

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

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| In the Matter of |) | |
| |) | |
| Rules and Regulations Implementing the |) | |
| Telephone Consumer Protection Act of 1991 |) | CG Docket No. 02-278 |
| |) | |
| Junk Fax Prevention Act of 2005 |) | CG Docket No. 05-338 |
| |) | |
| Petition for Expedited Declaratory Ruling of |) | |
| Amerifactors Financial Group, LLC |) | |

**COMMENTS OF AMSTERDAM PRINTING & LITHO, INC. IN SUPPORT OF
AMERIFACTORS FINANCIAL GROUP, LLC’S PETITION FOR EXPEDITED
DECLARATORY RULING**

I. Introduction

Amsterdam Printing & Litho, Inc. (“Amsterdam”) submits these comments in support of *Amerifactors Financial Group, LLC’s Petition of for Expedited Declaratory Ruling under the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278, 05-338 (filed July 13, 21017) (“Amerifactors’ Petition”) requesting clarification on the Junk Fax Prevention Act of 2005 (“JFPA”) as part of the Telephone Consumer Protection Act (“TCPA”).

The Federal Communications Commission (“FCC”) should grant Amerifactors’ Petition and rule that fax advertisements received electronically by a computer are not received by a “telephone facsimile machine” as defined in the TCPA such that the draconian class actions do not apply to innocent senders of promotional faxes. This position makes no sense, and any ordinary prudent businessperson would not understand the statute to apply to fax advertisements received electronically by a computer.

II. Background

Amsterdam is a company located in Amsterdam, New York, that markets and sells promotional products to businesses and advertises its promotional products via facsimile.

III. Amsterdam has been sued for solicited faxes under the TCPA

Congress passed the TCPA in 1991 to protect consumers from invasions of privacy caused by unsolicited telephone calls or faxes. *See* Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227).

In 2014, a company called Career Counseling, Inc. (“Career Counseling”) alleged Amsterdam violated the TCPA by sending unsolicited faxes to Career Counseling. It alleged that Amsterdam

did not have permission to send these faxes, and the faxes failed to include the required opt-out language.

But rather than the uninvited communication addressed in the TCPA, Career Counseling actively solicited contact via fax. When Career Counseling received the requested faxes, it filed a class action lawsuit alleging invasion of privacy despite never requesting the faxes to stop.

Specifically, prior to the receipt of any faxes, Career Counseling made a purchase from Amsterdam by telephone on April 21, 2005. On June 12, 2015, Career Counseling employee and owner Virginia McCuen also purchased goods from Amsterdam.

During one or both of these purchases, Career Counseling voluntarily provided its fax number to Amsterdam giving it prior express permission to send faxes. All subsequent faxes contained a disclosure describing how the recipient could opt out of future faxes. At no time did Career Counseling or any representative of the company contact Amsterdam and request the faxes to stop.

Because Amsterdam sent Career Counseling solicited fax advertisements with its express invitation or permission, the JFPA's opt-out notice requirement does not apply to these faxes. Even if Amsterdam sent unsolicited fax advertisements, it had an established business relationship with Career Counseling and included a disclosure clearly showing how to opt out of future faxes.

It is inconceivable that Congress intended this result—a legitimate company being sued by a customer for faxes after the customer provided her fax number to the company and never made a request for the faxes to stop.

The FCC should take action to end or limit this abuse by clarifying that fax rules apply only to those situations where recipients' faxes or fax machines supplies are used without prior express invitation of permission, and not situations where there is no consumer harm, e.g. no resources are used and no costs are incurred, or when a computer receives a solicited fax.

IV. Statutory Provision

In relevant part, the TCPA provides that it shall be unlawful for any person within the United States ...

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

- (i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;
- (ii) the sender obtained the number of the telephone facsimile machine through—
 - (I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 [enacted July 9, 2005] if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D), except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); ...

47 U.S.C. § 227(b)(1)(C).

V. Argument

A. Statutory Construction

It is a simple exercise of statutory construction that necessitates Amerifactors' request for relief. The FCC should review the text of the TCPA which specifies restrictions on unsolicited advertisements sent by "any telephone facsimile machine, computer or other device" to "a telephone facsimile machine" 47 U.S.C. § 227(b)(1)(C).

It is well established that the expression of one thing by Congress implies the exclusion of another, i.e. *expressio unius est exclusio alterius*. For the statute to apply, Congress has listed the various means that the unsolicited advertisement can be sent, but limited application of the statute for means which it can be received. There is no room for expansive agency interpretation for the term "telephone facsimile machine" to include "computers or other devices" when it is clear that Congress obviously knew how to express a broader means of sending than receipt. *See Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017).

If the FCC believes more regulation is needed, it should make its case to Congress, but should not adopt an interpretation that goes beyond the meaning of the JFPA.

B. Balancing Consumer Benefits

As cited by Amerifactors, Congress implemented the JFPA as part of the TCPA to ameliorate consumer harm caused by the receipt of unsolicited fax advertisements and the associated costs of using the recipient's paper and toner, or to monopolize the use of the device so that other

communications could not simultaneously be received. *See* Amerifactors’ Petition at 15-16. An electronic fax does not tie up telephone lines or require printing the advertisement—it is equivalent to receiving an e-mail. Thus, the consumer harm the TCPA sought to prevent is not present here when computers or other electronic devices receive fax advertisements.

But the harm and uncertainty caused by the inappropriate application of the JFPA to legitimate senders like Amerifactors and Amsterdam is great including claims for multi-million dollar damages under the TCPA and concomitant settlement demands. When balancing these interests, it is clear that that the FCC should grant Amerifactors’ Petition.

C. Consumer Harm

Congress designed the TCPA to prevent advertisers from shifting costs to recipients of their messages. H.R. Rept. 317, 102nd Congress, 1st session (Nov. 1991). It was also designed to prevent the sender from occupying the recipient’s inbound lines such that they became unavailable for legitimate business purposes. *Id.*

Neither of these harms is caused by recipient of messages on computers designed to receive inbound faxes which have unlimited capacity to receive messages and cost nothing per message received.

The harm created by an expansive definition, however, is manifest in the myriad lawsuits filed under the TCPA alleging violations of technical and other provisions in the TCPA against legitimate companies sending fax advertisements. The FCC should consider that this interpretation of the JFPA leads to the destruction of legitimate small businesses, who are unaware that electronic fax advertisements are being treated the same as traditional faxes.

VI. Conclusion

Amsterdam respectfully requests the FCC grant Amerifactors’ Petition and provide relief for similarly situated companies, holding that 47 U.S.C. § 227(b)(1)(C) does not apply to unsolicited fax advertisements received by a computer or other device and that the restriction is solely limited to restrictions to unsolicited advertisements received by a “telephone facsimile machine”.

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Respectfully submitted,

/s/ William E. Raney

COPILEVITZ & CANTER LLC
William E. Raney
Kellie Mitchell Bubeck
310 W. 20th Street, Suite 300
Kansas City, Missouri 64108
Telephone: (816) 472-9000
Facsimile: (816) 472-5000
Email: braney@cckc-law.com

kmitchell@cckc-law.com

Attorneys for Amsterdam Printing & Litho, Inc.