

05-338

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
)
Petition for Declaratory Ruling to Clarify That)
47 U.S.C. 227(b) Was Not the Statutory Basis)
for Commission's Rule Requiring an Opt-Out)
Notice for Fax Advertisements Sent with)
Recipient's Prior Express Consent)
)

Docket No. _____

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PETITION FOR DECLARATORY RULING

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PETITION FOR DECLARATORY RULING

Pursuant to Section 1.2 of the Commission’s rules,¹ Anda, Inc. (“Anda” or “Petitioner”) respectfully requests that the Commission issue a declaratory ruling clarifying the statutory basis for its rule that requires fax advertisements sent with the prior express consent of the recipient to include the same detailed opt-out notice that is required for unsolicited fax advertisements.² Specifically, Petitioner requests that the Commission declare that it based this rule on some statutory authority other than 47 U.S.C. § 227(b), as that provision authorizes the Commission to adopt opt-out notice rules only for *unsolicited* fax advertisements.

There is a serious question whether the Commission had any legitimate basis for requiring the inclusion of an opt-out notice on faxes sent with the prior express consent of the recipient, but, whatever the purported authority, the Commission has never identified it. To the contrary, the Commission adopted the rule in 2006 without any prior notice, opportunity for comment, or specific citation to statutory authority. Instead, the rule appeared for the first time buried within a final rulemaking order implementing the Junk Fax Prevention Act of 2005

¹ 47 C.F.R. § 1.2; 5 U.S.C. § 554(e).

² 47 C.F.R § 64.1200(a)(3)(iv).

("JFPA"). Moreover, the rule went well beyond the opt-out notice requirements that Congress authorized the Commission to adopt under the JFPA, which focused exclusively on advertisements faxed without any form of consent or pursuant to an "established business relationship" with the recipient (*i.e.*, with *implied* consent). And while the Commission's order adopting the rule listed no fewer than 11 statutory provisions at the end of the order apparently covering all of the rules adopted therein, the Commission never identified which of those provisions purportedly formed the legal basis for extending an opt-out notice requirement to fax advertisements sent with the recipient's prior express consent.

The uncertain legal basis for this rule has unfortunately had harmful, real-world effects. At least one court has erroneously concluded that the rule arises out of Section 227(b) of the Communications Act of 1934, as amended (the "Act"), which codifies the JFPA's opt-out notice requirement for *unsolicited* fax advertisements. As a result, the court permitted plaintiffs to sue for damages under the private right of action established by Section 227(b)(3), which authorizes private suits based on "a violation of this subsection or the regulations prescribed under this subsection."³ Petitioner is facing just such a suit in a state court in Missouri, where a purported class of plaintiffs is seeking hundreds of millions of dollars in damages for alleged deficiencies in an opt-out notice on faxes sent with the express consent of the recipients. And if uncertainty and confusion persists among state courts over the legal basis of the rule, these copycat lawsuits—seeking massive damages that Congress never intended to authorize—will only proliferate.

The Commission has an obligation to state the legal basis for its rules under must Section 553 of the Administrative Procedure Act ("APA"). There is significant doubt as to whether any

³ 47 U.S.C. § 227(b)(3).

provision of the Act authorized the Commission to adopt the rule and whether such a rule would survive First Amendment scrutiny. But given the potentially massive liability exposure that further confusion about this rule might engender, the Commission should—and indeed must—issue a declaratory ruling clarifying the statutory authority for its opt-out notice requirement for faxes sent with express consent. In particular, the Commission should clarify that it did not adopt the rule requiring an opt-out notice for faxes sent with the recipient’s prior express consent pursuant to Section 227(b), as that provision authorizes such a requirement only for *unsolicited* fax advertisements.

I. BACKGROUND

A. The Telephone Consumer Protection Act of 1991 Authorized the Commission to Adopt Restrictions Only with Respect to Unsolicited Fax Advertisements

From the very beginning of the regulation of fax advertisements, Congress has declined to impose restrictions on advertisements sent with the recipient’s express consent. The first laws governing fax advertisements came in 1991, when Congress enacted the Telephone Consumer Protection Act (“TCPA”).⁴ The TCPA prohibits the use of a telephone facsimile (“fax”) machine to send an “unsolicited advertisement” to another fax machine.⁵ Congress defined an “unsolicited advertisement” in the TCPA as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.”⁶ The definition thus expressly

⁴ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. § 227.

⁵ 47 U.S.C. § 227(b)(1)(C).

⁶ *Id.* § 227(a)(4).

excludes from the TCPA's restrictions any fax advertisements sent *with* the recipient's "prior express invitation or permission."

Although the TCPA required "express" consent by the recipient of a fax advertisement to authorize its transmission, the Commission's 1992 order implementing the TCPA concluded that faxes sent pursuant to an established business relationship ("EBR") "can be deemed to be invited or permitted by the recipient," and thus excluded from the prohibition on unsolicited advertisements.⁷ But the Commission reversed course in 2003, concluding that the EBR rule was incompatible with the statutory requirement of "express" consent. Accordingly, consistent with the statutory scheme embodied in the TCPA, the Commission required that the sender of a fax advertisement first obtain the recipient's prior express permission in writing.⁸ Thereafter, in response to reconsideration requests, the Commission delayed the effective date of its ruling and provisionally allowed the EBR rule to remain in effect, and later extended its deferral with the expectation that Congress would amend the statute to permit the sending of fax advertisements based on such implied consent.⁹

B. The Junk Fax Prevention Act of 2005 Authorized the Transmission of Unsolicited Fax Advertisements Pursuant to an EBR, as Long as They Included Opt-Out Notices

In 2005, Congress enacted the Junk Fax Prevention Act ("JFPA").¹⁰ The JFPA made a number of changes to the rules regarding unsolicited faxes but left materially unchanged the law

⁷ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 ¶ 54 (1992).

⁸ *Id.* ¶ 187.

⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order on Reconsideration, 18 FCC Rcd 16972 ¶¶ 5-6 (2003). *See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 20125 (2004); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, 20 FCC Rcd 11424 (2005).

¹⁰ Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) ("JFPA").

governing faxes sent with the recipient’s express permission. Most notably, the JFPA restored the EBR exemption to the prohibition on unsolicited faxes.¹¹ Congress realized, however, that recognizing a recipient’s “implied” consent through an EBR might still subject some recipients to unwanted faxes. Congress determined that advertisers should provide these recipients with an easy, cost-free way to terminate the EBR and opt out of future unsolicited faxes. Accordingly, Congress included in the JFPA a provision, now codified at 47 U.S.C. § 227(b)(2)(D), requiring that the sender of an unsolicited fax advertisement pursuant to an EBR must provide an “opt-out” notice on the fax that would inform recipients how to contact the sender and stop future faxes.¹² Congress expressly limited the opt-out notice requirement to “unsolicited advertisement[s]” sent pursuant to an EBR.¹³ Critically, it did not impose any opt-out notice requirement for faxes sent *with* the recipient’s express consent—which is not surprising, given that Congress did not alter the law regarding such fax advertisements and would have no reason to be concerned that recipients who *opted in* to such advertising needed special notices informing them how to *opt out*.

In December 2005, the Commission issued a Notice of Proposed Rulemaking to implement the JFPA.¹⁴ The proposed rules included a renewed recognition of the EBR provision,¹⁵ an updated definition of “EBR” to match the new statute,¹⁶ and “specific [opt-out]

¹¹ *Id.* § 2(a).

¹² *Id.* § 2(c).

¹³ *Id.* § 2(c)(3)(D).

¹⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19758 (2005) (“*JFPA NPRM*”).

¹⁵ *Id.* ¶ 9.

¹⁶ *Id.* ¶ 14.

notice requirements on unsolicited facsimile advertisements” as set forth in the JFPA.¹⁷ Regarding these opt-out notice requirements, the NPRM proposed adopting new rules that tracked the statutory language—including by “requir[ing] senders of *unsolicited* facsimile advertisements to include a notice on the first page of the facsimile that informs the recipient of the ability and means to request that they not receive future unsolicited facsimile advertisements from the sender.”¹⁸ The Commission also sought comment on a number of supplemental rules surrounding the opt-out notice requirement.¹⁹ But it did not solicit comments on, or even raise the possibility of, extending the opt-out notice requirement to fax advertisements sent with the recipient’s express permission.

Nevertheless, when the Commission adopted its final opt-out notice rules in April 2006, it included a requirement—without discussion, analysis, or citation to the JFPA—that even “entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements their opt-out notice and contact information”²⁰ Under the text of the new regulation, “[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)(3)(iii) of this section.”²¹ Although the rule imposed a new and unprecedented requirement on solicited fax advertisements, the Commission mentioned the new rule almost as an afterthought, in a paragraph devoted mainly to the unrelated

¹⁷ *Id.* ¶ 20.

¹⁸ *Id.* ¶¶ 19, 20 (emphasis added).

¹⁹ *See, e.g., id.* ¶ 22 (proposing a possible exemption for “certain classes of small business senders”).

²⁰ *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 ¶ 48 (2006) (“*JFPA Order*”).

²¹ 47 C.F.R. § 64.1200(a)(3)(iv).

issue of the legal status of consent obtained prior to the new rules' effective date.²² The Commission's order also failed to identify a specific source of statutory authority for this rule. Instead, the Commission listed a number of statutory provisions at the end of its order, relying on the implicit assumption that one of these provisions authorized a sudden expansion of the statutory opt-out notice requirement (which, again, applies only to unsolicited faxes) to faxes sent with express consent.²³

This expansion of the opt-out notice rule greatly increases the potential liability exposure of companies advertising via fax. Section 227(b)(3) of the statute authorizes private parties to bring an action for damages "based on a violation of this subsection [§ 227(b)] or the regulations prescribed under this subsection."²⁴ Thus, if a court concludes that the Commission relied on Section 227(b)(2)—the provision that codifies the JFPA's requirement of an opt-out notice for unsolicited faxes—when adopting its rule requiring the same notice for faxes sent with express consent, then it could arguably allow a private lawsuit alleging violations of that rule to proceed, even if the defendant's conduct was fully consistent with the text of Section 227(b)(2) itself. At least one court has so concluded, finding that the opt-out notice requirement for solicited faxes arises under Section 227(b) and can thus give rise to a private right of action under Section 227(b)(3).²⁵ Petitioner is now facing a similar suit in a Missouri state court, where plaintiffs are seeking hundreds of millions of dollars in damages by alleging deficiencies in an opt-out notice on fax advertisements sent with the recipients' express consent.

²² *JFPA Order* ¶ 48.

²³ *See id.* ¶ 64 (locating authority for all rules adopted in the order under "sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended").

²⁴ 47 U.S.C. § 227(b)(3).

²⁵ *MSG Jewelers, Inc., v. C & C Quality Printing, Inc.*, 2008 TCPA Rep. 1811 (Mo. Cir. July 17, 2008).

II. THE COMMISSION SHOULD CLARIFY THAT ITS OPT-OUT NOTICE REQUIREMENT FOR FAXES SENT WITH PRIOR EXPRESS CONSENT WAS NOT ADOPTED PURSUANT TO SECTION 227(B) OF THE ACT

The Commission has an obligation to resolve this uncertainty by clarifying the legal basis of its opt-out notice requirement for solicited fax advertisements. Indeed, under the APA, the Commission should have done so when it first adopted the rule in 2006. Section 553 of the APA requires an agency engaging in rulemaking to include a “reference to the legal authority under which the rule is proposed” in its notice of proposed rulemaking,²⁶ and to provide “a concise general statement of [the rule’s] basis and purpose” when adopting a final rule.²⁷ These requirements are designed not only to ensure that the agency acts pursuant to specific statutory authorization, but also “to assist judicial review [and] to provide fair treatment for persons affected by a rule.”²⁸ Especially now that courts are misapprehending the actual basis for Section 64.1200(a)(3)(iv) of the Commission’s rules—thus threatening to expose senders of solicited faxes to crushing liability—the Commission must move swiftly to identify the proper legal basis as required under the APA.

A. The Commission Arguably Lacked Authority Altogether To Adopt a Rule Requiring an Opt-Out Notice on Fax Advertisements Sent with the Recipient’s Express Prior Consent.

As an initial matter, it is unclear whether the Commission had authority at all to adopt a rule requiring an opt-out notice for faxes sent with the recipient’s express consent. Such a requirement appears nowhere in the JFPA. Indeed, Congress expressly limited the JFPA’s opt-out notice provisions to “unsolicited advertisements.”²⁹ Nothing in the JFPA, or in Section

²⁶ 5 U.S.C. § 553(b)(2).

²⁷ *Id.* § 553(c).

²⁸ *Home Box Office Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

²⁹ JFPA § 2(c)(3)(D).

227(b)(2) in particular, authorizes the Commission to expand the JFPA's opt-out notice requirement to other fax advertisements, such as those sent with the recipient's express consent. The Commission has not pointed specifically to any other source of authority that would justify this rule. The *JFPA Order* simply announced the rule's adoption without discussion,³⁰ and the preceding NPRM did not even raise the possibility of adopting such a rule, let alone identify a statutory basis.³¹

The legislative history of the JFPA likewise makes clear that Congress's concerns were limited to the problem of unwanted faxes. Specifically, once it departed from the express consent requirement and codified the EBR provision, Congress sought to ensure that consumers had a means of rebutting the *presumption* of consent afforded by an EBR: “[I]n reinstating the EBR exception, the Committee determined it was necessary to provide recipients with the ability to stop future *unwanted faxes sent pursuant to such relationships*.”³² Congress thus saw its opt-out notice requirement as a narrow solution to a specific problem—the possibility that presumed consent based on an EBR relationship could still lead to unwanted faxes where a recipient would not have otherwise provided actual and affirmative consent. In contrast, nothing in the legislative history remotely suggests that consumers who *expressly* consented to receive fax advertisements (*i.e.*, who opted *in*) should receive detailed notice describing how they can opt out.

³⁰ *JFPA Order* ¶ 48.

³¹ See *JFPA NPRM* ¶¶ 19-20 (discussing other proposals related to the opt-out notice requirement for unsolicited faxes).

³² S. REP. NO. 109-76, at 7 (2005) (emphasis added) (“Senate Report”). See also *id.* (explaining that the Committee “added the requirement that every *unsolicited* facsimile advertisement contain an opt-out notice that gives the recipient the ability to stop future unwanted fax solicitations . . .”) (emphasis added).

Nor was there any sound rationale for requiring opt-out notices for consumers who expressly agreed to receive fax advertisements, as discussed further below. The Commission certainly never articulated a rationale for the rule in its *JFPA NPRM* or the *JFPA Order*. And in light of the legislative history described above, it is unclear whether the Commission *could* have articulated a reasoned explanation for insisting on inclusion of an opt-out notice rule on solicited faxes. Indeed, the whole point of the opt-out rule is that the EBR exception hinges on implied consent, and that the inference of consent based on a business relationship may turn out to be incorrect. But where there is express consent—where the fax recipient opted *in*—that obviates the need for mandatory notice informing consumers how to express their preferences, as they already have done so.

An opt-out notice requirement for faxes sent with prior express consent presents serious First Amendment concerns as well. Rules like this one, which burdens the legitimate commercial speech of senders of truthful fax advertisements, must satisfy the three-pronged test articulated by the Supreme Court in *Central Hudson*.³³ First, the government must demonstrate “a substantial interest to be achieved by restrictions on commercial speech.”³⁴ Second, the government must show that the restriction “directly advance[s] the state interest involved.”³⁵ And third, the government must show that its asserted interest could not “be served as well by a more limited restriction on commercial speech.”³⁶ But in its order adopting the opt-out notice requirement for solicited fax advertisements, the Commission declined to subject the new rule to *Central Hudson*’s balancing test—identifying no government interest advanced by this particular

³³ *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

rule, no ways in which the rule advanced any such interest, and no reasons why a less restrictive rule would not suffice.³⁷

Courts applying *Central Hudson* to statutory requirements for *unsolicited* faxes under Section 227(b) have upheld those requirements by pointing to “a substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such *unwanted* advertising places on the recipient.”³⁸ But the government’s interest in preventing the cost-shifting and interference associated with unwanted fax advertisements vanishes when the recipient provides express consent to receive such faxes. Importantly, these courts also have concluded that the statute’s restrictions are sufficiently narrowly tailored precisely because advertisers remain free to “obtain consent for their faxes” through “telephone solicitation, direct mailing, and interaction with customers in their shops.”³⁹ When an advertiser *has* obtained such consent, it is highly doubtful that the government can lawfully impose further limits on such speech, including potentially massive liability exposure for any failure to comply with technical opt-out notice requirements.

B. At a Minimum, the Commission Should Declare That Section 227(b)(2) Is Not the Statutory Basis for the Rule.

Although serious doubts remain as to whether the Commission had authority at all to adopt this rule, one thing is clear: The Commission could not have relied on Section 227(b)(2) as the statutory basis for the rule. The Commission had an obligation to say as much in its order

³⁷ See *JFPA Order* ¶ 48.

³⁸ *Missouri v. AM Blast Fax*, 323 F.3d 649, 655 (8th Cir. 2003) (emphasis added); see also *Destination Ventures v. FCC*, 46 F.3d 54, 56, 57 (9th Cir. 1995) (articulating “the government’s substantial interest in preventing the shifting of advertising costs to consumers” and finding that “*unsolicited* fax advertisements shift significant advertising costs to consumers”) (emphasis added).

³⁹ *AM Blast Fax*, 323 F.3d at 659.

adopting the rule in 2006, and to point affirmatively to the correct source of authority “to assist judicial review [and] to provide fair treatment for persons affected by [the] rule.”⁴⁰ Thus, at a bare minimum, the Commission must now fulfill its obligation under Section 553 of the APA by clarifying that the rule is based on some grant of authority other than Section 227(b)(2).

As discussed above, the rule simply does not align with the text, legislative history, or purpose of Section 227(b). Section 227(b) contains no language authorizing the Commission to adopt rules regarding faxes sent with the recipient’s express consent, and certainly does not instruct the Commission to require an opt-out notice in such cases. Such a rule also is not rationally related to the interests animating the enactment of Section 227(b). As explained above, Congress enacted Section 227(b)(2) because it recognized that recipients receiving faxes pursuant to an EBR but without express consent—and in many cases without significant contact with the sender—needed an easy way to “stop future unwanted faxes sent pursuant to such relationships.”⁴¹ After all, while an EBR provides a reasonable basis for inferring that a business will be willing to receive faxes from an advertiser with whom it has an existing relationship, that inference may turn out to be unwarranted in some instances, and those businesses may not know how to halt fax transmissions absent an opt-out notice. By contrast, when a sender relies on express consent rather than an EBR, there is no need to provide the recipient with a detailed opt-out notice; if the recipient knows enough about the sender to opt *in*, he or she certainly knows enough to opt out just as easily.

Nevertheless, absent the Commission’s guidance, at least one court has proceeded under the incorrect assumption that the rule was properly promulgated pursuant to Section 227(b), and others may reach the same conclusion. That assumption is not only wrong, for the reasons just

⁴⁰ *Home Box Office*, 567 F.2d at 35.

⁴¹ Senate Report at 7.

discussed, but also dangerous, as it could expose legitimate senders of solicited faxes to significant liability that Congress plainly never intended to authorize. In particular, Section 227(b)(3) creates a private right of action that permits suits in state court based on “a violation of this subsection *or the regulations prescribed under this subsection.*”⁴² Accordingly, if a court mistakenly concludes that the Commission relied on Section 227(b) when adopting the opt-out notice requirement for faxes sent with express consent, it would open the floodgates to countless private, state-court actions for violations of a rule that Congress never contemplated. The liability can add up very quickly, based on the statutory damages assessment of \$500 per violation or the “actual monetary loss from such a violation, . . . whichever is greater.”⁴³

One such case, *MSG Jewelers, Inc. v. C & C Quality Printing, Inc.*, illustrates the need for prompt Commission action to clarify the actual basis for Section 64.1200(a)(3)(iv) of its rules.⁴⁴ There, a Missouri state court considered whether plaintiff could bring suit under Section 227(b)(3) for a violation of this rule where there was “no dispute that Plaintiff previously consented to be sent advertising faxes from Defendant.”⁴⁵ The court concluded that all of “[t]he FCC’s regulations regarding opt-out notices were promulgated under subsection ‘b’ [§ 227(b)], which gives Plaintiff standing to sue when those regulations are violated.”⁴⁶ The court thus allowed the private action for damages to proceed, despite its doubts as to “the wisdom of this requirement.”⁴⁷ Petitioner now faces a similar lawsuit, in which a class of plaintiffs seeks

⁴² 47 U.S.C. § 227(b)(3) (emphasis added).

⁴³ *Id.* § 227(b)(3)(B).

⁴⁴ *MSG Jewelers, Inc., v. C & C Quality Printing, Inc.*, 2008 TCPA Rep. 1811 (Mo. Cir. July 17, 2008).

⁴⁵ *Id.* at 1.

⁴⁶ *Id.* at 3.

⁴⁷ *Id.*

hundreds of millions of dollars in damages under Section 227(b) for alleged violations of the opt-out notice requirement for faxes sent at the express request of the recipients. And if confusion persists among courts over the legal basis of the Commission's rule, these meritless lawsuits, which target fax advertisements that Congress expressly exempted from the TCPA and JFPA, will only proliferate.

Given the requirements of the APA, the uncertainty regarding the basis of this rule, and the potentially crushing exposure to private lawsuits as a result, the Commission should issue a declaratory ruling that clarifies the rule's legal basis for courts and litigants. Although, as discussed above, the rule could not have arisen under Section 227(b), the Commission could declare that the rule arose under one of the other provisions listed in the *JFPA NPRM*.⁴⁸ One of the provisions cited by the Commission was Section 303(r), which authorizes the Commission to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act.”⁴⁹ Another provision cited by the Commission was Section 4(i), which authorizes the Commission to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”⁵⁰ Courts have recognized that both sections provide the Commission with authority to adopt regulations that are “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”⁵¹

⁴⁸ See *JFPA NPRM* ¶ 43.

⁴⁹ 47 U.S.C. § 303(r).

⁵⁰ *Id.* § 154(i).

⁵¹ *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010) (quoting *Am. Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005)).

In the declaratory ruling requested by this Petition, the Commission would have the opportunity to clarify that it adopted Section 64.1200(a)(3)(iv) pursuant to Sections 303(r) and 4(i), and in turn to explain how the rule is “reasonably ancillary” to its fulfillment of other responsibilities. In addition, the Commission may wish to initiate a proceeding to modify its rules if it determines that an opt-out notice requirement can no longer be justified for faxes sent with the express consent of the recipient. But, in all events, the Commission cannot permit courts to proceed under the erroneous assumption that it promulgated Section 64.1200(a)(3)(iv) pursuant to Section 227(b) of the Act, as that provision does not supply the requisite authority.

CONCLUSION

For the foregoing reasons, Anda respectfully requests that the Commission issue a declaratory ruling clarifying the legal basis of the rule requiring an opt-out notice for fax advertisements sent with the recipient's express permission. The Commission has not identified, as it must, the legal basis for its rule requiring such a notice in the case of express consent. Although there is a serious question whether *any* statutory basis for the rule exists, the Commission at least must make clear that the rule did not arise under Section 227(b). Failure to do so not only would be inconsistent with under Section 553 of the APA, but would also expose legitimate senders of solicited fax advertisements to class action lawsuits seeking massive damages that Congress did not intend to authorize.

Respectfully submitted,



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