

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

In the Matter of:)	
)	
Petition of FP Mailing Solutions, Inc.)	CG Docket no. 02-278
For Declaratory Ruling to Clarify Scope)	CG Docket no. 05-338
or Statutory Basis For Rule)	
64.1200(a)(3)(iv) or for Waiver)	

PETITION FOR DECLARATORY RULING OR WAIVER

Pursuant to Section 1.2 of the Federal Communications Commission (“the Commission”) rules, Francotyp-Postalia, Inc. (“FP”), requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) (“the Rule”) of the Commission’s regulations does not apply to fax advertisements sent with the prior express consent or permission of the recipient. In the alternative, FP requests that the Commission clarify that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b), which would mean that there would be no private right of action stemming from a violation of the Rule.

If the Commission declines to issue the rulings requested above, FP requests that, pursuant to Section 1.3 of the Commission’s rules, the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) with respect to faxes that have been transmitted by FP with the prior express consent or permission of the recipients or their agents.

INTRODUCTION

47 U.S.C. § 227(b) codifies, in part, the Telephone Consumer Protection Act (“TCPA”). The plain language and scope of Section 227(b) is expressly limited to *unsolicited* faxes, which the statute defines to exclude faxes sent with consent. Thus, no regulation adopted under Section 227(b) properly could extend to *solicited* faxes.

However, the scope and applicability of the Rule are unclear as it contains confusing and inconsistent language regarding the applicability of the opt-out notice requirements. This confusion and uncertainty has led to numerous legal disputes and the filing of many petitions with the Commission requesting the same types of relief sought by FP. FP therefore urges the Commission to resolve this uncertainty by clarifying that the Rule does *not* apply to solicited fax advertisements.

In the alternative, FP requests that the Commission issue a declaratory ruling that Section 227(b) of the TCPA is not the statutory basis for the Rule. Such a ruling would clarify the Commission's authority for this Rule, while making clear that solicited faxes sent without the opt-out notification language requirements listed in the Rule cannot form the basis of a civil action under the TCPA.

Finally, if the Commission declines to provide the declaratory rulings requested above, FP requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) from the effective date of the Rule for any fax transmitted by or on behalf of FP with the consent of the recipient. Subjecting FP to class action lawsuits brought by plaintiffs who agreed to receive the fax transmissions would not serve the Commission's goals, the public interest, or the legislative intent of the TCPA.

BACKGROUND

FP is a defendant in a putative class action lawsuit, alleging violations of the TCPA, which is currently pending in the United States District Court for the Eastern District of Missouri, Case No. 4:14-cv-01161 (the "Missouri Litigation"). The plaintiff in that case seeks to recover damages on behalf of itself and others similarly situated on the grounds that FP sent solicited faxes without the opt-out notices allegedly required by Section 64.1200(a)(4)(iv). In particular, the plaintiff seeks to recover on behalf of all persons who received a fax that did not

contain the opt-out notice, regardless of whether the fax was solicited or if FP had a business relationship with the recipient. In support of its allegations, the plaintiff attached to its complaint an exemplar fax sent to the plaintiff that does not contain the opt-out notice.

Plaintiff's complaint was the first complaint that FP had ever received alleging a purported failure to comply with the TCPA. When FP was served with the complaint in the Missouri Litigation, it immediately reviewed its current practices and then drafted language that complies with the opt-out requirement to include on every fax that it sends its customers. The fax attached to the plaintiff's complaint was sent from FP's offices to the plaintiff (who was a former customer of FP) and FP has never hired a third-party to send faxes on its behalf. FP understands the importance of complying with the FCC's rules and has implemented procedures going forward to ensure its compliance.

ARGUMENT

I. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING TO CLARIFY THE RULE.

The Commission has discretion to issue a declaratory ruling where, as here, such a ruling would remove unnecessary uncertainty. 5 U.S.C. § 554(e), 47 C.F.R. § 1.2(a). The uncertainty as to scope and statutory basis of the Rule is demonstrated by the numerous filings in federal district courts and before the Commission questioning the validity of the Rule. Private lawsuits that rely on the Rule unnecessarily burden defendants and the courts with claims Congress never intended to create. The Commission should therefore issue a declaratory ruling to clarify the scope and statutory basis of the Rule.

A. The Commission Should Issue A Declaratory Ruling To Clarify That The Rule Does Not Apply To Solicited Faxes.

The Commission should clarify that the Rule applies only to unsolicited faxes because the Rule and other guidance from the Commission is ambiguous. In addition, excluding solicited

faxes from the TCPA's ambit aligns with the legislative intent and plain language of the TCPA; namely, to regulate unsolicited faxes. The Rule states, in pertinent part:

No person or entity may: . . .

Use a telephone facsimile machine, computer or other device to send an **unsolicited** advertisement to a telephone facsimile machine, unless -- . . .

A facsimile advertisement that is sent to a recipient that **has provided prior express invitation or permission** to the sender must include an opt-out notice that complies with the requirements in paragraph a(4)(iii) of this section.

47 C.F.R. § 64.1200(a)(4)(iv) (emphasis added).

The Rule does not make sense on its face. Because the Rule begins by limiting the scope to unsolicited faxes, yet later refers to faxes sent with express permission, it is unclear whether the Rule is intended to apply to both solicited as well as unsolicited faxes.

An order issued by the FCC discussing the Rule after the Junk Fax Prevention Act was enacted only adds to the confusion. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*; Junk Fax Prevention Act of 2005, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) (the "Order"). The Order first explains that "the opt-out notice requirement only applies to communications that constitute unsolicited advertisements." *Id.* at 42 n.154. Later, in a paragraph addressing the issue of faxes sent based on consent received prior to the effective date of the rules, the Order states that an opt-out notice would be required "to allow consumers to stop unwanted faxes in the future." *Id.* at ¶ 48. Given these contradictions, there is legitimate uncertainty regarding whether Section 64.1200(a)(4)(iv) was intended to apply to solicited faxes. Entities such as FP should not be required to defend costly and time-consuming putative class action lawsuits, which seek millions of dollars in damages, where those lawsuits are based on an ambiguous and contradictory regulation.

The Commission also should clarify that the Rule does not apply to fax advertisements that were sent with the permission or consent of the recipient because such an interpretation comports with the text and legislative history of the TCPA. Indeed, both the text and the legislative history make clear that the TCPA's opt-out requirements apply only to unsolicited advertisements. *See* 47 U.S.C. § 227(b)(1)&(2); *id.* § 227(a)(5) (definition of "unsolicited advertisement," expressly excludes any fax advertisement sent with the recipient's "prior express invitation or permission."); *see also*, S. Rep. No. 102-178 at 3 (1991), *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 ("The bill as introduced proposed to ban artificial or prerecorded messages to residential consumers and to emergency lines, and to place restrictions on *unsolicited* advertisements delivered via fax machine.") (emphasis added); S. Rep. No. 109-76 at 1 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 319, 319 (Congress, when enacting the Junk Fax Protection Act meant to "[c]reate a limited [existing business relationship] statutory exception to the current prohibition against the faxing of unsolicited advertisements," and for only those "unsolicited advertisements," to require "notice of a recipient's ability to opt out of receiving any future faxes containing unsolicited advertisements."). Thus, there is no indication in the legislative history that Congress intended to regulate solicited fax advertisements.

Moreover, interpreting the Rule to apply to solicited fax advertisements would render it invalid. When it limited Section 227(b) to unsolicited fax advertisements, Congress restricted the Commission's jurisdiction to that particular type of communication. *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 705 (D.C. Cir. 2005) ("[T]he Commission can only issue regulations on subjects over which it has been delegated authority by Congress . . ."). Accordingly, the Commission did not obtain the jurisdiction to regulate *solicited* faxes when Congress passed a statute regulating *unsolicited* faxes. Thus, the Rule is invalid to the extent it purports to regulate

solicited faxes and is promulgated pursuant to the Commission's authority under Section 227. The Commission should construe the Rule to apply only to unsolicited faxes and thereby avoid exceeding the jurisdictional grant provided by Congress in Section 227(b).

Finally, interpreting the Rule to apply to solicited faxes would raise significant constitutional concerns. Imposing an opt-out notice requirement on consensual communications between fax senders and recipients would be inconsistent with the First Amendment. Assessing potentially massive statutory damages under circumstances where the recipient has expressly invited or consented to the fax also raises substantial Due Process concerns. Accordingly, the Rule should be interpreted in a manner that avoids these constitutional concerns.

B. Alternatively, The Commission Should Issue A Declaratory Ruling To Clarify That 47 U.S.C. § 227(b) Is Not The Statutory Basis For The Rule.

If the Commission declines to interpret Section 64.1200(a)(4)(iv) to exclude fax advertisements for which the sender has obtained prior express consent, the Commission should issue a declaratory ruling that Section 227(b) of the TCPA is not the statutory basis for the Rule as a means of clarifying the Commission's authority to promulgate the Rule and also make clear that the Rule cannot form the basis of a private lawsuit.

The statutory basis for Section 64.1200(a)(4)(iv) is not clear. The Commission cited eleven different statutory provisions in the Order as authority for the multiple amendments it made to Section 64.1200, including the amendment to Section 64.1200(a)(4)(iv). It is therefore unclear if the Commission meant to rely on the authority conferred by Section 227 (which contains the private right of action provisions) in promulgating Section 64.1200(a)(4)(iv), or on one of the other cited statutory provisions. A clarification by the Commission that its basis for promulgating Section 64.1200(a)(4)(iv) was a statutory provision other than Section 227(b)

would serve both the Commission's interests and promote the public's interest in fairness and justice.

By making it clear that Section 64.1200(a)(4)(iv) is not based on the jurisdictional grant found in Section 227(b), the Commission could assist businesses by removing the threat of massive class action lawsuits based solely on their communications with consenting consumers. At the same time, articulating a different statutory basis for the rule would preserve the Commission's ability to enforce the rule as appropriate using its broad, flexible enforcement powers. Purported violations of the rule which result in no actual harm could then still be addressed, but would not be the subject of civil claims seeking multi-millions of dollars in statutory damages. In contrast, declining to clarify the statutory basis of Section 64.1200(a)(4)(iv) leaves the courts to guess at the basis for the Commission's exercise of jurisdiction, complicating the class action suits that are pending around the country and prejudicing litigants who otherwise would have a clear defense.

The Commission therefore should, in the alternative, issue a declaration clarifying that the statutory provision the Commission relied on in promulgating Section 64.1200 (a)(4)(iv) of its rules was *not* section 227(b).

II. FP SHOULD BE GRANTED A RETROACTIVE WAIVER.

Finally, in the alternative to the requests for declaratory rulings contained in Section I, FP respectfully requests that the Commission waive strict compliance with Section 64.1200(a)(4)(iv) with respect to the FP faxes discussed herein and that would otherwise be the subject of claims raised in of the Missouri Litigation. The Commission should grant a retroactive waiver where, as here, "[t]he underlying purpose of the rule(s) would not be served" or the factual circumstances mandate a waiver to avoid application of the rule that would be "inequitable, unduly burdensome or contrary to the public interest." 47 C.F.R. § 1.925(b)(3)(i)-

(ii); *see also* 47 C.F.R. § 1.3 (the Commission may waive any provision of its rules “for good cause shown” when it concludes that a waiver would serve the public interest, considering all relevant factors).

The stated purpose of the Rule is to allow consumers to stop unwanted faxes in the future. That purpose is not served by subjecting entities such as FP to massive liability on the basis of faxes sent with the permission of the recipients. A retroactive waiver would serve the public interest by avoiding an abuse of the private right of action created by the TCPA, as an allegedly minor technical defect should not be a basis for serial TCPA-class action litigants to institute expensive and time-consuming litigation which expose businesses like FP to the potential of millions of dollars in liability.

CONCLUSION

For the reasons stated above, the Commission should issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission’s regulations does not apply to solicited faxes, or, alternatively, that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b). If the Commission declines to issue the requested declaratory rulings, the Commission should grant FP a retroactive waiver of Sections 64.1200(a)(4)(iii) and (iv) of the Commission’s rules under the circumstances described herein.

Dated: October 14, 2014

Respectfully submitted,

By: /s/ Paul E. Greenwalt

Paul E. Greenwalt
Ann H. MacDonald
SCHIFF HARDIN LLP
233 South Wacker Drive, Suite 6600
Chicago, Illinois 60606

Counsel for Francotyp-Postalia, Inc.