

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

Junk Fax Prevention Act of 2005

Petition for Expedited Declaratory Ruling of
Amerifactors Financial Group, LLC

CG Docket No. 02-278

CG Docket No. 05-338

**COMMENTS OF LEGAL & GENERAL AMERICA, INC.
IN SUPPORT OF AMERIFACTORS FINANCIAL GROUP, LLC’S PETITION FOR
EXPEDITED DECLARATORY RULING &
IN REPLY TO COMMENTS OF CAREER COUNSELING, INC.**

Legal & General America, Inc. (“Legal & General”) respectfully submits this comment in support of *Amerifactors Financial Group, LLC’s Petition of for Expedited Declaratory Ruling* (the “Petition”) and in reply to opposition comments filed by Career Counseling, Inc. (“Career Counseling”). For the reasons set forth in the Petition and by other commenters in support, the Petition should be granted, and the FCC should define “telephone facsimile machine” and “regular telephone line” consistent with the plain language of the Telephone Consumer Protection Act (“TCPA”). Contrary to the opposition of Career Counseling, the Petition raises important questions that have not been directly addressed by the FCC. The FCC should use this opportunity to clarify that the TCPA does not apply to faxes received on a “computer” or “device” other than a “telephone facsimile machine,” nor does the TCPA apply to faxes that are not transmitted through a “regular telephone line,” such as faxes received via online fax services or otherwise over the internet.

A. Background

Petitioner Legal & General is a financial services company offering life insurance and annuities. Petitioner's life insurance and annuity products are underwritten and issued by its subsidiaries and distributed primarily through independent insurance agents. As a result of faxes sent by third parties, Petitioner has been named as a defendant in four putative class action lawsuits filed by serial TCPA litigators who have contributed to an ongoing tsunami of class actions under the TCPA.¹ Two of the cases are being pursued by the same plaintiff's law firm that represents commenter Career Counseling. This law firm and others have developed a business model premised on pursuing multi-million dollar class actions based on the statutory penalties available under the TCPA. Because there is no cap on exposure under the TCPA, the potential statutory damages can escalate rapidly into the millions of dollars, and plaintiff lawyers extract large settlements from companies even though no consumers have been harmed in any meaningful way and even though the companies involved may have meritorious defenses. The harmful impact of this wave of litigation was neither contemplated nor intended by Congress in passing the TCPA in 1991.

B. The Petition is Supported by the Plain Language and Purpose of the Statute

The plain language of the TCPA makes it unlawful to use "a telephone facsimile, computer, or other device" send an unsolicited advertisement "to a telephone facsimile machine,"² where a "telephone facsimile machine" is defined as "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)

¹ *JWD Automotive, Inc. d/b/a Napa Auto Care of Cape Coral v. DJM Advisory Group LLC et al.*, Case No. 2:15-cv-793 (M.D. Fla.); *Russell M. Holstein, PHD, LLC v. Banner Life Ins. Co. et al.*, Case No. 3:16-cv-462 (D.N.J.); *O.P. Schuman & Sons, Inc. v. DJM Advisory Group*, No. 2:17-cv-157-UA-CM (M.D. Fla.); *Miller's Furniture of Mercer Co. v. Banner Life Ins. Co.*, 2:17-cv-00456 (M.D. Fla.).

² 47 U.S.C. § 227(b)(1)(C).

from an electronic signal received over a regular telephone line onto paper.”³ In other words, the TCPA applies only to a fax sent through a regular telephone line to a traditional fax machine that receives and prints the fax onto paper. Under the statutory language, a fax machine is different from a “computer” or “other device.”

The FCC should use the Petition as an opportunity to define the terms “telephone facsimile machine” and “regular telephone line” consistently with the plain language of the statute. In prior orders, the FCC has stated that the statute covers “computerized fax servers”⁴ or “efaxes,”⁵ but not “facsimile messages sent as email over the internet.”⁶ These prior orders, however, do not account for the wide range of new technologies and online services through which consumers can receive information, most of which are not “telephone facsimile machines” as defined in the statute and did not exist at the time the TCPA was enacted. An online fax service does not constitute a telephone facsimile machine under the language of the statute. Similarly, a laptop, mobile phone, tablet, or similar device cannot be a “telephone facsimile machine” under any reasonable construction of the TCPA, and particularly if the device is not capable of printing a message on paper. If a device is connected to the internet and does not use a “regular telephone line,” then the device is also not a telephone facsimile machine.

For the FCC to interpret the TCPA to cover all web-based and/or computerized technologies would far exceed the scope of the statutory language and intent of the TCPA. And although the historic trend has been for the FCC to interpret the scope of the statute broadly, the FCC cannot expand the TCPA beyond the borders set by Congress in the text of the statute;

³ 47 U.S.C. § 227(a)(3).

⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Red 14014, 14133 (¶ 200) (2003) (*2003 TCPA Report and Order*).

⁵ *Westfax, Inc. Petition for Consideration and Clarification*, Declaratory Ruling, 30 FCC Rcd 8620 (¶ 1) (2015) (*Westfax Order*).

⁶ 2003 Report and Order, ¶ 200.

instead, “[t]he FCC may only take action that Congress has *authorized*.”⁷ It would be inconsistent with the statutory text if any device capable of receiving an electronic communication could be a “telephone facsimile machine.”

C. The Petition Raises Issues That Have Not Been Directly Addressed by the FCC

Commenter Career Counseling argues in opposition to the Petition that all of the issues have already been directly addressed by the FCC. That is not correct. Specifically, the FCC has never (to our knowledge) provided guidance on the term “regular telephone line,” which circumscribes the definition of telephone facsimile machine and the scope of the TCPA. In the *Westfax Order*, the FCC assumed as part of the question it addressed that the efaxes had been transmitted “as faxes over telephone lines.”⁸ The *Westfax Order* did not consider online faxes services or internet-based transmission methods that do not employ regular telephone lines. The term “regular telephone line” should be interpreted according to its plain meaning, which is plain old telephone service (POTS).

Similarly, the FCC has not addressed computerized fax equipment that is not connected to a regular telephone line and/or lacks the capacity to transcribe an electronic signal onto paper, which includes most computer-based devices. The FCC should clarify that merely connecting a computer to a printer does not transform a computer into a fax machine.

D. Granting the Petition Would Be Consistent with the Purpose of the TCPA

Communications equipment and technology has evolved dramatically since the statute was enacted more than 25 years ago, and the harms that the TCPA sought to address do not exist with online fax services or faxes received on devices that are not traditional fax machines. With an online or computer-based fax service, receipt of a “fax” does not cause wear and tear on a

⁷ See *Bais Yaakov of Spring Valley v. Fed. Commc'ns Comm'n*, 852 F.3d 1078, 1083 (D.C. Cir. 2017) (emphasis in original).

⁸ *Westfax Order*, ¶¶ 9-10.

traditional fax machine, nor does the sender force the recipient to incur the cost of paper, ink, and toner associated with the printing of a fax. In enacting the statute, Congress also expressed concern that unwanted faxes would block the flow of other business messages by occupying the telephone line and the fax machine, but online fax services can handle a large volume of messages simultaneously and the line will never be unavailable to receive other messages.

In contrast to these purported harms which are nonexistent with online fax services, the unsupported expansion of the scope of the TCPA has caused unwanted and unintended consequences—namely, a tsunami of business-crippling predatory class action lawsuits that burden legitimate businesses, while unscrupulous fax broadcast services are largely immune from liability under the statute and/or judgment proof. Legal & General supports the Petition because it will confirm the intended scope of the TCPA and thereby put reasonable limits on the runaway wave of class action lawsuits.

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Respectfully submitted,

EVERSHEDS SUTHERLAND (US) LLP

By /s/ Lewis S. Wiener

Lewis S. Wiener

Wilson G. Barmeyer

700 Sixth St. NW, Suite 700

Washington, DC 20001

Lewis.wiener@sutherland.com

wilson.barmeyer@sutherland.com

On behalf of Legal & General America, Inc.