

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amerifactors Financial Group, LLC)	
Petition For Declaratory Ruling)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02278
Telephone Consumer Protection Act of 199)	
)	
Junk Fax Protection Act of 2005)	CG Docket No. 05338

**COMMENTS OF CYNTHIA BRINKER
IN SUPPORT OF THE AMERIFACTORS FINANCIAL GROUP, LLC
PETITION FOR DECLARATORY RULING**

Introduction

1. The TCPA act, along with the JFPA act, were created predominantly to prevent the shift of advertising cost from the sender to the consumer/recipient as well as address any privacy concerns. The “costs” of receiving traditional facsimile communications have been widely accepted and versed by the TCPA as: paper, toner/ink, wear and tear on the facsimile equipment and the analog fax telephone line cost and cost of use or inability to use said telephone line during an unsolicited fax receival.

2. The CAN-SPAM act was created to address the proliferation of unwanted advertising emails that if left ungoverned could threaten to clog recipient's email box, the underlying SMTP servers that process email, and quite possibly key internet infrastructure choke points. This concern was founded in the understanding that email advertising was essentially “free” to the sender and left without regulation would proliferate exponentially to the point of drowning consumers and the very network infrastructure that supports SMTP (simple mail transfer protocol) traffic.

3. Both the TCPA and CAN-SPAM act's serve a critical public interest and as such are very important. However, they are both very different and very specific as to the types of communications that they govern over. Components of the Ryerson petition for declaratory ruling appear to be simple. The FCC is basically being asked to more accurately define what constitutes a “facsimile” governed by the TCPA order and what constitutes an “email” governed by the CAN-SPAM act in lieu of today's radically evolved communications technology landscape.

4. The FCC has attempted to review and publish clarifications regarding the TCPA and CAN-SPAM acts and how they relate to an ever-changing technology landscape. However, in review of the Amerifactors petition and the proliferation of various electronic digital communications methods available today, it would seem prudent to further explore, clarify and ultimately classify these various forms of electronic digital communications to the most appropriate governing body, act and legislature.

Discussion Points

5. Amerifactors asserts that the TCPA should only apply to messages that are received by a facsimile machine that used regular telephone lines. This assertion has been supported by the FCC on multiple occasions by the commission's own citation of the statutory definition of what constitutes a telephone facsimile machine. The commission recently wrote this within a Declaratory Ruling released on August 28th, 2015, "The Commission's rules define "telephone facsimile machine" to mean "equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line".¹ This rule that the commission cites within said Declaratory Ruling is 47 C.F.R. § 64.1200(f)(13), has been referenced and supported in multiple cases over the years.

6. The Amerifactors petition includes the description of how modern-day communications technologies have radically changed and that modern day online fax services no longer meet the concise language of the TCPA and FCC rulings. Modern day online fax solutions are nothing more than internet based electronic message servers that take packets of TCP/IP data and move them on to their destination as either a message in an online web-portal or attachments via email. The question now is whether the FCC should attempt to encompass modern day internet efax communications within the TCPA or not. They should not attempt to do this for three reasons. First, the TCPA language dealing with the definition of a "facsimile machine" is clear and concise on purpose. Congress did not want to impact any other form of electronic communication other than facsimile machine transmissions over regular telephone lines. Secondly, the FCC would be overstepping their legal authority as they do not have legal authority to fundamentally change or expand the law. They do not have the authority to legislate. They certainly could appeal to Congress to amend the TCPA or legislate a whole new statute, but they do not have the power to do so themselves under the US Constitution. Thirdly, to do so they would be stepping on other laws and statutes that already protect email communications and they would most likely be impeding on the First Amendment to the US Constitution.

7. The Amerifactors petition is similar to another petition for declaratory ruling back in 2015 from petitioner Joseph T. Ryerson & Son, Inc. The Ryerson petition asserted that electronic messages that initiate in electronic form over the internet and are received in digital form as an internet based email, should be treated as such and governed by the CAN-SPAM Act. This made a lot of sense to me back in 2015 and it also could be an argument here with the Amerifactors petition.

Conclusion

8. It is my belief that we must follow the statutory definitions of the technologies involved in order to determine which digital communications should be governed by either the TCPA or CAN-SPAM act's. We adhere to the specific letter of the law in this country, it's that simple. With the ever evolving and advancing technology landscape that we continue to see in the area of communications, we must sharply rely on the defined legal statutory definitions set forth in the TCPA and CAN-SPAM Act's. Today, commercially available digital communications solutions come in a multitude of different technologies, products and services. Most of which cannot be governed by either the TCPA or CAN-SPAM act's due to their clear statutory definitions. This includes chat applications on smartphones and websites and even digital communications solutions embedded in our most popular social media tools like Facebook, Twitter and SnapChat, to name a few. We do not consider a photo sent via Twitter a "fax", nor do we consider messages within Facebook "e-mails". While these are extremely simple and frankly silly examples, they show how important it is to define electronic digital communications by their statutory definitions.

¹ FCC DA15-977 Declaratory Ruling in the Matter of Westfax, Inc. Petition for Consideration and Clarification, Adopted/Released Aug. 28, 2015. See id. at 8.

9. Communications technology will continue to evolve and as it does we will need to stay vigilant and firm on our statutory definitions within the current TCPA and CAN-SPAM Act's. Not doing exactly that will continue lead to additional harm to the public interest.

I thank the Commission for the opportunity to comment on this matter.

Respectfully submitted,

Cynthia Brinker

“A concerned citizen leveraging my right to free speech”.