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August 9, 2019

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

Re: ***Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278; Rules and Regulations Implementing the Junk Fax Prevention Act of 2005, CG Docket No. 05-338.***

Dear Ms. Dortch:

On August 6 and 7, 2019, the undersigned, joined by Graham Owens, Director of Legal and Regulatory Policy at the National Association of Manufacturers (“NAM”), held separate meetings with the following: Zenji Nakazawa, advisor to Chairman Pai; Arielle Roth, advisor to Commissioner O’Rielly; Travis Litman, advisor to Commissioner Rosenworcel; Michael Scurato, advisor to Commissioner Starks; and Evan Swartztrauber, advisor to Commissioner Carr.

During these meetings, we discussed Akin Gump’s pending petition for expedited clarification or declaratory ruling (the “Petition”)¹, which asks the Commission to clarify what it meant in the *2006 Junk Fax Order*² when it said that the party whose goods and services are advertised in an unsolicited fax ***is not always*** the liable sender. Specifically, we discussed Akin Gump’s request for clarification that an advertiser is not the liable sender when its fax broadcaster both commits TCPA violations and engages in deception or fraud against the advertiser such that the advertiser cannot control the fax campaign or prevent TCPA violations. We discussed the importance of closing this loophole and shutting down abusive TCPA lawsuits against advertisers that were not the source of the TCPA violations.

¹ Akin Gump Strauss Hauer & Feld LLP, Petition for Expedited Clarification or Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (filed Feb. 26, 2019).

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787 (2006) (“*2006 Junk Fax Order*”).

August 9, 2019
Page 2

In describing NAM's support for the Petition, Mr. Owens provided several specific examples of cases in which NAM's members have been forced to defend themselves in lawsuits when they were not the source of the offending TCPA violations, and even when their products were advertised in facsimile advertisements about which they had no knowledge. Mr. Owens also noted that NAM's members, particularly those in the pharmaceutical and medical device manufacturing industries, frequently rely on fax messages sent through third parties to advertise their products, and would benefit from this clarification.

Receiving the requested clarification from the Commission will not end abusive lawsuits, but it will provide guidance to courts to be able to resolve these cases more quickly. We also discussed the importance of advertisers undertaking reasonable due diligence before contracting with fax broadcasters to undertake a fax campaign. Mr. Owens noted the importance to his members of always trying to do business with reputable companies because it is imperative to protect their brands.

The record in the proceeding includes 10 commenting parties, all of whom agree with the clarification sought by Akin Gump except for a plaintiff and a plaintiff's law firm that support strict liability for advertisers regardless of the facts and circumstances.

Sincerely,

/s/ Jennifer L. Richter
Jennifer L. Richter
Virginia D. Hiner

Attachment A

TCPA Petition for Clarification

Filed February 26, 2019



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The Scenario

- An advertiser hires a fax broadcaster to assist it in undertaking a lawful advertising campaign regarding its products and services.
- The fax broadcaster engages in fraud or deception against the advertiser, violating its commitments to the advertiser to conduct a campaign that complies with the TCPA.
- The fax broadcaster commits TCPA violations.
- Because of the fax broadcaster's fraud or deception, the advertiser could not control the fax campaign or prevent TCPA violations.
- An abusive lawsuit is filed against the advertiser for the TCPA violations committed by the fax broadcaster.
- **Where should liability reside?**

The Commission Contemplated this Scenario in 2006

In the 2006 Junk Fax Order, the Commission said that the party whose goods and services are advertised in a fax *is not always* the liable sender:

“We take this opportunity to emphasize that under 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.”

What did the Commission mean? What are the relevant “instances” in which the fax broadcaster, and not the advertiser, is the liable “sender” of a facsimile advertisement?

Petition for Clarification Filed February 26, 2019

Akin Gump asks the Commission to make the common-sense clarification that a party whose goods and services are advertised is NOT the liable sender when its fax broadcaster both commits TCPA violations, and engages in deception or fraud against the advertiser (or blatantly violates its contract with the advertiser) such that the advertiser cannot control the fax campaign or prevent TCPA violations.

The Akin Gump Petition presents an easy opportunity for the Commission to clarify TCPA policy, protect innocent parties, and assign TCPA liability where it belongs -- with the offending party.

Why is this important? Without Commission clarification that the fax broadcaster is the liable “sender” in these scenarios, innocent advertisers are spending years in litigation, and millions of dollars defending themselves or unjustifiably settling claims not because they have violated the law, but because they are the deep pockets.

8 out of 10 commenters in the proceeding, including the National Association of Manufacturers, agree with Akin Gump that this clarification is needed.

The only opposition to Akin Gump’s request comes from 2 plaintiff’s firms who suggest the **inequitable result** that advertisers always should be liable for fax TCPA violations, even if they are victims of fraud or sabotage, and even if they are kept so in the dark that they cannot know about and cannot prevent TCPA violations.

Attachment B

Petition for Expedited Clarification or Declaratory Ruling Filed by Akin Gump
Initial Comment Summary

Petition Request: Akin Gump requests that the Commission clarify what it meant in the 2006 *Junk Fax Order* when it said that the party whose goods and services are advertised in an unsolicited fax is not always the liable sender. Specifically, Akin Gump requests that the Commission clarify **that a party whose goods and services are advertised is not the liable sender when its fax broadcaster “both commits TCPA violations and engages in deception or fraud against the advertiser (or blatantly violates its contract with the advertiser) such that the advertiser cannot control the fax campaign or prevent TCPA violations.”**

Comments in Support

- **National Association of Manufacturers (NAM):** In reply comments, NAM expressed support for the clarification requested by Akin Gump, which the NAM agrees is necessary “to hold violators of the TCPA liable and curtail damaging lawsuits against innocent players,” and to “correct conflicting interpretations of sender liability in junk fax cases.” NAM represents a number of pharmaceutical and medical device manufacturers, who are increasingly being targeted in abusive TCPA class actions because their products are often advertised via fax. In many cases, these manufacturers face liability simply because their goods are advertised in faxes sent by third party retailers, and are dragged into “years of wasted litigation” despite having no involvement in committing the TCPA violations. This growing problem underscores the need for clarification of sender liability – without it, “manufacturers could continue to face liability for the actions of any third party, no matter how tenuous the legal relationship between the two may be.” NAM therefore supports Akin Gump’s request for guidance, which it believes “could have a broad positive impact, producing fairer, more consistent results without imposing undue expense on defendants or pressuring them into early settlement.”
- **Vincent A. Lavieri:** As an attorney who has represented clients in over 30 TCPA class action cases, Mr. Lavieri agrees that the clarification requested by Akin Gump is desperately needed. He notes that the current lack of clarity has prolonged litigation at the expense of defendants, citing as an example the case *Bridgeview Health Care Center v. Clark*, in which Mr. Lavieri represented the defendant, Mr. Clark. He asserts that the case was prolonged as the district court – and later, the Seventh Circuit – engaged in multiple attempts to decipher the meaning of “sender” based on inconsistent and ambiguous statements from the FCC. Had the requested clarification existed at the time the district court decided *Bridgeview*, the district court could have made a straightforward determination at summary judgment.
- **Amerifactors Financial Group, LLC:** Amerifactors supports Akin Gump’s request for the Commission to clarify that under certain circumstances, a fax broadcaster’s conduct may result in the fax broadcaster, rather than the advertiser, being solely liable for a TCPA junk fax violation. Amerifactors agrees with Akin Gump that when a fax broadcaster engages in fraud or misrepresentation, such that the advertiser effectively

loses control over the ad campaign, the broadcaster – not the advertiser – should be liable. This includes situations where a fax broadcaster makes misrepresentations to an advertiser about the legality of the fax campaign, or induces an advertiser to pursue an advertisement that the broadcaster recognizes may implicate the TCPA without informing the advertiser of the risk.

- Alternatively, Amerifactors proposes that the FCC initiate a rulemaking to revise its standard related to liability of “highly involved” fax broadcasters, which Amerifactors asserts incentivizes fax broadcasters to not discuss the TCPA with clients or inform them of potential liability of fax broadcasting. At a minimum, Amerifactors argues, the rule should be revised to require fax broadcasters to affirmatively provide notice regarding the TCPA and its principal requirements.
- **Educational Testing Service:** ETS agrees with Akin Gump that clarification of the “sender” definition is desperately needed, and that, under the circumstances described in Akin Gump’s petition, the fax broadcaster, and not the advertiser, should be the liable sender. ETS also supports the use of agency principles to determine sender liability, a position that is directly in line with Akin Gump’s proposal. Although Akin Gump does not use agency terminology to describe its proposed test, the test is based on agency principles, similar to how the 7th circuit views these cases. ETS agrees with Akin Gump that this interpretation makes sense of the TCPA’s text, fits with the Commission’s regulations, and places TCPA liability where it ought to rest – with the entity responsible for violating the law.
- **RingCentral, Inc.:** RingCentral agrees with Akin Gump that the Commission should clarify the meaning of “sender” under the TCPA. Like Akin Gump, RingCentral argues that the test for determining who is liable as a “sender” should focus on the persons or entities who actually exercise control over the fax in question and who choose its recipients, not simply on the party whose goods or services are being advertised. This position is consistent with the clarification Akin Gump seeks in its petition: when this analysis is applied to a situation where the acts of a fax broadcaster deny the advertiser control over the contents or recipients of the fax, the fax broadcaster, and not the advertiser, will be liable.
- **Edelman Combs Lattner & Goodwin, LLC:** ECLG, a plaintiff’s firm, agrees with Akin Gump that agency principles should be applied to determine sender liability, consistent with the Seventh Circuit’s approach. ECLG notes that it is not certain that clarification of the 2006 Order is necessary, suggesting that the FCC already dealt with the “rogue fax broadcaster” scenario when it stated that “a fax broadcaster that provides a source of fax numbers, makes representations about the legality of faxing to those numbers or advises a client about how to comply with the fax advertising rules, also demonstrates a high degree of involvement in the transmission of those facsimile advertisements,” and would be jointly and severally liable with the sender.
 - Akin Gump notes that this argument does not adequately address the situation described in our petition, where an advertiser is denied control over a fax campaign. Under those circumstances, applying joint and several liability would

be inappropriate and unfair due to the advertiser's complete inability to prevent the harmful conduct.

- Responding to ECLG's suggestion that no clarification is needed in light of the 2006 Order, we note that: (1) the wide variety of standards applied by courts to determine "sender" liability in cases involving rogue fax broadcasters is clear evidence that there is uncertainty that requires clarification by the Commission; (2) the "highly involved fax broadcaster" standard quoted above does not foreclose the possibility of the fax broadcaster also qualifying as the sole, liable "sender" of the subject fax; and (3) the "highly involved fax broadcaster" standard does not address misrepresentation or fraud.
- **Buccaneers Limited Partnership (BLP):** BLP agrees with Akin Gump that the requested clarification "is necessary and should be provided" so that more courts can decide at the summary judgment stage cases like *Cin-Q* that "involve unscrupulous fax broadcasters." This would ensure that "victims of such broadcasters are not further victimized by prolonged and costly litigation as well as exorbitant and otherwise unwarranted settlement demands." Although "it is unnecessary for purposes of the Petition for the Commission to address the underlying facts of the lawsuit *Cin-Q* and its counsel filed against BLP," BLP notes that "*Cin-Q*'s one-sided recitation of the facts" in its comments "requires a correction of the record." Specifically, *Cin-Q*'s account of that case (1) leaves out the fact that BLP lacked control over the dissemination of the offending faxes due to fraud committed by a third party broadcaster, and (2) exaggerates the number of complaints BLP received about the faxes, as well as BLP's response to those complaints. BLP also notes that the confusion over the correct standard of liability in that case – as well as the fact that *Cin-Q*'s counsel has argued for different standards of liability in other cases – serves as evidence that the Commission's clarification is needed.

Comments in Opposition

- **Craig Moskowitz et al.:** This group of frequent TCPA plaintiffs, represented by Bellin & Associates, adopts *Cin-Q*'s comments. This group also asserts, that the Commission should simply confirm that any party whose goods or services are advertised in an unsolicited fax is the directly liable sender. They support sabotage liability.
- **Cin-Q Automobiles, Inc.:** After discussing the background of the *Cin-Q* case, *Cin-Q* argues that the Akin Gump petition does not raise any "controversy" or "uncertainty" for the Commission to resolve, and should therefore be dismissed as an untimely petition for reconsideration of the 2006 Order. If the Commission does decide to issue a ruling aimed at preventing third parties from sabotaging unknowing defendants, *Cin-Q* argues that the Commission should adopt a "but-for" causation standard similar to the one used in tort law for determining liability. Under this standard, a defendant would be liable if "the harm would not have occurred" in the absence of the defendant's conduct – in other words, "but for" the defendant desiring advertising of its goods and services, the harm would not have taken place. *Cin-Q* asserts that this standard would prevent sabotage liability, while allowing consumers to pursue parties that hire fax broadcasters. *Cin-Q* argues that the Petition does not raise any controversy or uncertainty regarding the 2006

Junk Fax Order that requires clarification because the Commission directly addressed the scenario discussed in the Petition when it clarified that a fax broadcaster that provides the source of numbers to be faxed makes representations regarding the legality of faxing those numbers, or provides advice regarding compliance with the fax marketing rules qualifies as a “highly involved fax broadcaster” and is jointly and severally liable with the sender for any TCPA violations.

- Akin Gump notes that that (1) the wide variety of standards applied by courts to determine “sender” liability in cases involving rogue fax broadcasters is clear evidence that there is uncertainty that requires clarification by the Commission, (2) the “highly involved fax broadcaster” standard does not foreclose the possibility of liability for an innocent advertiser – where the advertiser is denied control over the fax broadcaster through lies and deceit, the fax broadcaster is the solely liable “sender” – it is not equitable to hold the advertiser jointly and severally liable.

Attachment C

JUNK FAX PETITIONS CURRENTLY PENDING WITH THE FCC

Petitions That Address the “Sender” Definition Under the Junk Fax Rules	Other Pending Junk Fax Petitions
<p><u><i>Akin Gump Strauss Hauer & Feld, Petition for Expedited Clarification or Declaratory Ruling</i></u>, CG Dkt. Nos. 02-278, 05-338 (filed Feb. 26, 2019): Asks the Commission to clarify the definition of “sender” under the Junk Fax Rules, and specifically, what the Commission meant in the <i>2006 Junk Fax Order</i> when it stated that the party whose goods and services are advertised in an unsolicited fax <u>is not always</u> the liable sender. Seeks confirmation that a fax broadcaster is the sole liable “sender” when it both commits TCPA violations and engages in fraud against the advertiser or blatantly violates its contract with the advertiser such that the advertiser cannot control the fax campaign or prevent TCPA violations.</p> <p><u><i>RingCentral, Inc., Petition for Expedited Declaratory Ruling</i></u>, CG Dkt. No. 02-278 (filed July 6, 2016): Requests confirmation that a provider of internet-based fax services is not the “sender,” if it played no role in choosing the content of the fax, even if the service provider’s name is referenced on the fax cover sheet. More broadly, RingCentral asks for confirmation that the Commission did not intend to expand its definition of “sender” in the <i>2006 Junk Fax Order</i> to include party whose goods or services appear in an unsolicited fax, but who did not engage the sender of the fax to perform marketing services on its behalf.</p> <p><u><i>Insights Association, Inc. et al., Petition for Declaratory Ruling</i></u>, CG Dkt. No. 02-278 (filed Oct. 30, 2017): Seeks clarification on what constitutes a “dual purpose communication” under the Junk Fax rules, and more specifically, confirmation that survey, opinion, and market research studies do not constitute goods or services vis-à-vis the survey respondent, and are not transformed into goods or services merely because they include some nominal inducement to participate. Though the petition does not directly raise the issue of sender liability, Anderson + Wanca implied in comments that the Commission’s “sender” definition imposes strict liability on any entity whose goods or services are advertised or promoted in an unsolicited fax, a claim that would read out half the definition of “sender” under the Junk Fax Rules. (<i>See Anderson + Wanca Comments on Petition for Declaratory Ruling of Insights Association and AAPOR</i>, CG Dkt. No. 02-278, 7-8 (filed June 22, 2018)).</p>	<p><u><i>Best Doctors, Inc., Petition for Declaratory Ruling</i></u>, CG Dkt. Nos. 02-278, 05-338 (filed Dec. 14, 2018): Requests confirmation that a faxed request for information that does not state the commercial availability or quality of property, goods, or services is not an “advertisement” under the TCPA. Seeks guidance on the factors to be considered in determining whether an “informational” message is a pretext for an advertisement, arguing for a standard that would require the “pretext” to be apparent from the content of the initial faxed message without examination of other communications outside the fax.</p> <p><u><i>Inovalon, Petition for Expedited Declaratory Ruling</i></u>, CG Dkt. No. 02-278 (filed Feb. 19, 2018): Requests clarification that (1) faxes requesting records or information pursuant to an established business relationship, and (2) faxes that offer free services without promoting any commercially available product or service to the recipient do not qualify as “advertisements” under the TCPA.</p> <p><u><i>M3 USA Corporation, Petition for Declaratory Ruling</i></u>, CG Dkt. Nos. 02-278, 05-338 (filed March 20, 2017): Seeks confirmation that faxed invitations to participate in market research surveys are not a “pretext” for advertising unless they promote commercially available property, goods, or services within the fax or survey itself.</p> <p><u><i>Amerifactors Financial Group, LLC, Petition for Expedited Declaratory Ruling</i></u>, CG Dkt. Nos. 02-278, 05-338 (filed July 13, 2017): Requests clarification regarding which types of faxing devices fall within the scope of the Junk Fax Rules based on the Commission’s statements that “faxes sent as email over the internet are not subject to the TCPA,” but that “computerized fax modems” are. Seeks confirmation that faxes received through devices other than traditional telephone facsimile machines fall outside the scope of the TCPA.</p> <p><u><i>Joseph T. Ryerson & Son, Inc., Petition for Declaratory Ruling</i></u>, CG Dkt. Nos. 02-278, 05-338 (filed Nov. 3, 2015): Seeks confirmation that the TCPA does not apply to faxes initiated and received in digital form, noting that because such transmissions do not require paper, ink, or toner, and do not tie up phone lines, they are “more closely analogous” to email and therefore more appropriately regulated under CAN-SPAM, as opposed to the TCPA.</p>