filed Feb. 26, 2019) (“Petition”). *See* Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Akin Gump Strauss Hauer & Feld LLP Petition for Expedited Clarification or Declaratory Ruling, DA 19-159 (rel. March 7, 2019).

³ *See* 47 C.F.R. § 64.1200 (a)(4), (f).

blatantly violates its contract with the advertiser) such that the advertiser cannot control the fax campaign or prevent TCPA violations.”⁴

As discussed in more detail below, AmeriFactors supports the Petition’s main principle — in certain circumstances, the fax broadcaster’s conduct may result in sole liability for a TCPA junk fax violation — and the Commission should issue an Order granting this part of Akin Gump’s request. The fax broadcaster may engage in certain conduct that results in the fax broadcaster, rather than advertiser, being exclusively liable for submission of a fax advertisement that is found to violate the TCPA. Many fax broadcasters either imply to customers that faxing the advertisement is permissible or induce advertisers into using fax advertising without mentioning the TCPA restrictions around fax advertisements. Further, some persons operate as marketers of fax broadcasting services, and their potential liability should be addressed more clearly by the Commission. Therefore, AmeriFactors supports Commission action to identify the circumstances where either the fax broadcaster or the fax marketer could be solely liable for an unlawful fax transmission. Placing sole liability on these entities in appropriate circumstances would promote overall compliance with the rules by placing the greatest incentive to address unlawful facsimile advertisements in the hands of the party with the greatest ability to control whether a transmission is lawful. If the Commission decides to clarify in line with Akin Gump’s request, AmeriFactors recommends the Commission consider other circumstances, beyond those raised by Akin Grump, in which a fax broadcaster’s actions or a fax marketer’s actions could result in advertisements that violate the Commission’s rules, such as improper inducement and misrepresentation that causes reasonable reliance by a third party.

⁴ Petition at 3.

Alternatively, the Commission should issue a notice of proposed rulemaking to reconsider the high degree of involvement standard for assessing broadcaster liability to remove the incentive to be silent on the possibility of TCPA violations for fax advertisements. The Commission should, at a minimum, revisit its *Junk Fax Order* and revise its “high degree of involvement” standard such that it does not continue to unintentionally discourage fax broadcasters (or fax marketers) from giving guidance to advertisers about the possible TCPA implications of sending fax advertisements.

I. THE COMMISSION SHOULD CLARIFY THAT A FAX BROADCASTER’S OR FAX MARKETER’S CONDUCT MAY RESULT IN SOLE LIABILITY FOR A TCPA VIOLATION

In the *2006 Junk Fax Order*, the Commission appeared to suggest that in certain situations, the fax broadcaster could face exclusive liability for unsolicited fax advertisements, stating that:

[U]nder the Commission's interpretation of the facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent. In most instances, this will be the entity whose product or service is advertised or promoted in the message. As discussed above, the sender is liable for violations of the facsimile advertising rules, including failure to honor opt-out requests. Accordingly, we adopt a definition of sender for purposes of the facsimile advertising rules.⁵

In its Petition, Akin Grump asserts that it is logical for the Commission to adopt an interpretation that recognizes that “either the advertiser or the fax broadcaster could be liable for TCPA violations”⁶ and thus, asks the Commission to clarify that this is consistent with its intention for

⁵ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005, CG Docket Nos. 02-278, 05-538, Report and Order, FCC 06-42, ¶ 39 (rel. April 6, 2006) (emphasis added).

⁶ Petition at 2.

the definition of the term “sender.”⁷ While AmeriFactors takes no position on the specific “sender” definition request in the Petition, it supports the main idea behind the Petition’s request—the Commission should recognize and articulate that in some situations the fax broadcaster (instead of the advertiser) engages in conduct that is the cause of a junk fax transmission and as such is necessarily the liable party.

In fact, a Commission decision finding that fax broadcasters can be solely liable instead of the entity whose information is being advertised would be consistent with other Commission decisions. For example, in the E-rate context, the Commission (and the Universal Service Administrative Company) determine whether to pursue recovery for competitive bidding rule violations against either the applicant or the service provider.⁸ In *Achieve Telecom Network of Massachusetts*, the Commission’s Wireline Bureau decided that enforcement actions related to the violations at issue should be pursued only against the service provider, Achieve, as it “was in the best position to prevent the violation of E-rate program rules.”⁹ The Wireline Bureau found that “Achieve unlawfully funded the Schools’ co-payment for E-rate services through its *de facto* control of grants to the Schools and caused the Schools to violate the requirement that applicants not accept payment from vendors, directly or indirectly, for the applicants’ non-discounted portion of the cost of E-rate supported services.”

⁷ See *id.* at 3.

⁸ Request for Review of Decisions of the Universal Service Administrator by Achieve Telecom Network of MA, Canon, MA *et al.*, Order, DA 15-463 (rel. April 15, 2015).

⁹ *Id.*, ¶ 3.

In *Achieve*, the Wireline Bureau concluded that although multiple entities were involved in the conduct that violated the E-rate rules, Achieve would be held solely liable because it caused the other entities to engage in the improper conduct. Similarly, when an unsolicited fax advertisement is sent using a fax broadcaster's services, the advertiser may not always be in control of the fax recipients or aware of the possible violative nature of the fax. As explained in the Petition, fax broadcasters often engage in deceptive and improper conduct that causes many legitimate, unsuspecting advertisers to "fall victim to unscrupulous, dishonest or rogue fax broadcasters, and have been left open to liability in the courts even though they were not the source of offending TCPA conduct."¹⁰

Akin Gump requests that the Commission clarify that "[w]hen such fax broadcasters engage in deception, fraud, blatant contract violations and misrepresentations, their clients (the advertisers) are stripped of the ability to control the fax campaign or ensure compliance with the TCPA. [Thus,] in these instances, it is only equitable that the fax broadcaster alone should be held liable."¹¹ AmeriFactors fully supports an equitable approach to interpreting fax broadcaster TCPA liability and encourages the Commission to grant Akin Gump's petition on this matter. The Commission should declare, consistent with Akin Gump's request, that in cases where the fax broadcaster engages in fraud, misrepresents the facts related to legality of the fax service, or deceives the advertiser, the fax broadcaster will be deemed exclusively responsible for any resulting violations.

¹⁰ Petition at 2.

¹¹ *Id.* at 3.

The Commission should provide examples of such situations as guidance for parties and the courts. For example, AmeriFactors recommends that the Commission impose liability for situations where the fax broadcaster makes representations that induce the advertiser to pursue an advertisement that the fax broadcaster recognizes may be implicated by TCPA restrictions without informing the advertiser of the risk. Similarly, the Commission should find that it is reasonable and fair to impose liability on a fax broadcaster where the advertiser reasonably relies on representations that the faxes are legal (or deliberate omissions about the potential illegality of the fax) in pursuing fax transmission to advertise a business or service.¹² Further, if a fax broadcaster supplies a list of numbers to be faxed and affirmatively represents that consent has been given by the recipients, the fax broadcaster should be solely liable for any violations in the event that faxes are sent to parties that did not consent. AmeriFactors agrees with Akin Gump that a clarification would be appropriate from a policy position as it places liability with the source of the offending conduct.¹³

In addition, the Commission should recognize that some parties act as an intermediary between a fax broadcaster and the advertiser. These parties solicit advertisers to

¹² See e.g., *Cin-Q Automobiles, Inc. v. Buccaneers Limited Partnership*, No. 8:13-CV-1592, 2014 U.S. Dist. LEXIS 174134 (M.D. Fla. Dec. 17, 2014). In this case the defendant contacted FaxQom, a purported fax broadcaster, about transmitting some faxes advertising Tampa Bay Buccaneers tickets. Defendant and FaxQom discussed legal concerns and FaxQom represented that its services were legal and that the numbers it used were all opt-in numbers in order to induce Defendant to enter into a contract. Defendant would also later learn that FaxQom was not in fact a fax broadcaster but that it engaged a separate, unrelated company to actually transmit the faxes and customer. These combination of circumstances resulted in a number of complaints about the faxes and alleged violations of the TCPA holding Defendant liable despite the broadcaster's actions.

¹³ See Petition at 5; cf. *Achieve Telecom*, or the underlying Errata Order.

use the fax medium, often supply marketing lists and place fax advertisements on a broadcaster's service. These parties – which we refer to as fax marketers – market and generate fax traffic for a fee and/or a commission from the fax broadcaster. In these situations, the services the FCC has address as “fax broadcasting” are split into two – with the fax marketer providing the promotion of services and much of the direct handling with an advertiser customer, while the fax broadcaster handles the technical elements of transmitting the resulting messages. In such circumstances, it could be the fax marketer that engages in the improper activity described in the Akin Gump petition, by engaging in fraud, misrepresenting the facts related to legality of the fax service, or deceiving the advertiser/customer as to the legality of the activity.

A Commission order declaring that the fax broadcaster or a fax marketer can be held solely liable in these circumstances would promote overall compliance with the TCPA rules and minimize the incentive for those parties most involved in repeat faxing to deceive advertisers that are operating in good faith. Much as the FCC has ruled in the context of E-rate competitive bidding violations, the party most responsible for the illegal act, and the party most able to prevent the violation, should bear the brunt of the obligation to eradicate unsolicited fax advertisements. Moreover, the Commission would remove some uncertainty and rein in excessive class action litigations by providing guidance to impacted parties.

II. ALTERNATIVELY, THE COMMISSION SHOULD REVISE THE 2006 JUNK FAX ORDER HIGH DEGREE OF INVOLVEMENT LIABILITY STANDARD

If the Commission does not to grant the requested clarification, the Commission should issue a notice of proposed rulemaking to revise the standard for liability for fax broadcasters related to their level of involvement in the transmission of the junk fax. Under the Commission's rules, a fax broadcaster will be liable “if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such

facsimile transmissions.”¹⁴ In the *2006 Junk Fax Order*, the Commission stated that fax broadcasters may also face liability if they discuss the legality of the fax advertisement or advise an advertiser client about how to comply with the TCPA rules. This approach may have the unintended consequence of encouraging broadcasters to act in a manner that may result in advertisements that violate the rules as the broadcaster attempts to not have its conduct be deemed as a “high degree of involvement.” Fax broadcasters may be reluctant to inform advertisers about existence of the TCPA rules or areas of possible liability.

The Commission should issue a notice of proposed rulemaking to revise its rules and interpretations to eliminate the incentive that currently exists for fax broadcasters to be silent about TCPA requirements and possible liability. Instead, the Commission should consider adopting new rules that require fax broadcasters (and fax marketers) affirmatively to provide notice of the TCPA and its principal requirements, before engaging with a fax advertisement client. Beyond that, the Commission should seek guidance about new standards that can help eliminate the scenario where broadcasters are disincentivized to assist with eliminating faxes that may violate the rules.

III. CONCLUSION

For the reasons outlined above, AmeriFactors supports the principle of sole fax broadcaster liability when the fax broadcaster or fax marketer engages in improper conduct or deceives the advertiser and asks the Commission to issue a clarification to that effect. Alternatively, the Commission should consider a notice of proposed rulemaking to revise the

¹⁴ 47 C.F.R. § 64.1200(a)(4)(vi).

consideration factors related to the high degree of involvement standard for fax broadcaster liability.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven A. Augustino". The signature is stylized with a large, sweeping initial "S" and a trailing flourish.

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