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August 29, 2019

VIA ECFS

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

**Re: Notice of Ex Parte Presentation by Mastercard International Incorporated,
CG Docket Nos. 02-278 and 05-338**

Dear Ms. Dortch:

We represent Mastercard International Incorporated, and write pursuant to Section 1.1206 of the Commission's rules to provide notice that Mastercard met with representatives of the FCC's Consumer and Governmental Affairs Bureau (the "Bureau") concerning the Petition for Expedited Declaratory Ruling filed on July 13, 2017, by the AmeriFactors Financial Group, LLC in the above-captioned proceedings (the "Petition").

On August 26, 2019, Mastercard met with Patrick Webre, Bureau Chief, Zachary Champ, Chief of Staff, Nancy Stevenson, Deputy Chief, Consumer Policy Division, Erica McMahon, Attorney Advisor, Consumer Policy Division, and Richard Smith, Special Counsel, Consumer Policy Division. In attendance at this meeting were Jenna Goodfellow, Senior Counsel, Litigation, at Mastercard, as well as George Foote, Christopher Karagheuzoff and Jonathan Montcalm of Dorsey & Whitney LLP, counsel to Mastercard. Prior to the meetings, Mastercard submitted a letter to Ms. Stevenson, Mark Stone, Deputy Bureau Chief, and Kurt Schroeder, Chief, Consumer Policy Division & Information Access & Privacy Office in which Mastercard explained its interest in the Petition and its position in favor of the relief sought therein. A true and correct copy of that letter is attached hereto as Exhibit A.

During this meeting, Mastercard explained certain aspects of its business, including (i) how it partners with thousands of financial institutions that issue Mastercard-branded payment cards, as well as with hundreds of other co-brand partners; and (ii) that although it directly advertises its brand on a broad scale, generally it does not advertise specific payment cards that include Mastercard branding.

Mastercard then described its particular interest in the Petition, including Mastercard's status as a defendant in a Telephone Consumer Protection Act ("TCPA") junk fax lawsuit and the tremendous financial implications of this kind of litigation, particularly on the smaller financial institutions and co-branding partners with which Mastercard does business. It acknowledged that

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junk faxes sent to traditional fax machines are a nuisance that can cost recipients potentially significant time and money, and that they should be prevented. To that end, granting the Petition will not affect the rights of any person receiving a junk fax on a traditional fax machine, as intended under the TCPA.

However, as explained by Mastercard during the meeting (and in greater detail in the written submission), the legal and policy bases for the Petition are sound, and granting it will curb rampant litigation abuse of the junk fax provisions of the TCPA. From a legal perspective, Mastercard explained that the TCPA is only meant to prevent the sending of junk faxes to traditional fax machines, as evidenced by the plain language of the statute, which draws a distinction between the equipment from which it is prohibited to send a junk fax (telephone facsimile machines, computers and other devices), and the equipment to which it is prohibited to send junk faxes (traditional fax machines only). From a policy perspective, advances in technology have completely changed the faxing industry, such that most faxes are no longer transmitted or received in a manner that is prohibited by the TCPA. Indeed, the vast majority of businesses that and consumers who still receive faxed documents now receive them online through the use of online fax services, and will view their faxes either via email, mobile applications, or via an online portal. As a result, the harms that the junk fax provisions of the TCPA were designed to address—the shifting of advertising costs to consumers in the form of the costs of paper and ink/toner and the tying up of telephone lines that prevents their use for legitimate business communications—have been eliminated for users of online fax services. In short, there is no reason that the junk fax provisions of the TCPA should be read to apply to non-traditional (i.e., most of today's) faxes that are, in reality, indistinguishable from emails (which are not prohibited by the TCPA and that are the subject of other protective measures for consumers, including the CAN-SPAM Act, spam filters, and do-not-fax functionality provided by many online fax services).

Finally, Mastercard discussed how a 2015 order by the Bureau, which decided a petition brought by Westfax Inc.¹ (the “2015 Order”), was inconsistent with the TCPA, and that the precise question at issue in the Westfax petition did not address the full scope of services provided by online fax services. Nevertheless, some courts are effectively treating the 2015 Order (improperly, in Mastercard's view) as binding, with the result that they are not considering whether new technologies fall within the statute. As Mastercard has argued in the TCPA case that it is defending, the Commission—including, through delegated authority, the Bureau—is the appropriate authority to review the current state of faxing technologies and to clarify that the use of such technologies falls outside the scope of the TCPA.

¹ See *In re Westfax, Inc. Petition for Consideration & Clarification*, 30 FCC Rcd 8620 (F.C.C. August 28, 2015).



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For the reasons discussed above and in its written submission, Mastercard urged the FCC to promptly grant the Petition and to issue the declaratory ruling sought by AmeriFactors.

Sincerely,

s/ Christopher G. Karagheuzoff

Enclosure

Exhibit A

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VIA ELECTRONIC MAIL

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**Re: Meeting to Discuss the Petition for Expedited Declaratory Ruling Submitted
by AmeriFactors Financial Group, LLC, CG Docket Nos. 02-278 and 05-338**

Dear Messrs. Stone and Schroeder and Ms. Stevenson:

We represent Mastercard International Incorporated, and write in advance of our August 26, 2019 meeting with you to discuss the above-referenced Petition. This letter lays out, both in Executive Summary form, and separately in more fulsome detail, the reasons for Mastercard's keen interest in the Petition and its position regarding the relief sought by AmeriFactors. We look forward to the opportunity to discuss these issues with you, and thank you for making the time to meet with Mastercard. The content of this letter is nearly identical to that contained in the letters we submitted to Chairman Pai and Commissioner Carr in advance of our meetings with them on March 11, 2019, and to Commissioners O'Rielly, Rosenworcel, and Starks in advance of our meetings with them or their representatives on May 6, 2019, both of which were filed on the above-referenced docket.

Executive Summary

As you are well aware, in recent years there has been an explosion of nationwide class actions alleging violations of the TCPA, including its junk fax provisions. The current state of lawsuit abuse, led by a small group of law firms, unduly burdens legitimate businesses and exploits technological advances in a manner that contravenes the plain language of the TCPA. Furthermore, the courts have had a difficult time applying the provisions of the TCPA to new technologies that the drafters of the TCPA neither foresaw nor addressed. Respectfully, some of these issues have been exacerbated either by inconsistent guidance from the FCC, or by broad interpretations of the TCPA by the FCC, some of which recently have been struck down by the D.C. Circuit in decisions that have received approval from Chairman Pai, among others at the Commission.

As highlighted in the Petition, one area in which new technologies require clarification by the FCC is the scope of the definition of “telephone facsimile machine.” The plain language of the statute and concurrent Congressional statements demonstrate that the TCPA’s prohibitions on junk faxes were meant to apply to traditional fax machines that tied up telephone lines and automatically printed all incoming faxes. In fact, the shifting of advertising costs in the form of the cost of paper and ink and the occupation of telephone lines impeding legitimate business communications were the primary harms against which the fax provisions of the TCPA were designed to protect. The TCPA thus defines “telephone facsimile machine” to include only equipment that has the “capacity” to transmit or receive text or images over regular telephone lines from or onto paper.

For the majority of businesses and consumers that continue to send and receive faxes, advances in technology have eliminated the very harms the TCPA was designed to address. This is made clear by the consistent and drastic reduction in junk fax-related complaints received by the FCC, even as advances in technology have resulted in the emergence of online fax services that are able to transmit faxes, on a wide scale basis, cheaply and efficiently. Online fax services do not use traditional fax machines; instead, they rely on computer servers to send and receive fax transmissions, convert those faxes into digital files, and send or receive those digital files via email, mobile applications or an online portal accessible by users. The equipment utilized by online fax services does not qualify as a “telephone facsimile machine” under the TCPA because it does not print faxes, have the “capacity” to print faxes, or use a “regular telephone line” as that term would have been understood in 1991. These services obviate the need for separate faxing equipment, the requirement of a dedicated telephone line, and the cost and annoyance of automatically printed faxes.

Yet paradoxically, while the harms against which the junk fax provisions of the TCPA were designed to protect have been addressed for years now by advances in technology, abusive junk fax litigation against legitimate businesses that ignores the ameliorative impact of that technology continues unabated. In fact, the number of total TCPA lawsuits (including, but not

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limited to, junk fax lawsuits) grew from merely a handful per-year in the early 2000's to well over 4,000 cases per year in 2016 and 2017. And, as Chairman Pai and many federal and state courts have observed, the only stakeholders who obtain any significant benefit from these cases are plaintiffs' attorneys who exploit the TCPA for their own personal gain and to the detriment of legitimate businesses.

Mastercard is one of those legitimate businesses facing enormous potential damages in a TCPA junk fax litigation. By way of relevant background, Mastercard does not issue credit or debit cards, bill customers, or collect fees for credit card balances. Mastercard licenses the use of its brand and/or associated payments network to (a) thousands of financial institutions that actually issue payment cards, and (b) other entities that want to provide co-branded payment cards (*e.g.*, airlines, universities, etc.). Mastercard then earns revenue from fees associated with payment card transactions made using those co-branded cards on its network. Mastercard does not directly market or advertise the co-branded payment cards that are issued by its customer banks, but those banks and Mastercard's other business partners use Mastercard's name and logo in their advertising.

One such business partner did just that and sent thousands of unsolicited faxes, thus ensnaring Mastercard in a TCPA lawsuit that seeks nine-figure damages, even though Mastercard did nothing improper. Compounding the problem, plaintiffs in this litigation, as they routinely do in TCPA class action lawsuits, ask the court to simply ignore the changes in technology that have otherwise rendered the statute inapplicable to a wide swath of putative class members who no longer use traditional fax machines. As a result, and to put this in perspective, Mastercard is defending a lawsuit that seeks \$190 million in compensatory damages – roughly 42% of the entire FY2019 operating budget of the FCC. If those damages were to be trebled under the statute (and to be clear, Mastercard does not believe that the grounds to do so exist), damages would well exceed the FCC's entire operating budget.

Mastercard is not alone. As even a cursory review of the crowded dockets of the federal courts and of junk fax class action settlements makes amply clear, plaintiffs' law firms continue to seek, and defendants continue to pay, huge awards to "compensate" putative plaintiffs who in fact have suffered no real harm and the lawyers who "vindicate" those plaintiffs' interests. In reality, the overwhelming majority of recipients of the allegedly offending faxes do not even submit post-class adjudication claims seeking compensation; claims rates of five percent (and sometimes even much lower) are typical in TCPA junk-fax settlements. That so few class members who receive notice of their entitlement to compensation would seek it evidences the lack of harm to the majority of class members who now use online fax services, and illustrates that plaintiffs' attorneys are the only persons benefitting greatly from these suits.

Further, Mastercard is concerned about the potentially recurring nature of junk fax claims made against it. Mastercard's customers – the hundreds of co-branding partners and thousands of issuing banks with which it does business – are responsible for the legal compliance of the

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advertising and marketing efforts associated with the Mastercard-branded cards that they issue. As a practical matter, there is no other way for Mastercard to conduct its necessarily decentralized business. However, only businesses with the deepest pockets can even hope to withstand the annihilating damages available in TCPA actions. These lawsuits therefore have the potential to ruin small and mid-size businesses—including those with which Mastercard partners—while at the same time leaving larger businesses like Mastercard on the hook for huge damages, regardless of how liability is apportioned between Mastercard and its business partners. Thus, this situation is eminently unfair, not just to Mastercard and any company similarly situated to it, but ultimately to the small businesses with which they partner. It also has a chilling effect on Mastercard’s ability to enter into new partnerships, given the potentially disastrous consequences associated with doing so relative to the potential upside it otherwise derives from them.

The Commission can remedy this situation by issuing the declaratory ruling sought by the Petition clarifying that “fax” advertisements the recipient receives through online fax services or on a device other than a “telephone facsimile machine” do not fall within the statute’s prohibitions. The basis for such a ruling is straightforward and sound: the equipment utilized by online fax services does not print faxes, have the “capacity” to print faxes, or use a “regular telephone line” as that term would have been understood in 1991. Moreover, the equipment utilized by the users of online fax services to access “faxes” (*e.g.*, computers, smartphones, tablets, etc.) also does not have the requisite “capacity,” particularly in light of the distinction drawn in the TCPA between, on the one hand, the equipment from which it is prohibited to send an unsolicited fax (which includes not only telephone facsimile machines, but also computers and other devices), and, on the other, the equipment to which it is prohibited to send such faxes (just telephone facsimile machines). To find otherwise would: (a) stretch the meaning of “capacity” in the statute too far, and in a manner very similar to that which was recently struck down in *ACA Int’l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018); and (b) ignore a clear distinction in the statute in a manner very similar to that which was struck down in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017).

Additionally, granting the Petition would account for and acknowledge the positive effects that technological advancements in the faxing industry have wrought that eliminate the need for dedicated phone lines and the automatic and involuntary use of paper and ink. Furthermore, granting the Petition would significantly reduce abusive TCPA junk fax litigation. It would decrease the size of putative classes because potential class members who used online faxing services—and thus did not suffer the harms against which the statute was designed to protect—would no longer have a claim. It also would make it more difficult for plaintiffs’ counsel to obtain class certification, and thus would decrease the number of unfair settlements extracted by these attorneys from legitimate businesses that are fearful of the astronomical damage awards available under the TCPA. Finally, the relief sought in the Petition would not foreclose legitimate TCPA junk fax claims by those recipients who still use a traditional fax machine and thus incur the costs of ink and paper, as well as the occupation of their phone lines. The consumers and businesses who were meant to be protected by the TCPA would still be protected.

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By granting the Petition and circumscribing the scope of prohibited fax transmissions to only those sent to traditional fax machines, the FCC can effectively remedy this situation not only for AmeriFactors and Mastercard, but also for the many legitimate businesses large and small that have been forced to hand over large settlements as a result of abusive TCPA litigation that has gone far beyond the statute's intended scope.

Explanation of Mastercard's Interest in, and Position Regarding, the Petition
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A. Mastercard's Interest in the AmeriFactors Petition and a Clarification by the FCC Regarding the Scope of the TCPA's Junk Fax Provisions

Mastercard is a leader in the payments industry that uses its technology and expertise to make payments safe, simple, and smart. Mastercard does not issue payment cards, bill customers, or collect fees for credit card balances. Rather, in relevant part, it licenses the use of its brand and/or associated payments network to the financial institutions that issue payment cards, and to other entities that want to provide co-branded payment cards (*e.g.*, airlines, retailers, etc.). Mastercard then earns revenue from fees associated with payment card transactions made using those co-branded cards on its network.

Mastercard does not directly advertise specific co-branded payment cards, and does not send faxes to market its services. However, as part of its co-branding relationships, it typically provides a marketing budget and offers access to other marketing resources to its business partners. In cooperation with the issuing banks, those business partners determine how a co-branded payment card will be advertised. The issuing banks are responsible for the legal compliance of those advertising efforts.

Despite not being directly involved in the advertising of co-branded payment cards (or other co-branded services to which Mastercard has licensed the use of its brand), Mastercard has been ensnared in two TCPA junk-fax cases. Although it was voluntarily dismissed from one of those cases, the other case is still pending in federal court in Florida. That case involves faxes sent by a co-branding partner of Mastercard who, for the cost of \$5,000, sent approximately 500,000 faxes (381,000 of which were successfully transmitted) to various medical care providers throughout the country. Those faxes contained an image of a payment card containing the Mastercard logo. The co-brand partner was eager to promote its co-branded cards, and the issuing bank—a regional bank based in Arkansas—failed to ensure compliance with the TCPA. Despite having no direct involvement in this fax campaign, plaintiffs in the Florida action are seeking statutory damages against Mastercard that exceed \$190 million before trebling. That action has progressed through discovery, and—upon Mastercard's successful motion to the Florida district court—is currently stayed pending resolution of the Petition.

As evidenced by the Florida case, the combination of (a) cheap access to fax blasting technology, (b) current broad interpretations of sender liability and the definition of “telephone

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facsimile machine,” and (c) uncapped statutory damages, make it too easy for an inexperienced and relatively unsophisticated business to create the potential for astronomical liability for its business partners. Simply put, technological advances have made it exceedingly cheap to send thousands of faxes, and have eliminated the inconvenience and expense associated with tying up phone lines and automatic printing. But because the TCPA continues to be interpreted in a manner that is inconsistent with its language, intent and purpose, defendants in these lawsuits paradoxically face astronomical liability in circumstances where the plaintiffs themselves no longer experience the harms against which the TCPA was designed to protect. The scope of the resulting inequity is astonishing. To illustrate, every dollar spent by Mastercard’s co-branding partner on the faxes that are the subject of the Florida case, in theory, could lead to \$38,000 of damage to Mastercard (or \$114,000 if damages were trebled). Put differently, an expenditure of just \$5,000 by a business partner of Mastercard to transmit faxes could lead to statutory damages equivalent to 42% of the entire requested 2019 budget for FCC (or 126% if damages were trebled).¹ Congress could not have intended to create circumstances so patently inequitable.

The reality for Mastercard and other businesses that do not directly engage in certain marketing activities is that the risks of enormous TCPA liability cannot be adequately contained. The partners with which Mastercard does business run the gamut, from large banks and Fortune 500 companies to small, regional, financial institutions and small businesses. Many such businesses would face financial ruin defending, let alone paying damages resulting from, a TCPA junk fax lawsuit. And, because of the huge damages available in TCPA fax actions, large entities like Mastercard are left holding the bag (as it is on the Florida case) despite playing no genuine role in the purported violation.

For these reasons and those discussed below, Mastercard has tremendous interest in the AmeriFactors Petition and a declaratory ruling by the Commission that the TCPA’s prohibitions against unsolicited faxes do not apply to faxes received through online fax services or on a device other than a “telephone facsimile machine.”

B. Granting the Petition Will Help Curb TCPA Lawsuit Abuse in the Junk Fax Context

As Commissioner Pai himself has noted, the TCPA is the “poster child for lawsuit abuse.” *See In re Rules & Regulations Implementing the TCP Act of 1991 et al.*, 30 FCC Rcd 7961, 8073 (2015) (the “2015 Order”) (Comm’r Pai, dissenting).² The number of total TCPA lawsuits

¹ See FCC Fiscal Year 2019 Budget in Brief, available at www.fcc.gov/document/fy-2019-budget-brief (proposing a total gross budget authority of approximately \$450 million).

² See also, *In re Rules & Regulations Implementing the TCP Act of 1991 et al.*, 29 FCC Rcd 13998, 14015 (2014) (Statement of Commissioner Ajit Pai, Concurring in Part and Dissenting in Part) (2014) (“Subjecting small businesses to crippling suits at the behest of predatory trial lawyers only serves the interest of those self-fame lawyers, not the American public.”).

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(including, but not limited to junk-fax lawsuits) grew from merely a handful per-year in the early 2000's to well over 4,000 new cases per year in 2016 and 2017.³ And the only stakeholders who obtain any significant benefit from these cases are plaintiffs' attorneys. *See, e.g., First Mercury v. Nationwide Sec.*, 2016 IL App (1st) 143924, ¶¶ 44-46 (Ill. App. Ct. 2016) ("This case is typical of the TCPA class action cases. . . . [T]he only ones who stand to reap any significant benefit from a favorable outcome are the attorneys for the class."). Many factors have contributed to the explosion in TCPA litigation over the last several years, including: (a) the uncapped statutory damages available under the TCPA; (b) large putative classes created by the dramatic increase in the ability to contact thousands of recipients either by telephone, text or facsimile, all for a relatively low price; (c) the fact that previous interpretations of the TCPA are technologically outdated; and (d) broad interpretations of the scope of the TCPA's prohibitions by the FCC and federal courts.

These factors and others have created an entire cottage industry of plaintiffs' law firms that specialize in TCPA litigation only, and that engage in aggressive tactics to locate new TCPA plaintiffs. Their efforts have led to the creation of "professional plaintiffs" who have relationships with those law firms, and who typically receive multiple thousands of dollars in incentive payments for serving as class representatives. These clients provide the TCPA law firms with a steady stream of communications that can potentially form the basis for nationwide class-actions seeking enormous damages, most of which will never be claimed by class members. And because the potential damages under the TCPA often are enormous, the vast majority of cases are settled, many for multiple millions of dollars. As noted by the Seventh Circuit in a case brought by the same law firm that is leading the Florida case against Mastercard:

[W]hat motivates TCPA suits is not simply the fact that an unrequested ad arrived on a fax machine. Instead, there is evidence that the pervasive nature of junk-fax litigation is best explained this way: it has blossomed into a national cash cow for plaintiffs' attorneys specializing in TCPA disputes.

Bridgeview Health Care Ctr., Ltd. v. Clark, 816 F.3d 935, 941 (7th Cir. 2016) (internal citations and quotations omitted). Indeed, an employee of the law firm prosecuting the Florida case against Mastercard has stated in the context of another TCPA case that the law firm "want[ed] to set a record' by extracting more than \$75 million in damages" from another TCPA defendant. *Tech. Training Assocs. v. Buccaneers Ltd. P'ship*, 874 F.3d 692, 695 (11th Cir. 2017).

Moreover, these lawsuits—which typically settle—do not actually benefit the vast majority of recipients of allegedly offending faxes. To that end, claims rates of five percent (and sometimes even much lower) are typical in TCPA junk-fax settlements. *See, e.g., First Mercury*, 2016 IL App (1st) 143924, ¶¶ 44-46 (Ill. App. Ct. 2016) ("That is, attorneys in class action TCPA cases are acutely aware that only a handful of persons or entities who receive the offending fax transmissions

³ See <https://webrecon.com/webrecon-stats-for-dec-2018-2018-ends-with-a-whimper/>.

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will actually come forward to pursue a claim. . . .”). Indeed, plaintiffs’ attorneys often argue that such low claims rates are typical in TCPA cases when seeking approval of class action settlements. That so few class members actually submit claims for compensation further supports the inescapable conclusion that many recipients are not experiencing the harm that the statute was designed to address.

A declaratory ruling granting the Petition would cause a significant reduction of junk fax lawsuit abuse. It would dampen the ability of the plaintiffs’ bar to extract large settlements because it will reduce the number of potential plaintiffs with legitimate TCPA claims, and will make it more difficult to certify large classes of TCPA junk fax plaintiffs.

C. The AmeriFactors Petition

Mastercard assumes your familiarity with the Petition, which, in brief, asks the FCC to “re-examine the state of facsimile technology today and issue a declaratory ruling that the TCPA does not apply to *faxes received* via an online facsimile service.” Petition at 2 (emphasis supplied). The primary basis for the Petition is that the equipment used by online fax services does not constitute a “telephone facsimile machine” as defined in the TCPA because that equipment: (a) does not have the capacity to print faxes; and (b) does not receive faxes over regular telephone lines. *Id.* at 12-16. Furthermore, advancements in technology employed by online fax services eliminate the harms that the TCPA was designed to address, including the use of expensive paper and ink, and the occupation of the facsimile machine making it unavailable for legitimate business messages. *Id.* at 16-19.

The Commission received over thirty initial comments and five reply comments on the Petition, most of which supported AmeriFactors’ position. The commenters supporting the Petition included the American Bankers Association, Westfax, Inc., Legal & General America, Inc., the Louisiana Association of Business and Industry, and multiple small businesses. Like AmeriFactors, many of these commenters faced TCPA lawsuits filed against them by one of the plaintiffs-side law firms that specialize in TCPA fax litigation. We understand that attorneys for AmeriFactors have had multiple discussions and in person meetings regarding the Petition with staff members both from the offices of the Chairman and the Commissioners, and from the Consumer and Governmental Affairs Bureau (the “Bureau”), including a meeting on July 25, 2019, that all of you attended.

D. The Definition of “Telephone Facsimile Machine” Applies to Traditional Fax Machines that Tie Up Telephone Lines and Print Incoming Faxes

The legal bases for the Petition are sound. AmeriFactors seeks a declaratory ruling that faxes received by users of online fax services are not prohibited by the TCPA because such faxes are not received by a “telephone facsimile machine.” The TCPA provides that “[i]t shall be unlawful for any person within the United States . . . to use any telephone facsimile machine,

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computer, or other device to send, *to a telephone facsimile machine*, an unsolicited advertisement” 47 U.S.C. 227(b)(1)(C) (emphasis supplied). The statute draws a distinction between the type of equipment from which it is prohibited to send a fax (“telephone facsimile machine, computer, or other device”), and the type of equipment that receives the fax (telephone facsimile machine only). Thus, to fall within the statutory prohibition, a fax must be received by a telephone facsimile machine, and not a “computer, or other device.”

The statutory definition of a telephone facsimile machine is:

equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

Id. § 227(a)(3); *see also* 47 C.F.R. § 64.1200(f)(13). This definition describes a traditional fax machine, which receives faxes over a telephone line, thus tying up that line, and automatically prints those faxes. The 1991 House Report on the TCPA (the “Report”) from the Committee on Energy and Commerce (the “Committee”) underscores the TCPA’s focus on traditional fax machines, stating that:

Facsimile machines are designed to accept, process, *and print all messages* which arrive over their dedicated lines. The fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that it will be received and printed by the recipient’s machine.

H.R. Rep. No. 317, 102nd Cong., (1991) at p. 11 (emphases supplied).

The Committee also identified the harms that the TCPA was designed to eliminate, all of which are relevant only in the context of traditional fax machines. *First*, fax advertising “shifts some of the costs of advertising from the sender to the recipient” because “the recipient assumes both the cost associated with the use of the facsimile machine and the cost of the expensive paper used to print out facsimile messages.” *Id.* at p. 23. *Second*, fax advertising “occupies the recipient’s facsimile machines so that it is unavailable for legitimate business messages while processing and printing the junk fax.” *Id.* at p. 11. As described below and in the Petition, however, none of these harms exist in the context of online fax services.

E. The Online Fax Services That Are the Subject of the AmeriFactors Petition

Online fax services have transformed the paradigm for sending and receiving faxes. Traditional fax machines connected to a landline, tied up that line while sending and receiving faxes, and automatically printed incoming faxes. This required paying for equipment, a dedicated telephone line, ink or toner, and paper. By contrast, users of online fax services do not need any

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dedicated equipment or even a telephone line, and there is no automatic printing, so the cost of paper and toner is no longer foisted upon the user. Petition at pp. 7-10. Indeed, these are the main selling points utilized by online fax service providers, which tout the fact that users no longer need to pay for fax machines, fax telephone lines,⁴ or other supplies. *See, e.g.*, Petition at p. 9.

Instead of telephone facsimile machines, online fax providers use cloud-based or “hosted” fax servers to send, receive and store faxes. These cloud-based servers are hosted on the internet, which means that no on-site physical fax server (for larger businesses) or traditional fax machine (for smaller businesses and individuals) is required.⁵ They convert received faxes into digital files (*e.g.*, PDFs), and make those files available to end-users, typically via an online portal or as an email attachment. From the user perspective, the entire process is internet-based. Accordingly, users can send and receive faxes from a computer, a tablet or a smartphone using email, a website, software programs, etc. *See* Petition at pp. 7-10.

One of the leading providers of online fax services is Westfax, Inc., which submitted comments to the Petition. In its comments, Westfax described how online fax services work as follows:

An electronic fax may begin or originate as a traditional facsimile message from the sender but it is intercepted by an independent third-party vendor before it is received by the recipient. The intercepted message is reformatted and converted to a different digital message (*i.e.* an email) and terminated. The content of the message is then transmitted (sent) as an email to the recipient’s email address over the Internet. The recipient receives an email on whatever device the recipient chooses to use to access his or her emails. Electronic faxes are not sent as a fax over a telephone line to a telephone facsimile machine. There is no incoming fax, telephone fax machine, telephone line or paper.

Westfax, Inc. Comments on the Petition, Cmt. 5.

There has been significant growth in the usage of online fax services (*see* Petition at p. 8), which means that fewer and fewer fax recipients use traditional fax machines. Accordingly, as of 2018, the FCC reported that junk fax complaints had declined by 95% since their peak in 2007-

⁴ Users of online fax services still have a fax telephone number, which is used by the fax service to send and receive faxes. But the user does not pay the phone company for that line; instead the use of the number (for faxing only) is part of the service offered by the online fax provider.

⁵ “Cloud-based fax servers” refers to the equipment and software used by online fax providers that allows them to provide fax services to their customers without the need for those customers to have any specialized equipment on-site. And, because this equipment allows online fax providers to “create[] a gateway between the Internet and the public telephone network,” their customers no longer must dedicate telephone lines to sending and receiving faxes. *See Migrating from Fax Servers to the Cloud*, available at: myfax.com/resources/pdf/Whitepaper_Migrating_from_Fax_Servers_to_the_Cloud.pdf, at pp. 4-5.

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08.⁶ The FCC also reported that as few as 3% of American households had a device capable of receiving faxes. *Id.* at p. 2.

F. Online Fax Services Do Not Use Telephone Facsimile Machines to Receive Faxes Nor Do Their Users Receive Faxes on Telephone Facsimile Machines

The Petition should be granted because the equipment used by online fax services does not have the capacity to print text or images received over a “regular telephone line,” and thus does not qualify as a “telephone facsimile machine” under the TCPA. *See* 47 U.S.C. § 227(a)(3). *First*, online fax services do not use their equipment to print the millions of faxes they receive. To do so would be extremely expensive and antithetical to their entire business model, which is based on providing services that obviate the need for printing faxes. For online fax services to print incoming faxes also may be illegal because it would undercut the very encryption and other security functions they employ to be compliant with privacy regulations like HIPAA.⁷

Second, the equipment used by online fax services (*e.g.*, cloud-based servers) does not have the capacity to print text or images just because, in theory, that equipment could have software added to it and then be connected to a printer, thus providing printing functionality. To find otherwise would stretch the meaning of “capacity” beyond that envisioned by the TCPA and thus exceed the FCC’s authority, as illustrated by *ACA Int’l*. There, the Court set aside the FCC’s broad interpretation of “capacity” under the TCPA’s definition of an automatic telephone dialing system (“ATDS”). 885 F.3d at 695. Under that interpretation, all smartphones would have the capacity to be an ATDS because software or a mobile app could be downloaded onto a smartphone to provide the requisite autodialing functionality. *Id.* at 693-94. The Court held that the question of capacity turned on “how much is required” to enable the requisite functionality, and, “depending on the answer, what kinds (and how broad a swath) of telephone equipment” might be deemed to have the requisite functionality. *Id.* at 696. Applying that framework, the Court held that the FCC’s prior broad interpretation of “capacity” was “untenable” in part because its sheer scope could ensnare any smartphone user. *Id.* at 698. Here, that same reasoning compels the conclusion that the equipment used by online fax services does not have the requisite capacity. Otherwise, any electronic device (like a cloud-based server or even a smartphone) that can receive text and data over a phone line and that could print that text and data if software were added and the device was connected to a printer would have the requisite “capacity” to qualify as a telephone facsimile machine. Just as it did in *ACA Int’l*, such a broad interpretation would go too far.

Third, to qualify as a TFM, equipment must have the “capacity” to send or receive text or

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

⁷ For example, eFax notes on its website that “eFax Corporate’s fax to email service uses several layers of encryption to keep your faxes secure [U]nlike traditional paper-based faxing—your organization is ensured complete privacy” *See* enterprise.efax.com/online-fax-services/regulatory-compliance.

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images over a “regular telephone line.” *See* 47 U.S.C. § 227(a)(3). The equipment utilized by online fax providers does not use a “regular telephone line” as that term would have been understood in 1991 when the TCPA was enacted. At that time, fax machines had to be connected to a landline. That line would have been tied up or “busy,” whenever a fax was being sent or received. The unwanted occupation of the recipient’s dedicated telephone line was one of the harms the TCPA was designed to address. Online fax services do away with this harm. Although their equipment uses 10-digit telephone numbers to send and receive fax transmissions over phone lines, they do so through “complex telecommunications facilities.” Petition at p. 15. There are no dedicated telephone lines at the customer’s premises to be tied up while faxes are being received. Indeed, users no longer need a dedicated landline at all. And the fax numbers they are assigned or that they “port over” to the online fax service are for faxing only, and, unlike a landline, cannot be used to make calls.

Finally, the equipment on which users of online fax services receive “faxes” (computers, smartphones, tablets, etc.) also does not qualify as a “telephone facsimile machine.” There is no prohibition on sending unsolicited faxes to computers or other devices, only to telephone facsimile machines. *See* 47 U.S.C. 227(b)(1)(C). So, the only way that faxes sent to a computer, smartphone, etc. would be prohibited would be to ignore the statutory language and conclude that these devices are telephone facsimile machines. Such an interpretation would exceed the FCC’s authority in a manner very similar to that in *Bais Yaakov*. There, the D.C. Circuit struck down an FCC rule regarding solicited faxes that the Court determined ignored a clear distinction in the statute. 852 F.3d at 1079. Moreover, the computers, smartphones, tablets, etc. do not have the requisite “capacity” to qualify as “telephone facsimile machines” for the same reasons that the equipment used by online fax services does not have the requisite capacity, *i.e.*, interpreting “capacity” to encompass these devices would be “untenable” because it potentially would sweep in any electronic device that could in theory receive messages over a phone line and be connected to a printer. *See ACA Int’l*, 885 F.3d at 698.

G. The Commission Should Embrace the Advances in Technology that Have Eliminated the Harms Against Which the TCPA Was Designed to Protect

What is referred to as “faxing” today often bears little resemblance to “faxing” in 1991, when dedicated machines and phone lines were required, and those machines automatically printed incoming faxes. As discussed above, today most users receive “faxes” as emails or through online portals, and so the entire concept of “faxing” has changed because of technology. Indeed, there can be little doubt that when the FCC reported that as few as three percent of U.S. households have a device capable of receiving faxes, it was referring to traditional fax machines that tie up phone lines and automatically print incoming faxes. By granting the Petition, the Commission would embrace and acknowledge these changes, all within the context of adhering to the statutory language and Congressional intent, with the positive consequence of curbing lawsuit abuse.

The D.C. Circuit has approved of acknowledging the limitations of the TCPA in the context

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of technological advances. In *ACA Int'l* it rejected the notion that Congress should be presumed to have intended the ATDS definition “to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time.” *ACA Int'l*, 885 F.3d at 699. As the Court pointed out, the TCPA also prohibits certain calls to paging services and mobile radio services, which “have ceased to have practical significance.” *Id.* That rationale applies with equal force here. The faxing industry and the technology upon which it is based have evolved. Online fax services eliminate the costs associated with receiving unwanted faxes that the statute was meant to address. Technological advances have rendered the term TFM inapplicable to those who choose to take advantage of online fax services. The response to the use of these new technologies cannot be to stretch the TCPA beyond its plain meaning to encompass them, because to do so would exceed the FCC’s authority. *See In re Rules & Regulations Implementing the TCP Act of 1991 et al.*, 30 FCC Rcd 7961, 8076 (2015) (the “2015 Order”) (Comm’r Pai, dissenting) (“[I]f the FCC wishes to take action against newer technologies beyond the TCPA’s bailiwick, it must get express authorization from Congress—not make up the law as it goes along.”).

For these reasons—some of which, as set forth above, have become even more clear since the Petition was filed—the Commission should issue the declaratory ruling sought by AmeriFactors.

Thank you in advance for making time to meet with Mastercard and to consider its input with regard to the Petition.

Sincerely,

s/ Christopher G. Karagheuzoff