

February 12, 2014

Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: PETITIONS CONCERNING THE COMMISSION'S RULE ON OPT-OUT NOTICES ON
FAX ADVERTISEMENTS, CG Docket No. 02-278, CG Docket No. 05-338

Ladies/ Gentlemen:

The National Association of Consumer Advocates (NACA) is a national non-profit organization of attorney and advocate members who represent millions of consumers victimized by fraudulent, abusive, and predatory business practices. NACA respectfully submits these comments as a response to the several petitions seeking a declaratory ruling, rulemaking, and/or waiver concerning section 64.1200(a)(4)(iv) of the Commission's rules, which requires fax advertisements sent to a consumer who has allegedly given prior express invitation or permission to include an opt-out notice.

Section 64.1200(a)(4)(iv) is both within the FCC's authority to prescribe regulations and a proper and desirable exercise of that authority, and should be applied to faxes sent pursuant to any alleged consent or invitation.

Very few if any advertising faxes are sent because of "prior express invitation or permission, in writing or otherwise." It is highly unusual for a consumer or business to specifically ask or agree that written advertising material concerning some product or service be faxed to the consumer or business, which request is fulfilled in such a time frame that the faxing can actually be said to be a response to a request or solicitation that advertising material be faxed. It is even more unusual where a consumer or business requests or agrees that for some specific or indefinite period, advertising material will be faxed to that person.

Generally, what faxers contend in litigation is that days, weeks, months or years prior to the faxing, the recipient somehow "consented" to receive faxes. Sometimes the "consent" is contained in the "fine print" of some contract or other document which may not actually reflect consent by the party. Sometimes the faxer has a poorly documented claim that they contacted some person at the recipient's place of business. Whether or not there really was contact with anyone who had even apparent authority to give consent is often very questionable.

Thus, most claims of "solicited" faxes are really claims that a business relationship of some sort justified the faxing, rather than a claim of a specific request or grant of permission that was immediately fulfilled, or extended over some specific period of time.

This is the case with the parties whose petitions are pending before the Commission. The fax supplied by All Granite & Marble is a generic advertisement, not specifically addressed to anyone. Purdue Pharma claims (p. 4) that "Purdue has a long-standing, documented, and well-established business relationship" with the recipients. TechHealth states that it has a contract (p. 6) in which the recipient of its fax "consented to TechHealth communicating with it via fax."

Certainly, there is no clear dividing line between faxes sent with "prior express invitation or permission," those sent pursuant to a prior business relationship, and those sent with neither. All of the petitions assume that there is a clear distinction between the three, which is fallacious, and argue from that faulty premise that the FCC does not have authority to regulate faxes allegedly sent with "prior express invitation or permission."

Once it is recognized that there is no clear dividing line, both the legal and logical objections to a universal opt out notice requirement fall apart.

The FCC is specifically authorized by the TCPA to issue regulations implementing the "business relationship" exception. Furthermore, the FCC necessarily has authority to allocate the burden of proof, to take measures to prevent false or abusive claims that fax advertising is "solicited," to take reasonable steps to insure that "prior express invitation or permission" is real and meaningful and given by someone with authority, and to insure that fax advertising recipients continue to consent to fax advertising after being apprised of the nature and extent of the fax advertising.

The FCC has held on multiple occasions that "a sender should have the obligation to demonstrate that it complied with the rules, including that it had the recipient's prior express invitation or permission." In re: Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991, CG Docket No. 02-278; CG Docket No. 05-338, FCC Release 06-42, 21 FCC Rcd 3787, at 3812, 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006).

The same authority that permits the FCC to place the burden of proof on the sender also permits a requirement of a notice of "opt out" rights. It is a necessary and reasonable procedural measure. Without such information, a subsequent fax cannot be said to have been "unsolicited," as opposed to the result of the recipient not knowing or figuring out how to "opt out." Similarly, there is no way to assure that claims that faxes were authorized by "fine print" or by vague calls that occurred some time prior to the faxing actually reflect informed consent to the receipt of advertising faxes. See *Mourning v. Family Publications Service, Inc.* <<https://a.next.westlaw.com/Document/I235fe7a49c1e11d9bdd1cfdd544ca3a4/View/FullText.html?listSource=Search&navigationPath=Search%2fv3%2fsearch%2fresults%2fnavigation%2fi0ad60402000001441d5780ed9e97e5f6%3fNav%3dCASE%26fragmentIdentifier%3dI235fe7a49c1e11d9bdd1cfdd544ca3a4%26startIndex%3d1%26contextData%3d%2528sc.Search%2529%2>

6transitionType%3dSearchItem&list=ALL&rank=1&listPageSource=95fb3117ad68a2b14ab7e5903bf9a45a&originationContext=docHeader&contextData=(sc.Search)&transitionType=Document&docSource=bca43c6724fe43c4916c807f1864be91>, 411 U.S. 356 (1973).

Over consumer objection, the FCC provided senders of facsimile a safe harbor as long as they complied with a simple and straightforward opt out requirements. In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 & the Junk Fax Prevention Act of 2005, CG Docket No. 02-278; CG Docket No. 05-338, FCC Release 06-42, 21 FCC Rcd 3787; 2006 FCC LEXIS 1713; 38 Comm. Reg. (P & F) 167 (April 6, 2006), par. 24. In this regard, a faxer is not required to honor requests for cessation of faxing not communicated in the manner specified in an opt out notice. Id. Not satisfied with the safe harbor provided, the industry thus wants the FCC to rule both that it can ignore requests not made in a specific way, and not require faxers to disclose how to make requests that cannot be ignored. Such a position is inequitable.

Alternatively, the industry wants to substitute "substantial compliance", which would replace a straightforward opt out requirement with an ambiguous standard that is sure to result in inconsistent rulings. As in the request to remove the opt out language, the request to create a substantial compliance standard would make the opt out meaningless in many cases. Regardless, there has been no showing why the FCC should reverse its long standing position and water down the opt out provisions to effectively make it meaningless. The fact of the matter is that most business comply with the simple and straightforward Opt Out notice and the FCC should not change the standard to benefit the handful of companies that have ignored the requirement.

In addition, the petitioners requesting a waiver have not shown any special circumstances or provided support for the request for waiver. *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 n.9 (D.C. Cir. 1969) (Must show "special circumstances," "articulate a specific pleading, and adduce concrete support, preferably documentary" for a waiver"); *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 127 (D.C. Cir. 2008). Once again, the fact that a small handful of companies ignored the straightforward opt out requirement out of the universe of companies that send faxes, is not special circumstances warranting a waiver. If anything, it shows that the majority of businesses are in compliance.

Sincerely,

Ira Rheingold

Executive Director
National Association of Consumer Advocates