

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

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)	

REPLY COMMENTS OF AMERIFACTORS FINANCIAL GROUP, LLC

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SUMMARY

In its Petition, Amerifactors asked the Commission to take notice of the significant technological changes in fax technologies, both since the enactment of the TCPA in 1991 and since the full Commission last visited the issue 14 years ago. Amerifactors relied principally on the rise of online fax services, which allow users to send and receive “faxes” in essentially the same way as e-mail, and which are now used by over 11 million subscribers in the U.S. today. This change, Amerifactors argued, required the Commission to re-examine faxing technologies and to clarify the applicability of the TCPA to these new uses. As Amerifactors explained, the plain language of the TCPA confirms that online fax services are not “telephone facsimile machines” and do not use “regular telephone lines” as defined in the Act. Moreover, users of online fax services do not suffer the costs of paper, toner and ink, or experience the tying of telephone lines while a fax is received, as fax users in 1991 did. Instead, the extent of “harm” associated with the receipt of a fax via an online fax service is the same as receiving junk e-mail – a harm that Congress addressed with a very different approach in the CAN-SPAM Act enacted a dozen years after the TCPA.

Over 20 parties timely filed comments in response to the Petition. Of those, only two parties – the plaintiff that filed the lawsuit against Amerifactors and one express commenter – opposed the Petition. All other timely commenters agreed with Amerifactors that online fax technologies are different in kind from ordinary fax machines. They agreed that such services do not involve a “telephone facsimile machine” – indeed, the services are marketed as ways to **replace** the fax machine – and that the receipt of faxes via these services does not cause harm to the recipient. Further, all commenters – including the plaintiff in the Amerifactors case –

confirm that receipt of a fax via an online fax service is indistinguishable from the receipt of an e-mail.

The Commission has an obligation to update its regulations in response to changes in technologies and market conditions. It also has an obligation to adhere to the statutory language, and not to revise statutes that Congress has written. Moreover, as the Commission knows, class action cases have proliferated, causing harm to legitimate businesses and deterring legitimate business practices. This Petition presents the Commission with an opportunity to fulfill its statutory obligations, by declaring that faxes received via online fax services are not within the scope of the TCPA. The rise of the Internet has changed almost every aspect of commerce in the United States, and faxing is no exception. With online fax services, even the term “fax” is a misnomer --- much like the term “dialing” a telephone number has outlived its rotary dial origins. Users of online fax services receive an e-mail, no more and no less. By updating its interpretations to reflect this reality, the Commission will free this area of commerce from uncertainty, enable the growth of new services that incorporate fax-like capabilities and will protect entities from unreasonable potential liability for persons that suffer no harm from receipt of a communication.

Notably, the ruling requested will not deprive any person actually harmed by an unsolicited fax advertisement received on traditional equipment from obtaining a remedy. The requested ruling will preserve individual TCPA actions for those persons still using telephone facsimile machines while stemming abusive class action litigation that disproportionately harms first-time fax marketers like Amerifactors. Therefore, the Commission should grant Amerifactors’ petition promptly.

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Amerifactors Financial Group, LLC (“Amerifactors” or the “Company”), by its attorneys, hereby respectfully submits its reply comments in response to the Public Notice¹ on Amerifactors’ Petition for Expedited Declaratory Ruling (“Petition”) that the Telephone Consumer Protection Act (“TCPA” or the “Act”) does not apply to fax advertisements that the recipient receives through online fax services or on a device other than a telephone facsimile machine.² The overwhelming majority of initial comments filed in response to the Petition support Amerifactors’ request, agreeing that the transmissions described in the Petition clearly fall outside the scope of the TCPA and do not cause the harms that the Act remedies. The commenters also agree that a declaratory ruling would correct the current imbalance in private TCPA litigation that has emboldened plaintiffs to pursue class action claims that are inflated with

¹ See Public Notice, “Consumer and Governmental Affairs Bureau Seeks Comment on Amerifactors Financial Group, LLC Petition for Expedited Declaratory Ruling Under the Telephone Consumer Protection Act of 1991,” DA 17-690 (rel. July 18, 2017).

² See Petition for Expedited Declaratory Ruling of Amerifactors Financial Group, LLC, CG Docket Nos. 02-278, 05-338 (filed July 13, 2017).

large numbers of persons that suffer no harm whatsoever. This inflated class action liability serves only to enrich plaintiffs lawyers while imposing disproportionate harms on innocent actors such as Amerifactors.

In the initial comment period, only the plaintiff in the current pending litigation against Amerifactors and one other party opposed the Petition. However, these oppositions concede that “faxes” received by online fax services operate in the same way as e-mail – a central premise of Amerifactors’ Petition. Instead of following the statute, these commenters ask the FCC to bend the statutory language to reach cloud-based services that are distinct from the dial-up era equipment that Congress addressed. The Commission must reject these arguments and instead “should read the TCPA to mean what it says.”³

Therefore, for the reasons set forth in the Petition and these reply comments, Amerifactors requests that the Commission expeditiously issue a declaratory ruling that the TCPA does not apply to fax advertisements that the recipient receives through online fax services or on a device other than a telephone facsimile machine.

I. ONLINE FAX SERVICE TRANSMISSIONS DO NOT EMPLOY A “TELEPHONE FACSIMILE MACHINE” OR USE A “REGULAR TELEPHONE LINE”

Commenters, both supporting and opposing the Petition, confirm a central contention of the Petition: that modern online fax services operate differently than the 1990’s-era

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278 et al., Declaratory Ruling and Order, FCC 17-52, Dissenting Statement of Commissioner Ajit Pai (rel. July 10, 2015).

fax machines. Modern faxing technologies are cloud-based services that replace dial-up fax technologies and do not require a physical telephone facsimile machine or a dedicated regular telephone line to receive a transmission.⁴ Many of the initial comments filed in response to the Petition confirm this fact. The American Bankers Association, for example, explained that “[t]oday, businesses rarely receive faxes on machines that automatically print incoming faxes and require ink refills and paper rolls.”⁵ Fax service provider Westfax, confirms that, “A recipient of an electronic facsimile receives an e-mail.”⁶ Similarly, commenter Michael Friend notes that “modern day efax solutions” are an example of a much broader trend in communications:

Since the inception of the TCPA act, dramatic changes in communications have taken place. New communications protocols like TCP/IP (Transmission Control Protocol/Internet Protocol) have enabled data communications over the internet, which has dramatically impacted electronic and document messaging. The advent of e-mail (SMTP) over TCP/IP and hundreds of different

⁴ See Petition at 12-16.

⁵ Letter from Jonathan Thessin, Senior Counsel, Center for Regulatory Compliance, American Bankers Association, CG Docket Nos. 02-278, 05-338, at 1 (filed Aug. 17, 2017) (“American Bankers Association Comments”); *see also* Letter from David Boneno, General Counsel, Louisiana Bankers Association, CG Docket Nos. 02-278, 05-338 (filed Aug. 14, 2017); Comments of Jerry Bologna, President and CEO, Jefferson Parish Economic Development Commission, CG Docket Nos. 02-278, 05-338 (filed Aug. 11, 2017); Comments of Lauren Chauvin, Energy Director, Louisiana Association of Business and Industry, CG Docket Nos. 02-278, 05-338 (filed Aug. 15, 2017); Comments of Michael Hecht, President and CEO, Greater New Orleans, Inc., CG Docket Nos. 02-278, 05-338 (filed Aug. 15, 2017); Comments of the Jefferson Chamber of Commerce, CG Docket Nos. 02-278, 05-338 (filed Aug. 16, 2017); Comments of Bert Goldberg, CG Docket Nos. 02-278, 05-338 (filed Aug. 14, 2017).

⁶ Westfax, Inc. Comments on the Petition for Declaratory Ruling Filed by Amerifactors Financial Group, LLC., CG Docket Nos. 02-278, 05-338, at 3 (comment #5) (filed August 17, 2017) (“Westfax Comments”).

“apps” that allow audio, video, pictures, digital documents and typed data communications between similar and dissimilar computing devices (smartphones, tablets, PC’s, etc.) all via TCP/IP, have evolved and proliferated.⁷

Indeed, even two late-filed comments that oppose the Petition plainly state that they utilize online fax services that allow them to “receive faxes at anytime, via e-mail PDF.”⁸ These commenters’ descriptions illustrate how communications terms such as “faxing” can often outlive the actual technology, much the same way that we commonly say that we “dial” a telephone number when rotary-dial phones were replaced decades ago. In truth, the late-filed commenters receive e-mails, not the faxes of the 1990’s.

Because “commercially available digital communications solutions come in a multitude of different technologies, products, and services,” the definitions set forth in the TCPA are not necessarily applicable.⁹ For example, one commenter notes that her home refrigerator is “capable of receiving e-mail and other forms of communication” and that she can send e-mails

⁷ Comments of Michael Friend, CG Docket Nos. 02-278, 05-338, at 2 (filed Aug. 16, 2017) (“Friend Comments”).

⁸ *See* Letter from Peter F. Barry, Esq. Barry & Helwig, LLC, to Marlene Dortch, Secretary, Federal Communications Commission, CG Docket Nos. 02-278, 05-338, at 1 (Aug. 22, 2017) (“Barry Comments”); Letter from Javier L. Merino, Esq., Dann & Merino, P.C., to Marlene Dortch, Secretary, Federal Communications Commission, CG Docket Nos. 02-278, 05-338, at 1 (Aug. 22, 2017) (“Merino Comments”). Both the Barry and Merino comments disclose that their firms are consumer law firms. It is reasonable to assume that the firm’s business interests would be advanced by the statutory interpretation suggested, and this self-interest should be considered in assessing the weight to give to their comments.

⁹ Comments of Cynthia Brinker in Support of the Amerifactors Financial Group, LLC Petition for Declaratory Ruling, CG Docket Nos. 02-278, 05-338, at 2 (filed Aug. 17, 2017) (“Brinker Comments”). *See also* Friend Comments at 2.

and other documents from her refrigerator to her wireless printer.¹⁰ The commenter correctly observes that “[c]ommon sense would dictate that [her] kitchen refrigerator while capable of receiving [her] e-mails and thus [her] electronic faxes and print them out if [she] so choose[s], is not a ‘facsimile machine.’”¹¹ It does not square with the statute to assert that every computer or “other device” that can receive a fax transmission from an online fax service – such as a home refrigerator – is a facsimile machine because it has the “potential” to be (and generally is) connected to a printer.¹² Such an interpretation would make the statutory language nonsensical.¹³

The comments also make clear that online fax services do not depend on a “regular telephone line.”¹⁴ Although the Commission has not yet opined on exactly what

¹⁰ Comments of Stephanie Elizabeth, CG Docket Nos. 02-278, 05-338, at 2 (filed Aug. 16, 2017).

¹¹ *Id.*

¹² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, CG Docket Nos. 02-278, 05-338, 18 FCC Rcd 14014, 14133 (¶ 201) (2003).

¹³ As Chairman Pai observed in the context of autodialers, an “expansive reading of the term ‘capacity’ transforms the TCPA from a statutory rifle-shot targeting specific companies that market their services ... into an unpredictable shotgun blast covering virtually all communications devices.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278 et al., Declaratory Ruling and Order, FCC 17-52, Dissenting Statement of Commissioner Ajit Pai (rel. July 10, 2015).

¹⁴ *See, e.g.*, Westfax Comments at 5 (“an electronic facsimile is never sent to a telephone fax machine or transmitted over a regular telephone line or to a machine that transcribes text or images (or both) from an electronic signal received over a regular telephone line onto paper”); Comments of Amsterdam Printing & Litho, Inc. In Support of Amerifactors Financial Group, LLC’s Petition for Expedited Declaratory Ruling, CG Docket Nos. 02-278, 05-338, at 4 (filed Aug. 17, 2017) (“Amsterdam Printing & Litho Comments”) (“An

constitutes a “regular telephone line,” the most logical conclusion is that it refers to a plain old telephone service (“POTS”) line. The majority of the comments confirm that rather than utilizing a regular telephone line, “[m]odern 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 e-mail.”¹⁵

In fact, a key selling feature for online fax services is the ability of customers to send and receive fax transmissions without having to maintain a dedicated phone line for them.¹⁶

electronic fax does not tie up telephone lines or require printing the advertisement”); Comments of David Cover, CG Docket Nos. 02-278, 05-338 (filed Aug. 17, 2017) (“Modern online fax solutions cannot transcribe from or to paper, nor do they or the recipient use regular phone lines to communicate these messages over the internet via e-mail.”); Comments of David Lloyd, CG Docket Nos. 02-278, 05-338 (filed Aug. 17, 2017) (“Lloyd Comments”) (“Users and recipients receiving electronic messages and attachments from online efax services do not do so over regular telephone lines”); Comments of Gary Evans, CG Docket Nos. 02-278, 05-338 (filed Aug. 16, 2017) (“My business sends and receives faxes from my ipad, it has no telephone line.”); Comments of Kim Jarreau, CG Docket Nos. 02-278, 05-338 (filed Aug. 16, 2017) (“My understanding is that the efax solution I use has no regular telephone lines at all and uses the internet”); Comments of Lalo Robles, CG Docket Nos. 02-278, 05-338 (filed Aug. 16, 2017) (“Robles Comments”) (“Digital sent e-fax’s are sent completely differently than a POTS (telephone line) sent fax”); Comments of Mark Valencia, CG Docket Nos. 02-278, 05-338 (filed Aug. 17, 2017) (“Valencia Comments”) (“Users of online fax services do not have their regular phone line tied up so there is no undue burden keeping them from using their online fax service when receiving an efax/e-mail.”).

¹⁵ Brinker Comments at 2; *see also* Comments of Mark Gregg, CG Docket Nos. 02-278, 05-338 (filed Aug. 15, 2017); Comments of Javier Gonzalez, CG Docket Nos. 02-278, 05-338 (filed Aug. 16, 2017) (“Gonzalez Comments”); Comments of Erika Eaton, CG Docket Nos. 02-278, 05-338 (filed Aug. 16, 2017).

¹⁶ *See* “Testimonials,” RapidFAX Online Faxing Service, available at <http://www.rapidfax.com/homepage/testimonials.htm> (last viewed August 21, 2017) (“The use of RapidFAX has allowed us to eliminate an analog phone line, which in turn eliminated the monthly phone line charges and the need for an external modem. The cost of the phone line, modem, and modem maintenance far outweighed the cost of a situation we had just last week where a phone line was cut in our immediate area, subsequently all

Similarly, Amerifactors attached to its Petition an advertisement from the largest online fax service provider, eFax (which claims 11 million subscribers), touting that its service:

✓ Eliminates need for extra fax line and fax machine. No more toner, paper, expensive phone bills or machine repairs.¹⁷

Significantly, neither Career Counseling nor the other commenter opposing the Petition allege that a “regular telephone line” is used in connection with online fax services.

Given the agreement in the record regarding how online fax services operate, it is clear that these services do not meet the relevant statutory definitions. The facsimile provision of the TCPA provides that, with certain exceptions, “[i]t shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States ... to use any telephone facsimile machine, computer, or other device to send, *to a telephone facsimile machine*, an unsolicited advertisement.”¹⁸ Online fax services do not employ “telephone facsimile machines”; they replace them.

The plaintiff in the Amerifactors litigation, Career Counseling, Inc. (“Career Counseling”) nevertheless urges the Commission to twist the statutory language to reach these services. It asserts that the TCPA applies “when [a fax] is received by the end user on a computer,” purportedly because computers can have the capacity to transcribe text or images

of the fax machines in the area did not operate. However, because we are using RapidFAX for our clients faxing needs they were completely unaffected and unaware of any such problems.”).

¹⁷ Petition, at Exhibit 3.

¹⁸ 47 U.S.C. § 227(b)(1)(C) (emphasis added).

from an electronic signal to paper.¹⁹ However, as Career Counseling’s counsel correctly explained in previous comments before the Commission, on the receiving end, the TCPA limits the type of equipment that it covers. Career Counseling’s counsel noted that, in order for the TCPA to apply, “[t]he receiving device must be a ‘telephone facsimile machine,’ but the originating device can be any ‘other device’ and, in particular, it can be a ‘computer.’”²⁰ In other words, while the originating device can be a “computer,” the TCPA clearly excludes that device when it discusses how a fax is received. Career Counseling’s attempt to add receiving computers to the TCPA must fail.

Implicitly recognizing that the text of the TCPA doesn’t cover modern equipment, Career Counseling claims this interpretation is necessary to prevent fax advertisers from “circumventing” the TCPA.²¹ As then-Commissioner Pai noted in a previous TCPA case, it is not the role of the FCC to twist the statute in such a manner:

[W]hat the Commission deems defeat is in fact a victory for consumers. Congress expressly targeted equipment that enables telemarketers to dial random or sequential numbers in the TCPA. If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it. And if the FCC wishes to take action against newer technologies beyond the

¹⁹ Career Counseling, Inc.’s Comments on Amerifactors Financial Group, LLC’s Petition for Expedited Declaratory Ruling, CG Docket Nos. 02-278, 05-338, at 6 (filed Aug. 17, 2017) (“Career Counseling Comments”).

²⁰ Anderson + Wanca’s Comments on Ryerson’s Petition for Declaratory Ruling, CG Docket Nos. 02-278, 05-338, at 2 (filed Dec. 8, 2015) (emphasis added).

²¹ *Id.*

TCPA's bailiwick, it must get express authorization from Congress—not make up the law as it goes along.²²

Career Counseling's position would require the FCC to do just that – to “make up” law to meet changes in technology. Congress chose to use expansive language on the originating end of faxes – covering faxes originating from a variety of devices, including “computers” – but chose a narrow definition on the receiving end – a “telephone facsimile machine.” If consumers are no longer receiving “faxes” via telephone facsimile machines, the TCPA does not apply. Put simply, the plain language of the TCPA excludes fax advertisements that the recipient receives through online fax services or on a device other than a telephone facsimile machine do not fit within the bounds of the statute. As Commissioner Pai noted in 2015, “In short, we should read the TCPA to mean what it says.”²³

II. ONLINE FAX SERVICES DO NOT CAUSE THE HARMS THAT THE TCPA INTENDED TO AVOID

As discussed in the Petition, the House Report on the TCPA makes clear that the facsimile provisions of the TCPA were intended to curb two specific types of harms: “First, [a fax advertisement] shifts some of the costs of advertising from the sender to the recipient.

²² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278 et al., Declaratory Ruling and Order, FCC 17-52, Dissenting Statement of Commissioner Ajit Pai (rel. July 10, 2015); *cf. id.*, Dissenting Statement of Commissioner Michael O’Rielly (“The Commission should have had gone back to Congress for clear guidance on the [whether the TCPA applies to text messages] rather than shoehorn a broken regime on a completely different technology.”).

²³ Dissenting Statement of Commissioner Ajit Pai, *supra*.

Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax.”²⁴

No commenter asserts that online fax services impose these harms. Several commenters agree that fax advertisements that the recipient receives through online fax services or on a device other than a telephone facsimile machine do not cause any cognizable harm to recipients, let alone these particular harms.²⁵ Even the commenters that oppose the Petition do not claim that modern faxing technology causes cost shifting or fax machine interference.

Instead, commenters opposing the Petition ask the FCC to invent new harms that the TCPA is designed to protect. Career Counseling lists a myriad of other “harms” from online faxes, in the form of time spent opening, reviewing, and in some instances, deleting e-mails with the online fax advertisement attachments.²⁶ Similarly, Mr. Shaw, and the late-filed comments of Mr. Barry, and Mr. Merino, assert that fax transmissions received via online fax services or on a device other than a telephone facsimile machine are more akin to e-mails, and equate unsolicited faxes to “spam.”²⁷

²⁴ H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991).

²⁵ Westfax Comments at 5; Amsterdam Printing & Litho Comments at 4; Gonzalez Comments at 1; Robles Comments; Valencia Comments; Horner Comments.

²⁶ Career Counseling Comments at 6-8; *see also* Comments of John A. Shaw, CG Docket Nos. 02-278, 05-338, at 2 (filed Aug. 17, 2017) (“Shaw Comments”).

²⁷ *See id.* (“A fax sent to a fax recipient who uses a fax service will normally be sent from the fax service by way of e-mail. If the fax is unsolicited the e-mail may be considered spam, in violation of the CAN-SPAM Act.”); Barry Comments at 1; Merino Comments at 1. *See also* Amsterdam Printing & Litho Comments at 4; Michael Friend Comments at 2; Comments of Jason Stephens, CG Docket Nos. 02-278, 05-338, at 2 (filed Aug. 15, 2017).

These harms are not TCPA harms. While transmissions received via online fax services may be subject to regulation under the Controlling the Assault of Non-Solicited Pornography and Marketing (“CAN-SPAM”) Act of 2003, they are not within the scope of the TCPA. In fact, the CAN-SPAM Act’s legislative history specifically identifies the “harms” cited by these commenters – time spent opening, reviewing, and deleting the messages – as harms that the CAN-SPAM Act was intended to address.²⁸ At most, the consequences of receiving a fax through an online fax service are the same as receiving direct mail advertisements²⁹ or e-mail, neither of which are covered by the TCPA. The Commission should not be swayed by attempts to turn the TCPA into a general prohibition against all unsolicited communications.

Career Counseling further asserts that fax advertisements received through online fax services or on a device other than a telephone facsimile machine cause harm because “unsolicited fax advertising interferes with company switchboard operations and burdens the computer networks of those recipients who route incoming faxes into their electronic mail

²⁸ S. Rep. No. 108-170, 108th Cong., 1st Sess. 288, at 2 (2003) (“The costs of spam are significant to individuals as well, including *time spent identifying and deleting spam, inadvertently opening spam*, installing and maintaining anti-spam filters, tracking down legitimate messages mistakenly deleted by spam filters, and paying for the ISPs’ blocking efforts.”) (emphasis added).

²⁹ See H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991) (“The Committee found that when an advertiser sends marketing material to a potential customer through regular mail, the recipient pays nothing to receive the letter.”). See also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (holding that the “journey from mail box to trash can” is insufficient to allow the government to “shut off the flow of mailings to protect those recipients who might potentially be offended.”) (internal citations omitted).

systems.”³⁰ Again, this argument is based on a misunderstanding of the specific harms that the TCPA seeks to avoid. Nothing in the TCPA’s legislative history suggests that “company switchboard operations” were a concern of the fax provisions. Moreover, the burdens on telephone lines in 1991 were acute. On the issue of occupation of the recipient’s fax machine, the House Report explained that “when a facsimile machine is receiving a fax, it may require several minutes or more to process and print the advertisement. During that time, the fax machine is unable to process actual business communications.”³¹ In 1991, an unsolicited fax imposed a significant and recognizable harm – it occupied the machine for “several minutes or more” and it prevented other business communications during that time.

Career Counseling’s alleged burden on computer networks is not comparable to the harms of faxes in 1991. Today’s broadband networks transmit megabits of information per second, while the typical fax likely is a few kilobytes at most. The resulting transmission time to deliver a “fax” from an online fax service would be measured in milliseconds, a far cry from the “several minutes or more” that traditional faxes occupied facsimile machines in 1991. Moreover, broadband networks utilize the TCP/IP protocol, which is designed specifically to allow simultaneous transmissions of information. Thus, it is hard to see how a computer network is “occupied” at all, let alone occupied in the way that the TCPA sought to remedy.

Moreover, Career Counseling’s claim is refuted by the comments of other parties in this proceeding. Several commenters explained that, because transmissions received via

³⁰ Career Counseling Comments at 6-7 (quoting *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655 (8th Cir. 2003)).

³¹ H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991).

online fax services do not use a regular telephone line, they “do not prevent the recipient from receiving other faxes or communications at the same time.”³² Because Career Counseling presents no evidence that modern fax technologies actually disrupt recipients’ ability to receive other communications, its speculation should be disregarded.

Finally, Mr. Shaw and the late-filed comments by Mr. Sutton contend that the costs of fax services are relevant. Mr. Shaw contends that online fax service providers incur costs to “obtain telephone lines and size their equipment based, in part, on the number of faxes that the service receives,” and that these costs are “passed along to the recipient.”³³ However, Mr. Shaw provides no evidence of cost shifting to support this claim. Moreover, the type of cost Mr. Shaw references is more closely analogous to the cost of equipment, but there is no suggestion that the TCPA remedied the cost of purchasing a telephone facsimile machine in the first place (compared to *use costs* such as ink, paper and toner).

Mr. Sutton’s claim that the pricing of the online fax service itself causes “harm” should also be rejected. First, online fax service providers offer many different packages of

³² American Bankers Association Comments at 2; *see also* Westfax Comments at 5 (“An electronic facsimile does not cost a recipient time and money by way of interfering transmissions”); Comments of Joe Horner, CG Docket Nos. 02-278, 05-338 (filed Aug. 16, 2017) (“Horner Comments”) (“faxes sent via TCP/IP or received via TCP/IP do not use a ‘regular telephone line’ thus causing no damage components mentioned in the TCPA”); Comments of Mark Valencia, CG Docket Nos. 02-278, 05-338 (filed Aug. 17, 2017) (“Users of online fax services do not have their regular phone line tied up so there is no undue burden keeping them from using their online fax service when receiving an efax/e-mail.”); Lloyd Comments (“Since there are no ‘regular telephone lines’ ... there is no burden or harm as defined by the TCPA”).

³³ Shaw Comments at 2.

service. Exhibits 1 and 2 to Amerifactors' Petition identified dozens of service providers, each with different models for pricing their service.³⁴ Some plans will set pricing based on sent faxes, some will be based on sent and received faxes and some will be based on other features of the fax services. Users presumably select among those providers based on a mix of inbound and outbound faxes, international dialing, mobile phone features, and other functionalities.

Moreover, providers of online fax services offer Mr. Sutton and other subscribers numerous avenues to avoid receiving unwanted transmissions and minimize the costs associated with such services. For example, several online fax services include a "block sender" option that allows subscribers to block transmissions from certain numbers, similar to call blocking technology offered by telephone service providers.³⁵ Additionally, PCMag.com reports that at least one online fax service provider offers a "free, receive-only option," which allows subscribers to receive transmissions without incurring any cost,³⁶ and another provider has an option that allows subscribers to receive as many as 1,000 incoming pages per month, which greatly reduces the impact of an unwanted fax.³⁷ As a result, it is not possible to generalize how a particular received fax impacts the overall price of the service package the customer has selected.

³⁴ See Petition, at Exhibits 1 and 2.

³⁵ See Petition, at Exhibit 2.

³⁶ See Max Eddy, "HelloFax" Review, PCMag.com (Feb. 13, 2017) available at <https://www.pcmag.com/review/351602/hellofax>.

³⁷ See FaxCompare, available at <http://www.faxcompare.com/> (last accessed Sept. 1, 2017).

Second, economic principles suggest that online fax services will be priced in part based on the avoided costs of switching to the service, such as the cost of the fax machine itself and the monthly cost of a telephone line, and on the benefits of the service, such as e-mail storage capabilities and the ability to initiate faxes from mobile phones. These costs are incurred for all faxing – outbound, as well as solicited inbound faxes. They were never considered as part of the harm addressed by the TCPA, which targeted only unsolicited fax advertisements. Thus, the cost of an online fax service does not correspond in the manner Mr. Sutton suggests.

Finally, the rise in online fax services largely corresponds with a shift toward “free” internet services generally. According to a history of the fax machine by Jonathan Coopersmith, as the Internet grew and Internet-based services expanded, e-fax services expanded.³⁸ However, public information released by J2 Global, the largest provider of fax services, suggests that fewer than 15 percent of users even pay for fax services. Per the Coopersmith history: “Market leader j2 Global grew from 27,000 subscribers and \$3.5 million in revenue in 1998 to 4.0 million subscribers (200,000 paying) and \$48 million on revenue in 2002 then to 13.1 million subscribers (1.9 million paying) and \$255 million in revenue in 2010.”³⁹ With as few as 1.9 million out of 13.1 million (14.5%) subscribers paying for the service at all, the Commission cannot conclude that online fax services impose significant costs for received faxes.

³⁸ Jonathan Coopersmith, *Faxed: The Rise and Fall of the Fax Machine* (2015).

³⁹ *Id.* at 193 (citing j2 Global 10-K reports).

III. CHANGES IN MODERN FAX TECHNOLOGY COMPEL ACTION HERE

It has been twenty-six years since the TCPA was enacted and fourteen years since the full Commission last considered advances in fax technology. Agencies have an obligation to review their regulations periodically to ensure that their policies are not based on outdated information. As the D.C. Circuit recently emphasized, “[a]gency reasoning ... must adapt as the critical facts change.”⁴⁰

Career Counseling points to ambiguous statements made in the 1990’s or early 2000’s and asks the Commission to rest on its laurels, as if statements made in the dial-up era apply to broadband-era fax communications. That is not an option for the Commission. Today, millions of companies and consumers have opted to replace their fax machines and dedicated telephone lines in favor of online services to send and receive “faxes” in essentially the same way that e-mails are transmitted. The Commission is obligated to address these changes. If they suggest that users have migrated from traditional telephone fax machines and thus don’t suffer the cost-shifting or “tying” harms of previous eras, the Commission is obligated to clarify its existing regulations.

With online fax services, even the term “fax” is a misnomer --- much like the term “dialing” a telephone number has outlived its rotary dial origins. As explained above, users of

⁴⁰ *Flyers Rights Ed. Fund d/b/a FlyersRights.org et al. v. FAA et al.*, – F.3d – (2017 WL 3202638) (D.C. Cir. 2017) (quoting *American Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (holding that an agency’s refusal to act is particularly troubling “when a petition has sought modification of a rule on the basis of a radical change in its factual premises.”).

online fax services receive an e-mail, no more and no less. Commenter Michael Friend provided the following illustrative example of how the evolution of technology necessitates proper statutory interpretation of the TCPA:

[I]f a person sends a digital image of an advertisement to another person via a smartphone iOS app named “Super Fabulous FAX” and the receiving person receives that advertisement within the same “Super Fabulous FAX” iOS application, are we to consider this a facsimile governed by the TCPA just because the publisher of the iOS app included the word “FAX” in its name? Absolutely not. The iOS app does not conform to the statutory definition of a “facsimile machine” as defined by the TCPA and confirmed by the commission on numerous occasions. Nor does this example of data communication leverage expensive paper, ink or toner, or tie up limited phone line capacity. ... The same can be said about most other forms of digital data communications over TCP/IP (Internet Protocol), regardless of the creator’s name of their product including the word “EFAX” or other entities referring to said possible communications as “EFAXES”. In fact, there are hundreds of thousands of applications, social websites, etc. that leverage data communications over TCP/IP (Internet Protocol) capable of sending and receiving messages that can include images, photos, and text characters. Facebook, Doximity, Twitter, Google+, Instagram, just to name a few. We certainly do not govern these data communications under the TCPA.⁴¹

By updating its interpretations to reflect this reality, the Commission will free this area of commerce from uncertainty, enable the growth of new services that incorporate fax-like capabilities and will protect entities from unreasonable potential liability for persons that suffer no harm from receipt of a communication.

⁴¹ Friend Comments at 1-2.

Reforming the Commission’s fax regulations also will have the benefit of curbing an area of lawsuit abuse. Motivated individual plaintiffs and an economically symbiotic plaintiffs’ bar have seized upon the TCPA as a way to generate massive payouts based on claims of very large classes. By re-imposing rigor on the scope of the TCPA, the Commission can strike a blow against these inflated TCPA payouts. As the Commission is aware, the number of TCPA putative class actions has skyrocketed in recent years.⁴² In fact, at least one commenter on the Petition pointed out that “[t]he risk of draconian litigation costs has led financial institutions to limit—and, in certain instances, to eliminate—many pro-consumer communications.”⁴³

In this case, the Petition and the initial comments make clear that the critical facts are these: (1) millions of fax transmissions are now received through online fax services or on a device other than a telephone facsimile machine; (2) these transmissions do not cause the harms that the TCPA sought to avoid; and (3) clarification on this point will restore the TCPA’s balance, which has been tilted by aggressive class action plaintiffs and their law firms seeking massive judgments based on the statutory penalties in the TCPA, rather than any actual harms. Amerifactors therefore respectfully submits that the time is ripe for the Commission to update its interpretation of the TCPA, and declare that the TCPA does not apply to fax advertisements that

⁴² As Chairman Pai acknowledged in 2015, “the TCPA has become the poster child for lawsuit abuse, with the number of TCPA cases filed each year skyrocketing from 14 in 2008 to 1,908 in the first nine months of 2014.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, CG Docket No. 02-278 et al., Declaratory Ruling and Order, FCC 15-72, Dissenting Statement of Commissioner Ajit Pai (rel. July 10, 2015).

⁴³ American Bankers Association Comments at 2.

the recipient receives through online fax services or on a device other than a telephone facsimile machine.

IV. APPLYING THE TCPA TO ONLINE FAX SERVICES WOULD FAIL UNDER THE FIRST AMENDMENT

Career Counseling argues that the TCPA has consistently been held constitutional and the Amerifactors' First Amendment argument fails, ignoring the changes in technology.⁴⁴

Career Counseling misunderstands the substantive issue. First, the context of raising a First Amendment argument must be considered. The agency has a duty to ensure its policies do not go beyond either the statutory authority or the parameters of the Constitution. Amerifactors is not seeking some form of declaratory relief invalidating the TCPA. To the contrary, Amerifactors simply seeks to limit the reach of the TCPA as to online fax services and other forms of communications that fall outside the statutory scope because of the requirement of the receiving device be a "telephone facsimile machine."

The constitutional issues raised by this question are serious and are magnified by the deference the agency's rules, orders, and policies must be given under the Hobbs Act, as well as the general principles of administrative law. The Commission should interpret its policies and rules in a manner that avoids unnecessary constitutional issues. When a statute's constitutionality is in doubt, an agency has an obligation to interpret the law, if possible, to avoid

⁴⁴ Career Counseling Comment, pp. 9-10.

the constitutional problem.⁴⁵ As one treatise puts it, “[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt.”⁴⁶

There can be no serious question that the constitutionality of a statute is determined by current conditions, not the state of technology in 1991 or even 2005.⁴⁷ Unquestionably, the Internet is quickly evolving. Even statutory provisions based upon sociological facts are subject to this principle.⁴⁸ The FCC has wide discretion in its orders to accommodate new technological changes as long as it acts consistently with its statutory mandate and the Constitution.⁴⁹

In its comments, Career Counseling argues that the TCPA is constitutional under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557,

⁴⁵ See, e.g. *Edward J. De-Bartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988).cf. *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules, Fifth Report and Order*, 27 FCC Rcd 6529, 6537 (¶ 11) (2012) (“The doctrine of constitutional avoidance counsel us to interpret the Act as not imposing a rigid analog-carriage requirement on cable operators, where the record establishes a reasonable, less burdensome alternative that meets the statutory objectives.”) *aff’d sub nom Agape Church, Inc. v. FCC*, 738 F.3d 397 (D.C. Cir. 2013).

⁴⁶ A. Sclaia & B. Garner, *Reading Law: The Interpretation of Legal Texts* § 38, p. 247 (2012), cf. *Rural Cellular Ass’n v FCC*, 685 F.3d 1083 (D.C. Cir. 2012) (“cannon of constitutional avoidance trumps *Chevron* deference”; court will not accept agency interpretation if that interpretation raises serious constitutional difficulty).

⁴⁷ *Southern Bell Telephone and Telegraph Company v. FCC*, 781 F.2d 209 (D.C. Cir. 1986).

⁴⁸ *Shelby County v. Holder*, 570 U.S. 2 (2013).

⁴⁹ *National Ass’n of Broadcasters v. FCC*, 740 F.2d 1190, 1202, 1207 (D.C. Cir. 1984).

564 (1980) and incorrectly states that Amerifactors had conceded that “strict scrutiny” was not applicable.⁵⁰ To the contrary, Amerifactors expressly pointed out that while “TCPA cases typically are assessed using the intermediate scrutiny” Petition at 29, n.8, recent decisions considering the TCPA’s constitutionality had applied strict scrutiny.”⁵¹ Since the Petition was filed, a third federal district court has come to the same conclusion.⁵² Each of these cases is interpreting the constitutionality of the TCPA as to telephone calls or text messaging and each concludes that strict scrutiny is the applicable standard. That government loan exemption triggered a requirement that the court review the content of the communication, thus triggering strict scrutiny. In each case, the constitutionality of the statute was upheld, but the more rigorous strict scrutiny standard was applied. In *Brickman v. Facebook, Inc.*, the court certified the issue of the constitutionality of the TCPA as to instant messaging to a residential phone. The court stated that it is plausible that other courts could have endorsed the opposite result.⁵³ Other recent cases have not applied strict scrutiny, but all of these cases have been decided on motions to dismiss.

⁵⁰ Career Counseling’s Comments at 8.

⁵¹ *Petition* at p. 29, n. 8 (citing *Brickman v. Facebook*, Case No.: 16-cv-00751-THE, 2017 WL 1508719, at *3-4 (N.D. Cal. Apr. 27, 2017); *Holt v. Facebook, Inc.*, Case No.: 16-cv-0226-JST, 2017 WL 1100564 (N.D. Cal. Mar. 9, 2017)).

⁵² *See Mejia v. Time Warner Cable, Inc.*, 15-cv-6445 (JPO); 15-cv-6518 (JPO), 2017 WL 3278826 (S.D. N.Y. Aug. 31, 2017).

⁵³ *Id. citing Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015) (“it is a rare case in which a state demonstrates that a speech restriction is narrowly tailored to serve a compelling state interest.”)

The impetus for the change toward strict scrutiny is *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) which requires strict scrutiny to any content-based restriction. In *Reed*, a church and its pastor contested city ordinances (and the resulting fines) that permitted directional signs for events to be used only for certain time periods. The district court refused to grant the church’s motion for a preliminary injunction and the Ninth Circuit affirmed the denial of injunctive relief on the grounds that the ordinance was content neutral. The Supreme Court reversed, reasoning that the sign ordinance was not content neutral, and that the ordinance failed under the demanding strict scrutiny test.⁵⁴ The core of the court’s analysis was “content based discrimination singles out specific subject matter for differential treatment, even if it does not target view points within that subject matter.”⁵⁵ In other words, a restriction on “all religious speech” is no more constitutional than a restriction of the views of a specific disfavored religion. Because the restrictions in the sign code that apply to any given sign thus depends entirely on the communicative content of the sign, the ordinance violated the First Amendment under the strict scrutiny analysis.⁵⁶ Importantly, the Court emphasized in *Reed* “an innocuous justification cannot transform a facially content based law into one that is content neutral.”⁵⁷

The TCPA does not apply to all commercial transactions. Section 227(a)(5) defines “unsolicited advertisements” as promotional material that advertise “commercial

⁵⁴ *Reed*, 135 S.Ct. at 2232-33.

⁵⁵ *Id.* at 2223.

⁵⁶ *Id.* at 2227.

⁵⁷ *Id.* at 2228.

availability” or “quality,” of “any property, goods or services.” Numerous types of commercial advertisements have been excluded from the reach of the statute. In *Lutz Appellate Servs., Inc. v. Curry*, 859 F. Supp. 180, 181 (E.D. Pa.1994), there were two faxes that advertised for applicants to fill a job as an appellate lawyer. The district court found these faxes were not “unsolicited advertisements” under the TCPA because they advertised employment opportunities, not property, goods or services. Likewise, in *Phillips Randolph Enterprises, LLC v. Adler-Weiner Research Chicago, Inc.*, 526 F. Supp. 2d 851, 852 (N.D. Ill. 2007), the court dismissed a TCPA complaint because the fax in question did not detail the quality or availability of a good or service.

The trigger is the “availability” or “quality” of the subject matter of the advertisement.⁵⁸ The court must analyze the advertisement carefully to determine not only whether it is a “commercial” speech, but whether it meets the narrower requirements of the TCPA. Under *Reed*, the statute is subject to a strict scrutiny analysis. Significantly, in *Reed* the fine was imposed because of the violation of the time restriction, not the content of the communication. However, strict scrutiny still applied because the application of the restriction required an examination of the content of the speech.

⁵⁸ See *Al & Po Corp. v. Med-Care Diabetic & Medical Supplies, Inc.*, 14CO1893, 2014 WL 6999593, at *3 (N.D. Ill. Dec. 10, 2014) (finding coverage under the facts of that case, but noting whether a communication is covered by the TCPA requires a look at the precise information included in the fax such as description of the availability or quality of products).

Regarding the merits of the First Amendment claim, it is clear that (1) no court has considered the constitutional question of whether online fax services can constitutionally be subject to the TCPA; (2) the cases Career Counseling relies upon are no longer persuasive because of the dramatic change in the market, and the ascendancy of the Internet and more recently “cloud” based communications of faxes; and (3) the governmental interest is much less significant than at the time these cases were decided because of the substantial reduction of faxes to niche uses and the required “fit” of the problem to the regulation does not apply to online fax services.⁵⁹

This lack of public injury is particularly compelling as to online fax services since the traditional fax is viewed as an antiquated technology.⁶⁰ The FCC has no current information on the number of faxes sent, those that are solicited, or those that are not commercial. Nor has there been any effort to comprehensively quantify the injury from unwanted faxes, much less any costs associated with online fax services. Because the proponent of the statute has the burden of proof, this failing is significant.⁶¹

⁵⁹ See *Centerline Equipment Corp. v. Banner Personnel Service, Inc.*, 545 F. Supp. 2d 768, 773 (N.D. Ill. 2008) (the Court denied a motion to dismiss, but noted the issue of technical changes and stated “if the harm to the public is very small quantity, preventing that harm cannot be a substantial governmental interest.”)

⁶⁰ See *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1028, 1029 (D.C. Cir. 2017) (stating in the first sentence of the opinion “Believe it or not, the fax machine is not extinct.”)

⁶¹ *Edenfield v. Fame*, 507 U.S. 761, 770-71, 776, 113 S.Ct. 1292 (1993); see also *Wollschlaeger v. Governor of Florida*, 848 F.2d 1293, 1312-13, 1316 (11th Cir. 2012) (Applying strict scrutiny test to restrictions on physicians questioning patients with minor

Not only are there much lower costs associating with online faxing, but also a much smaller chance of disruption of a recipient's other faxes or telephone calls. However, the critical historical change in the technology relates to the fact that a material percentage of "facsimiles" are converted to PDF format and routed to computers, (online fax services), often ending up in spam folders not seen by anyone except perhaps an inquisitive plaintiff. There is no cost of paper or toner imposed on an involuntary recipient, and the chances of an interruption of the recipient's phone calls approaches absolute zero. Some commenters complain that faxes received via online fax services are a burden because they still must be reviewed. As discussed, there is little or no support in the legislative history to support the claim that review time was an injury the statute was intended to address. But even if there was such support, the statute would be unconstitutional since it only addresses faxes and ignores the much more numerous commercial emails that have the same effect.

In *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995), the Ninth Circuit considered the constitutionality of the TCPA under the First Amendment. The Ninth Circuit rejected an argument under the *Central Hudson* standard, that the "fit" was under-inclusive because only commercial faxes were barred, emphasizing that "the Plaintiffs do not dispute that unsolicited commercial faxes are responsible for the bulk of advertising cost shifting."⁶² However, if the government's restrictions is based on "inconvenience" of reviewing online fax service, the application of the statute is massively under-inclusive because it does not

children about firearms and rejecting certain restrictions because "the Florida legislature, in enacting the Act, relied on six anecdotes and noting more.")

⁶² *Id.* at 56.

include the functionally equivalent emails. The Ninth Circuit also rejected Destination Ventures' argument about the possibility of future technological advances allowing simultaneous transmissions and eliminating the need for paper because the court looked at the problem at the time of enactment, "rather than speculate upon what solutions may turn up in the future."⁶³ The future has arrived in the form of online fax services.

The leading case addressing the issue in the content of a First Amendment claim was *Missouri ex rel. Nixon v. American Blast Fax, Inc.*, 323 F.3d 649, 655 (8th Cir. 2003). In *Nixon*, the Eighth Circuit found the government had a substantial interest in regulating unsolicited faxes because the shift in advertising costs to the recipient (more than \$100 a year in direct costs) could tie up the phone line if the machine could only receive one fax at a time, 80 percent of faxes at the time were printed on paper, and unsolicited faxes interfered with company switchboard operations and burdened their computer networks. *Nixon* was decided in 2003 and was based on evidence submitted at a 2001 hearing. The decision was tied to the legitimate interest of the government regarding shifting costs of paper and ink and tying up telephone lines. Those concerns simply do not apply to online fax services and cloud based communications, even if they are originally sent by telephone wire.

Finally, in considering the First Amendment issues, the consequences of the violation must be considered because severe consequences, especially those out of proportion to

⁶³ *Destination Ventures*, 46 F.3d at 56.

potential gain, will chill legitimate speech.⁶⁴ The Commission is familiar with the huge class action damage awards, as well as the minimal amount of actual damages, involved in TCPA fax cases. No one disputes that Congress has substantial discretion, subject to Due Process standards, to establish minimum statutory damages. But the consequences of imposing such “incentives” to plaintiffs, or more appropriately, to plaintiff’s counsel, are clearly overkill in the context of class actions. Petitioner recognizes the limits of the FCC’s authority in this matter. However, the point is that the Commission should use particular care not to include communications that are beyond the statutory limits, and do not further the original purposes of the TCPA. The harsh consequences of these “remedies” should be recognized by the Commission in its decisions regarding what forms of communications are covered by the TCPA.

⁶⁴ See *N.Y.T. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 716 (1964) (Court reasoned that huge damage awards based upon a statute that presumed injury for criticism of public officials chilled free speech.)

CONCLUSION

For the reasons set forth in the Petition and these reply comments, Amerifactors requests that the Commission expeditiously grant its requested declaratory ruling.

Respectfully submitted,



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