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VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Public Notice DA 14-120, dated January 31, 2014, entitled “Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements,” and CG Docket Nos. 02-278 & 05-338

On behalf of a number of plaintiffs¹ that Bellin & Associates LLC represents in TCPA litigations throughout the United States, we submit these comments in response to the

¹ Currently, those plaintiffs are: (a) Bais Yaakov of Spring Valley, in a class action filed in 2013 against Richmond, The American University in London, Inc., in federal district court in the Southern District of New York, which is ongoing; (b) Bais Yaakov of Spring Valley, in a class action filed in 2013 against Houghton Mifflin Harcourt Publishers, Inc. and Laurel Kaczor in federal district court in the Southern District of New York, which is ongoing on limited issues and subject to a partial stay; (c) Roger H. Kaye and Roger H. Kaye, MD PC, in a class action filed in 2013 against Amicus Mediation & Arbitration Group, Inc. and Hillary Earle in federal district court in the District of Connecticut, which is ongoing; (d) Menachem Raitport and Crown Kosher Meat Market Inc., in a class action filed in 2009 against Harbour Capital Corporation in federal district court in the District of New Hampshire, in which the court has recently issued a stay of further proceedings pending final determination of the proceedings before the Commission that are the subject of these comments; (e) Bais Yaakov of Spring Valley, in a class action filed in 2012 against ACT, Inc. in federal district court for the District of Massachusetts, which is ongoing; and (f) Roger H. Kaye and Roger H. Kaye, MD PC, in a class action filed in 2010 against Merck & Co., Inc. and Medlearning, Inc. in federal district court for the District of Connecticut, in which the court, other than permitting extremely limited discovery, issued a stay

Commission's Public Notice dated January 31, 2014, DA 14-120, CG Docket Nos. 02-278 & 05-338, entitled "Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements." The rule on which the Commission seeks comment, 47 C.F.R. § 64.1200(a)(4)(iv) (the "Opt Out Regulation"), is one of the bases for the plaintiffs' claims in all of those litigations.

of further proceedings pending a final determination of these proceedings before the Commission.

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SUMMARY OF COMMENTS

The Commission's Authority to Issue the Opt Out Regulation

Contrary to the various petitioners' assertions, Congress has provided the Commission with ample authority to promulgate the Opt Out Regulation, which requires that permission-based (in addition to unsolicited) fax advertisements contain an opt-out notice compliant with the TCPA.² Congress has provided that authority in two sections of the TCPA: (a) 47 U.S.C. § 227(b)(2)(E), enacted in 2005 as part of the Junk Fax Prevention Act, in which Congress specifically directed the Commission to enact regulations providing the method by which recipients of fax advertisements may opt out of receiving "future unsolicited fax advertisements"; and (b) 47 U.S.C. § 227(b)(2), enacted in 1991 as part of the original version of the TCPA, in which Congress more broadly granted the Commission authority "to prescribe regulations to implement the requirements of [the TCPA's fax advertising provisions]."

As to Congress's more specific, 2005 grant of authority, the use of the phrase "*future* unsolicited fax advertisements" indicates that Congress was contemplating situations in which, *in the past*, a recipient may have consented to receiving fax advertisements, but then decides not to continue to consent to receiving faxes in the future. This phrase therefore empowers the Commission to issue regulations requiring fax advertisers to place an opt-out notice on all their fax ads that will enable a previously permission-based recipient to properly opt out of receiving future fax ads. As the Commission has reasoned, if fax advertisers are not required to include such an opt-out notice, a previously permission-based fax ad recipient might be subjected to receiving fax ads in perpetuity based on giving a one-time consent to receiving them. Indeed, the

² A "permission-based fax advertisement" is a fax advertisement that is transmitted to any person with that person's prior express invitation or permission. That term is used in these comments instead of the undefined term "solicited faxes" used by Petitioners.

TCPA lacks any provision specifically addressing how a previously permission-based fax recipient may revoke consent to receive future advertisements – creating a void that makes the Commission’s regulation filling that void all the more appropriate, as numerous courts have held.

Moreover, the Commission has reasoned that because the TCPA permits fax advertisers to obtain oral consent to send fax ads, that lax requirement is subject to abuse by unscrupulous fax advertisers. Requiring fax advertisers to include opt-out notices in purportedly permission-based fax ads serves the salutary purpose of cutting down on the number of unwanted fax ads sent to recipients whom the advertisers have erroneously or fraudulently deemed to have consented to receiving fax ads. Accomplishing this purpose also falls squarely within the Commission’s authority to devise a method for opting out of receiving “future unsolicited fax advertisements.”

Finally, partly at the behest of the fax advertising industry, the TCPA provides that a fax advertiser is required to honor an opt-out request “only if” the recipient making the request follows all of the steps for opting out set forth in the TCPA. Because a party thus must follow specific steps to opt out, the Commission sensibly required that fax advertisers include an opt-out notice describing those steps to unsolicited recipients as well as to permission-based recipients who do not want to receive fax ads in the future – yet another valid justification for the Commission’s promulgation of the Opt Out Regulation governing permission-based fax advertisements falls within its authority under 47 U.S.C. § 227(b)(2)(E) to regulate “future unsolicited fax advertisements.”

Not only did the Commission act well within its specific authority under 47 U.S.C. § 227(b)(2)(E) in promulgating the Opt Out Regulation, but it also acted within its more general authority “to prescribe regulations to implement the requirements of” the TCPA under 47

U.S.C.(b)(2) in doing so. Simply put, requiring opt-out notices on permission-based fax ads implements the basic requirement of the TCPA that fax advertisers not send unwanted fax ads. While petitioners argue that because some of the original, 1991 sections of the TCPA continue to contain language addressing only “unsolicited fax advertisements,” the Opt Out regulation covering permission-based fax advertisements does not “implement the requirements of” the TCPA, that argument is unavailing for two reasons. First, Congress has broadened the reach of the TCPA since 1991 by, among other things, explicitly directing the Commission in 2005 to address how to opt out of receiving “future unsolicited advertisements” – implying that previously permission-based advertisements are now part of the statute’s coverage. Accordingly, the Opt Out Regulation does in fact implement the requirements of the TCPA in its *current* iteration. Second, and just as importantly, extensive precedent from the U.S. Supreme Court and other federal courts empowers agencies to issue regulations that impose greater restrictions than those imposed by the underlying statute, so long as those restrictions are reasonably related to the purposes of the statute. Once again, the Opt Out Regulation plainly serves the central purpose of the TCPA – to prevent fax advertisers from sending out unwanted fax ads.

The Petitioners’ First Amendment Challenges to the Opt Out Regulation

Petitioners’ (and particularly Staples, Inc.’s) First Amendment challenges to the Opt Out Regulation are baseless. Staple’s insinuation that the Opt Out regulation should be reviewed under “strict scrutiny” for First Amendment purposes is ludicrous, as no case has ever so held in the commercial context at issue here. Instead, the Opt Out Regulation should be subject only to the lowest level of “reasonable relation” scrutiny applicable to laws designed to prevent deception to the public – and plainly satisfies that standard because it helps prevent unscrupulous fax advertisers from sending unwanted fax advertisements to consumers under the guise of

having obtained those consumers' consent to do so, and further prevents fax advertisers from deceptively preventing recipients from learning about exactly what they must do in order to opt out of receiving any further fax advertisements. Moreover, even if the Opt Out Regulation were subject to the intermediate level of First Amendment scrutiny generally applicable to commercial speech, it would satisfy that standard as well: there is a substantial governmental interest in protecting the public from continuing to receive unwanted fax advertisements, and the Opt Out Regulation directly advances that governmental interest by requiring that fax advertisers place a small notice on the first page of their ads informing the public how exactly to opt out of receiving any future ads.

The TCPA's Incompatibility with a "Substantial Compliance" Defense

As outlined above, the TCPA and regulations thereunder require a fax advertiser to honor an opt-out request "*only if*" the fax recipient takes the precise steps described in the TCPA, i.e., identifying the fax number to which the opt-out request relates; sending the request to the telephone, fax number, web site or email address specified in the advertiser's opt-out notice; and not subsequently opting back into receiving fax ads. Because the TCPA imposes these requirements on a fax recipient, it imposes similar requirements on a fax advertiser, who must include the same type of information on the opt-out notices it is required to include in its fax ads. If a fax advertiser could get away with including some, but not all of the requirements for opting out in its opt-out notice, and a fax recipient followed only that incomplete set of requirements, the fax advertiser could refuse to honor the opt-out request because it does not fully comport with the statute. That is why both the Commission and the courts have refused to recognize a substantial compliance defense to a claim for violation of the TCPA's opt-out requirements.

The Petitioners' Waiver Requests

Some of the petitioners have requested retroactive waiver of the application of the Opt Out Regulation, claiming that it would be inequitable and somehow contrary to the public interest for them to be subject to possibly large financial liability for their thousands of violations of that regulation. The Commission should deny those requests because petitioners have not satisfied, and cannot satisfy, their burden to show specific special circumstances, backed up by evidence, warranting a waiver, and that a waiver would be in the public interest. Instead, petitioners have only articulated their own general self-interest as the basis for their waiver requests. Indeed, Petitioners have failed to articulate any legitimate public interest supporting their waiver requests simply because there is none in permitting junk fax advertisers not to inform the persons to whom they send their fax ads of the only effective method for opting out of receiving future unsolicited faxes.

The Practical Realities Undermining the Petitions

Finally, as a practical matter – and from our experience in litigating these types of cases – the petitioners lose sight of several realities that undermine their arguments:

First, no matter how much counsel for the petitioners have tried to paint their clients as morally upright businesses caught in the cross-hairs of an oppressive TCPA, the reality is that many, many fax advertisers broadcast junk faxes – an activity that most individuals and businesses – and Congress in 1991 and again in 2005 – have considered a scourge that will not stop in the absence of strong federal legislation regulating unsolicited and permission-based fax advertising.

Second, the petitioners urge that they are being unwittingly and unfairly subjected to massive liability for violating the TCPA's Opt-Out Regulation. This appeal to sympathy ignores

the reality that if a fax advertiser simply reads the regulation and simply includes a short notice reciting all of its requirements at the bottom of the first page of its fax ads, it will not be subjected to such massive liability for failing to include a compliant opt-out notice.

Third, numerous fax advertisers contend that they have either specifically obtained consent from all recipients to send their fax ads or/and have an existing business relationship with all recipients, but rarely can produce written records during discovery credibly showing that to be the case. Since the TCPA currently authorizes fax advertisers to obtain consent orally to send fax ads, it is all too easy for fax advertisers to concoct stories that they have obtained consent, and then to use those assertions of consent to try to defeat certification of classes based on purported individualized issues of consent that need to be determined, and then to try to avoid being held liable for violating the TCPA on that basis. The Commission's Opt Out Regulation is one of the few helpful counters to this practice, insuring that recipients who have not actually given consent or who do not have an existing business relationship with the fax advertisers are able to effectively exercise their right to opt out of receiving any further fax ads from those advertisers.

Fourth, the Commission promulgated the Opt Out regulation in April 2006 – almost eight years ago. The reality is that none of the petitioners directly objected to or otherwise challenged the regulation, but instead waited for many, many years, all the while paying little or no heed to the requirements of the Opt Out Regulation.

In short, we strongly urge the F.C.C. to uphold the validity of the Opt Out Regulation, to deny requests for waivers, and to do so promptly so that TCPA defendants cannot use the pendency of these petitions as a basis for seeking stays to delay pending litigations, which some district courts unfortunately have granted.

THE JUNK FAX LEGISLATION AND REGULATIONS AT ISSUE

On July 9, 2005, Congress enacted the Junk Fax Prevention Act of 2005, which amended the Telephone Consumer Protection Act of 1991 (the TCPA). P.L. 109-21, 119 Stat 359 (July 9, 2005). Consistent with the original 1991 law’s prohibition against sending “an unsolicited advertisement,” section 2(c) of that law makes it illegal to send *unsolicited* faxes unless several requirements are satisfied: the sender must have an established business relationship with the recipient; the sender must have obtained the recipient’s telephone number in one of two permissible ways; and the fax ads must contain opt-out notices complying with the TCPA. P.L. 109-21, § 2(c); 47 U.S.C. § 227(b)(1)(C). From its inception in 1991, the TCPA has specifically provided that the Commission “*shall prescribe regulations to implement the requirements of* [the TCPA’s fax advertising laws],” 47 U.S.C. § 227(b)(2) (emphasis added). The same subsection of the statute lists various requirements that an opt-out notice must satisfy.³

³ 47 U.S.C. § 227(b)(2)(D) further provides that “the Commission. . . shall provide that a notice contain on an unsolicited advertisement complies with the requirements under this subparagraph only if” Those requirements are:

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

In addition, the TCPA, as amended in 2005, authorizes the Commission, in a section entitled “REQUEST TO OPT-OUT OF FUTURE UNSOLICITED ADVERTISEMENTS”, to promulgate rules providing “that a request not to send future unsolicited advertisements” will only be honored if (i) “the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates; (ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited advertisement provided pursuant to subparagraph [47 U.S.C. § 227(b)(2)](D)(iv) or by any other method of communication as determined by the Commission; and “(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.” Section 2(d) of P.L. 109-21; 47 U.S.C. § 227(b)(2)(E). As discussed more fully in the sections below, Congress’s use of the new phrase “*future* unsolicited advertisements” implies

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection [47 U.S.C. § 227](d) of this section.

47 U.S.C. § 227(b)(2)(D). 47 U.S.C. § 227(d), in turn, requires that faxes “clearly mark[], in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.”

that in 2005 Congress intended, or at minimum could reasonably be interpreted to have intended, to direct this provision to fax ads sent to recipients who previously had consented to receiving fax advertisements, but who did not want to continue to receive them in the future.

On April 6, 2006, in response to these statutory directives, the Commission, after notice and comment, promulgated a number of regulations.⁴ Among them is 47 C.F.R. § 64.1200(a)(4)(iii), which reiterates and clarifies all of the information that must appear in an opt-out notice on an *unsolicited* fax advertisement. Largely paralleling this opt-out notice regulation, the Commission promulgated 47 C.F.R. § 64.1200(a)(4)(v), which lists all of the information that a recipient must include in an opt-out request to require the fax advertiser to honor that request. *Compare* 47 C.F.R. § 64.1200(a)(4)(v) *with* 47 C.F.R. § 64.1200(a)(4)(iii).

On that same day that the Commission promulgated its regulation concerning opt-out notices and requests in connection with unsolicited fax advertisements, the Commission promulgated 47 C.F.R. § 64.1200(a)(4)(iv) (the Opt Out Regulation), which addresses permission-based fax advertisements. That regulation provides that “[a] facsimile advertisement that is a 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 [47 C.F.R. § 64.1200](a)(4)(iii)]. Accordingly, the Commission determined that unsolicited as well as permission-based fax advertisements should contain the same type of opt-out notice. The petitions on which the Commission seeks comment challenge these eight-year old regulations requiring opt-out notices, principally asserting that the Commission is authorized only to require them on unsolicited, not permission-based, fax advertisements.

⁴ The regulations relevant to the petitions at issue here became effective on August 1, 2006. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 71 Fed. Reg. 42297-01 (July 26, 2006).

POINT I

IN 47 U.S.C. § 227(b)(2)(E) AND IN 47 U.S.C. § 227(b)(2), CONGRESS GRANTED THE COMMISSION AUTHORITY TO PROMULGATE THE OPT OUT REGULATION

A. The Commission Promulgated the Opt Out Regulation Pursuant to Two Sections of the TCPA – Section 227(b)(2)(E) and Section 227(b)(2)

As highlighted above, the basic purpose of the TCPA’s provisions regarding fax advertising is to bar fax advertisers from imposing burdens on persons who do not want to receive fax ads. As the 1991 House Report on the TCPA explained, “[t]his type of telemarketing is problematic for two reasons. First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient’s facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax.” Telephone Consumer Protection Act of 1991, H.R. Rep. 102-317, 1991 WL 245201, *10 (1991). Congress further found that telemarketers use automatic telephone dialers to make millions of calls every day, and that “[t]elemarketers often program their systems to dial sequential blocks of telephone numbers, which have included those of emergency and public service organizations” which is “potentially dangerous.” *Id.*, *11.

To enable the Commission to help curb these harmful activities, Congress on two separate occasions gave the Commission the authority to promulgate fax advertising regulations pursuant to the TCPA. First, at the inception in 1991 Congress gave the Commission a broad grant of authority “*to prescribe regulations to implement the requirements of [42 U.S.C. § 227(b)].*” 47 U.S.C. § 227(b)(2) (emphasis added). Second, 14 years later, when Congress amended the TCPA via the Junk Fax Protection Act of 2005, Congress further directed the Commission to enact regulations providing the method by which fax ad recipients must give notice in order to opt out of receiving “*future unsolicited fax advertisements*”: “. . . the

Commission . . . shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements of this subparagraph only if—[it satisfies three enumerated requirements].” 47 U.S.C. § 227(b)(2)(E) (emphases added).

In its 2006 Report and Order promulgating the Opt Out Regulation – which was the first time the Commission required that opt-out notices appear in unsolicited and in permission-based faxes alike – the Commission stated generally that it had relied on, among other statutes, 47 U.S.C. § 227, as authority for promulgating that regulation. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (Junk Fax Protection Act of 2005)*, 21 F.C.C.R. 3787, 3817, ¶ 64 (April 6, 2006). This citation of 47 U.S.C. 227 in its entirety thus encompasses both subsections quoted above, 47 U.S.C. § 227(b)(2) and 47 U.S. C. § 227(b)(2)(E). While the Commission’s ordering clause does not go on to cite the specific subsections of Section 227 upon which the Commission was relying for its multiple sets of regulations promulgated in that Report and Order, nothing should be read into that lack of specificity: “Agencies often satisfy these loose requirements [for citing statutory authority for their actions] by citing the entirety of a statute, or citing a section number followed by ‘et seq.’ In no place is the agency called upon to state the specific provision that authorizes a rule like the specific rule at hand to be issued legislatively.” Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1378 n.378 (1992).⁵

⁵That agencies, for the most part, do not cite specific subsections of statutes as authority for promulgating a specific regulation is not surprising since “a reviewing court in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by

The Commission reiterated its position on its authority to issue the Opt Out Regulation in a February 24, 2012 amicus brief it filed in the Eighth Circuit in *Nack v. Walburg*. In that brief, the Commission stated: “. . . Section 64.1200(a)[4](iv) was ‘promulgated under the grant of authority that Congress gave the Commission under Section 227(b)(2) [of the TCPA],’” which statutory provision directs the Commission to “prescribe regulations to implement the requirements of subsection 227(b).” Commission Amicus Brief filed on Feb, 24, 2012 in *Nack v. Walburg*, No. 11-1460, Docket No. 00811860026, p. 20 (available on Pacer). Echoing its initial Order promulgating the Opt Out Regulation, the Commission explained that “requiring an opt-out notice on faxes even when permission is granted serves to ‘allow consumers to stop unwanted faxes in the future.’” *Id.*, p. 14.⁶

The Commission again reiterated its position on its authority in *In the Matter of Junk Fax Prevention Act of 2005*, 27 F.C.C.R. 4912, 4913, ¶ 4 (May 2, 2012), in which the petitioner, Anda, Inc. – one of the petitioners in these proceedings – had explicitly argued that the Commission “‘lacked authority altogether to adopt a rule requiring an opt-out notice on fax

substituting what it considers to be a more adequate or proper basis.” *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *N.L.R.B. v. Columbia University*, 541 F.2d 922, 930 (2d Cir. 1976). Thus, if an administrative agency specifically relies on one subsection of a statute to promulgate a regulation rather than the statute as a whole, a court could find that the agency had not validly promulgated it pursuant to that subsection, even if another subsection of the same statute would have been a sufficient basis to uphold the regulations. *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 245 (2d Cir. 1977) (if an agency specifically relies on one subsection of a statute to justify its promulgation of a regulation a court cannot uphold the regulation based upon another subsection of the statute that the agency could have properly relied on for the promulgation; rather, the agency must re-promulgate the regulation citing the proper subsection). Accordingly, to avoid citing an incorrect subsection of a statute and having to re-promulgate the regulation at issue, agencies typically take the safe course of citing the entire statute, or even multiple statutes, as justifications for their regulations to give courts the broadest possible bases upon which to uphold the regulations as properly promulgated.

⁶ U.S. Supreme Court precedent requires courts to generally defer to agencies’ positions on their regulations in those agencies’ legal briefs. *E.g., Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2260-61 (2011).

advertisements sent with the recipient’s express consent.”” Dismissing the petition, the Commission, through its Consumer & Governmental Affairs Bureau, explained that

[t]he rule itself, the requirements of which are clearly set forth in section 64.1200(a)(4)(iv) of the Commission’s rules, was adopted by the Commission in the *Junk Fax Order*. The *Junk Fax Order* cited the statutory provisions, including section 227 of the Act, that provide the Commission authority for the rules adopted in that *Order*.

27 F.C.C.R at 4914, ¶ 5.

B. The Commission Properly Concluded that It Had Authority under these Two Sections of the TCPA to Require that Unsolicited as Well as Permission-Based Fax Advertisements Contain Opt-Out Notices

1. By Directing the Commission to Issue Regulations Concerning “Future Unsolicited Fax Advertisements,” Congress was Empowering the Commission to Regulate Faxes Sent to Previously Permission-Based Fax Recipients

As quoted above, the Junk Fax Prevention Act of 2005 added a new section to the TCPA directing the Commission “to provide, by rule,” a mechanism for making “a request not to send future unsolicited fax advertisements.” 47 U.S.C. § 227(b)(2)(E). By using the phrase “future” unsolicited fax advertisements (and a title that parallels it⁷), Congress was directing the Commission to promulgate regulations concerning (a) fax advertisements to persons who had never consented to receiving those advertisements, *as well as* to (b) fax advertisements to persons who had previously consented to receiving fax advertisements but who did not want to receive “future unsolicited advertisements.” Indeed, if Congress had not intended to include

⁷ The title of the Section of the Public Law enacting this part of 47 U.S.C. § 227(b) is “REQUEST TO OPT-OUT OF FUTURE UNSOLICITED ADVERTISEMENTS.” P.L. 102-91 § 2(d). Congress’s intent can be gleaned from the title of a statutory provision. *E.g.*, *Brotherhood of Railroad Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 529 (1947) (titles of statutes or sections of statutes may shed light “on an ambiguous word or phrase”); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (title of statute and heading of section are “tools available for the resolution of a doubt about the meaning of a statute”) (internal quotation marks omitted); *Cheney R. Co. v. Railroad Retirement Benefit Bd.*, 50 F.3d 1071, 1074 (D.C. Cir. 1994) (broad title of Act reflected Act’s broad scope).

previously permission-based fax advertisements within the scope of this portion of the TCPA, Congress would have had no reason to include the word “future” in its 2005 amendments to the TCPA. *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) (“we must give effect to every word of a statute whenever possible”); *Cammarano v. United States*, 358 U.S. 498, 505 (1959) (refusing to read language in regulation as surplusage). Accordingly, basic principles of statutory construction support the Commission’s authority to issue the Opt Out Regulation governing permission-based fax advertisements. At the very minimum, that interpretation of the statutory language is a reasonable, and therefore proper, one by the Commission.

2. Without Including a Notice Informing Permission-Based Fax Recipients How to Opt Out, Fax Advertisers would not be Providing Recipients with any Information on How to Stop Receiving Future Unwanted Fax Ads in Perpetuity

Moreover, in its Report and Order promulgating the Opt Out Regulation, the Commission reasoned that once a person consents to receiving a fax advertisement, that consent will continue, potentially in perpetuity, unless that permission-based recipient is provided an opportunity to properly opt out of receiving future unsolicited fax advertisements. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, supra*, 21 F.C.C.R. at 3812, ¶¶ 46, 48 (“Express permission need only be secured once from the consumer in order to send facsimile advertisements to that recipient until the consumer revokes such permission by sending an opt-out request to the sender.”). Accordingly, the Commission determined that such permission-based recipients should be given the opportunity, through an opt-out notice on all fax ads they receive, to opt out of receiving faxes in perpetuity once they no longer want to receive them – wholly consistent with its statutory duty to promulgate regulations concerning “future unsolicited advertisements,” and indeed with its general duty to issue regulations “to implement the requirements of section 227(b).”

3. Well Settled Administrative Law Principles Authorize the Commission to Fill the Void in the TCPA Regarding How a Person can Revoke Consent to Receive Fax Ads

Further, “neither the text of the TCPA nor its legislative history directly addresses the circumstances under which prior express consent is deemed revoked.” *In the Matter of Rules & Regulations Implementing The Telephone Consumer Protection Act of 1991*, 27 F.C.C.R. 15391, 15394 (November 29, 2012); *Gager v. Dell Financial Services, LLC*, 727 F.3d 265, 268 (3rd Cir. 2013) (“Notably, the [TCPA] does not contain any language expressly granting consumers the right to revoke their prior express consent”). In such a situation, well settled principles of administrative law authorize an agency to fill such a void. As the U.S. Supreme Court has long held, “if [a] statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984); *Matter of Rules & Regulations Implementing The Telephone Consumer Protection Act of 1991*, *supra*, 27 F.C.C.R. at 15395 (“Where a statute’s plain terms do not directly address the precise question at issue and the statute is ambiguous on the point, the Commission can provide a reasonable construction of those terms”).⁸

Because of this void regarding how to revoke consent, the Commission was entitled to fill that void by regulation. Moreover, by requiring, in 47 C.F.R. § 64.1200(a)(4)(iv), that

⁸ Indeed, arguing that the Commission did not have authority to issue a regulation concerning revocation of consent to receiving fax advertisements is illogical because it would presume that Congress intended that only those persons who receive unsolicited advertisements be informed of how to properly opt out of receiving “future unsolicited fax advertisements,” while leaving persons who had previously given permission to receive such fax advertisements in the dark on how to do so. Such a narrow reading the TCPA would conflict with the statute’s broad remedial purpose. *Gager v. Dell Financial Services, LLC*, *supra*, 72 F.3d at 271 (“Because the TCPA is a remedial statute, it should be construed [broadly] to protect consumers.”); *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).

persons who have previously given consent may revoke it by following the same opt-out procedure applicable to persons who receive unsolicited fax advertisements, the Commission promulgated a permissible and eminently reasonable interpretation of the statute. *E.g.*, *Gager v. Dell Financial Services, LLC*, *supra*, 727 F.3d at 268-269 (recognizing that Commission has the right implement rules and regulations concerning the revocation of express consent based on the authority given to it under 47 U.S.C. § 227(b)(2)).⁹

In *In the Matter of Junk Fax Prevention Act of 2005*, *supra*, 27 F.C.C.R. at 4912, the Commission explained its void-filling role in connection with the TCPA. Dismissing the petition filed by one of the same petitioners on this matter, *Anda, Inc.*, challenging the Commission’s authority, the Commission ruled that

. . . we find unpersuasive Petitioner’s argument that the TCPA could not have given the Commission authority to adopt the rule. Section 227 defines an unsolicited advertisement as certain advertising material “transmitted to any person without that person’s express invitation or permission” when there is no EBR, but the statute does not define “prior express invitation or permission.” The *Junk Fax Order* thus properly addressed how such prior express permission can be obtained from, *and revoked by*, a consumer in that context. Among other things, the Commission held that “express permission need only be secured once from the consumer in order to send facsimile advertisements to that recipient *until the consumer revokes such permission by sending an opt-out request to the sender.*” . . . The *Junk Fax Order* thus specifically tied the opt-out notice requirement to the purposes of section 227.

27 F.C.C.R. at 4914, 4915, ¶¶ 5, 7 (first emphasis added, and second emphasis in original).¹⁰

⁹ See also *Matter of Junk Fax Prevention Act of 2005*, *supra*, 27 F.C.C.R. at 4913, ¶ 4 (“[T]he statute does not define “prior express invitation or permission. . . . [and therefore] the *Junk Fax Order* [that promulgated 47 C.F.R. § 64.1200(a)(4)(iv)] thus properly addressed how such prior express permission can be obtained from, *and revoked by*, a consumer in that context.”).

¹⁰ Contrary to some petitioners’ arguments, the fact that *In The Matter of the Junk Fax, Prevention Act of 2005* was issued by the Acting Chief of the Commission’s Consumer and Governmental Affairs Bureau, rather than the Commission as a whole, does not have any effect on the legitimacy of that ruling. That is because the F.C.C has delegated authority to that Bureau to adjudicate in this area. *E.g.*, 47 U.S.C. § 155(c)(1); 47 C.F.R. §§ 0.5(c), 0.141(a) & 0.361.

4. Requiring that Fax Advertisers Include an Opt-Out Notice on Fax Ads Sent to Permission-Based Recipients Permits Recipients Who Were Mistakenly or Fraudulently Deemed Permission-Based to Be Able to Opt Out of Receiving Future Fax Ads

The Commission’s 2006 Report and Order provided another compelling reason why the Commission designed its Opt Out Regulation to cover permission-based fax ads: the TCPA permits fax advertisers to obtain consent orally from recipients. 47 U.S.C. § 227(a)(5) (providing that “invitation or permission [may be validly obtained] in writing or otherwise”); *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, supra*, 21 F.C.C.R. at 3811, ¶ 45 (“Prior express invitation or permission may be given by oral or written means, including electronic methods”). The Commission was therefore “concerned that permission not provided in writing may result in some senders’ erroneously claiming they had the recipient’s permission to send facsimile advertisements.” *Id.* at 3812, ¶ 46. Requiring an opt-out notice on fax advertisements that the sender contends are permission-based assures that when that claim of having received oral permission is erroneous – or indeed fraudulent – the unwitting recipient of such a fax advertisement will know how to opt out properly. *Id.* ¶ 48.

“When, as here, Congress has expressly permitted delegation of authority by statute, *see* 47 U.S.C. § 155(c), and the agency delegates authority to a subdivision, ‘the decision of the subdivision is entitled to the same degree of deference as if it were made by the agency itself.’” *Indiana Bell Tel. Co., Inc. v. McCarty*, 362 F.3d 378, 387 (7th Cir. 2004) (*quoting* *MCImetro Access Transmission Services, Inc. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872, 880 n.8 (4th Cir. 2003)). Even where, as in *In the Matter of Junk Fax Protection Act of 2005*, the decision is subsequently appealed to the full Commission, deference to the initial decision is required from the moment of issuance of the decision “unless and until the FCC modifies the [decision].” *Indiana Bell Tel. Co., Inc. v. McCarty, supra*, 362 F.3d at 387.

5. Because a Fax Advertiser Need not Honor an Opt-Out Request that does not Fully Comply with the TCPA’s Requirements for Opting Out, the Regulation’s Parallel Requirement that Fax Advertisers Fully Spell Out the Items Required to Opt Out is Necessary and Appropriate

Moreover, section 227(b)(2)(E) of the TCPA requires fax advertisers to comply with an opt-out request “only if” the request follows the specific steps set forth that subsection and in 47 C.F.R. § 64.1200(a)(4)(iv). Because fax advertisers might ignore an opt-out request if a fax recipient does not follow all those steps, the Commission had all the more reason to require, in 47 C.F.R. § 64.1200(a)(4)(iv), that faxes sent to permission-based fax recipients (and unsolicited fax recipients pursuant to 47 C.F.R. § 64.1200(a)(4)(iii)) contain an opt-out notice describing all those specific steps so that permission-based fax recipients be able to stop receiving a fax advertiser’s ads.

6. The U.S. Supreme Court has long Held that an Agency may Promulgate Regulations that are more Restrictive than the Underlying Statute Providing the Agency Its Authority

Last but not least, even if the TCPA were construed not to expressly provide the Commission with the authority to promulgate the Opt Out Regulation – because the 1991 statutory language of 47 U.S.C. § 227(b)(1)(C) addresses only “unsolicited advertisement[s]” – the U.S. Supreme Court has long held that an agency may promulgate a regulation that is more restrictive than the language of the underlying statute, so long as the regulation is “reasonably related to the purposes of the enabling legislation.” *Mourning v. Family Publications Service, Inc.*, *supra*, 411 U.S. at 369.

For example, in *Alexander v. Trustees of Boston University*, 766 F.2d 630 (1st Cir. 1985), a federal statute provided that students who were required to register with the Selective Service and failed to do so would be ineligible for federal student aid. Pursuant to that statute, the U.S. Department of Education issued a regulation requiring that *all* students applying for federal

financial aid – not just those who were required to register with the Selective Service as specified by the statute – provide a statement certifying that they either had registered for the draft or were not eligible for the draft; if they failed to do so, the students would not be able to obtain federal financial aid. *Id.* at 632-33.

A number of students who were exempt from registering with the Selective Service and chose not to sign the statement required by the regulation were denied federal financial aid. 766 F.2d at 634. Those students challenged the regulation as being inconsistent with, and beyond the authority conferred by, the federal statute because “the regulations require[d] persons who [were] not required to register to submit [the statement] and den[ied] [federal financial aid] to persons not subject to any registration requirement.” *Id.* On that basis, the district court held the regulation invalid, but the First Circuit reversed, finding that the regulation “reasonably related” to the purposes of the federal statute denying financial aid to eligible draftees who fail to register. *Id.* at 637-39. As the Court explained:

Concededly, the statute’s language is limited, and on its face affects a smaller group than do the regulations. But the fact that the regulations cover individuals not included in the statutory scheme does not render them objectionable. . . . the relevant inquiry is whether the regulations are reasonably related to the purposes of the enabling legislation and can be said to have been within Congress’s contemplation

766 F.2d at 636-37; *United States v. O’Hagan*, 521 U.S. 642, 673 (1997) (upholding S.E.C. regulation prohibiting activity not explicitly prohibited by underlying statute); *Mourning v. Family Publications Service, Inc.*, *supra*, 411 U.S. at 369 (upholding Truth in Lending Act regulation requiring lenders to make disclosures not mandated by Truth in Lending Act itself).¹¹

¹¹ See also *American Trucking Ass’ns v. United States*, 344 U.S. 298, 309-10 (1953) (Court rejects defendant’s attack on power of agency to regulate leasing practices because nothing in the statute expressly delegated power to agency to do so, reasoning that Congress need not, and often cannot, specifically identify “every evil sought to be corrected” in statute); *Clifton v.*

Similar to the regulation validated in *Alexander*, the Opt Out Regulation in 47 C.F.R. § 64.1200(a)(4)(iv) arguably goes beyond the “unsolicited fax advertisements” described in some provisions in the TCPA. However, the Opt Out Regulation is more than reasonably related to the purposes of the TCPA – because the opt-out notice it requires is designed to stop junk fax advertisers from continuing to send (a) faxes that were initially permission-based but are no longer wanted, and (b) faxes that the advertisers contend are permission-based but turn out not to be unsolicited. Moreover, it accomplishes those goals by using precisely the same opt-out notice mechanism already approved for use in connection with unsolicited fax ads. Accordingly, *Chevron*, *Mourning*, a clear line of U.S. Supreme Court and Circuit Court precedent make it clear that the Commission has the power to issue § 64.1200(a)(4)(iv), and did so pursuant to 47 U.S.C. § 227(b).¹²

Federal Election Comm’n, 114 F.3d 1309, 1312 (1st Cir. 1997) (“Agencies often are allowed through rulemaking to regulate beyond the substantive directives of the statute so long as the statute is not contradicted”), *cert. denied*, 522 U.S. 1108 (1998); *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991) (“ . . . a congressional decision to prohibit certain activities does *not* imply an intent to disable the relevant administrative body from taking similar action with respect to activities that pose a similar danger”); *West v. Bergland*, 611 F.2d 710, 721, 723 (8th Cir. 1979) (citing *Mourning* and holding that “[t]he fact that Congress has addressed a specific class of activities does not foreclose an agency, expressly empowered to make necessary rules, from addressing others”), *cert. denied*, 449 U.S. 821 (1980).

¹² To be sure, the Eighth Circuit’s decision in *Nack v. Walburg*, 715 F.3d 680, 682, 687 (8th Cir. 2013), *petition for cert. filed*, 82 U.S.L.W. 3248 (Oct. 15, 2013), states in *dicta* that the Commission’s authority to issue the Opt-Out Regulation was “questionable,” and invited a challenge to that authority by concluding that “[o]n remand, the district court may entertain any requests to stay proceedings for pursuit of administrative determination of the issues raised herein.” The actual holding of the *Nack* decision, however, was only that the Hobbs Act precluded the court from addressing the validity of the Opt-Out Regulation until after the defendant challenged its validity in a proceeding before the Commission. *Id.* at 686-87. Accordingly, the Eighth Circuit did not have occasion to conduct any real analysis of the validity of that Regulation. Plaintiffs submit that if the Eighth Circuit had occasion to address that subject, and had before it the arguments raised in these comments, it would very likely have had different thoughts on that subject.

POINT II

THE OPT OUT REGULATION DOES NOT VIOLATE THE FIRST AMENDMENT

A. The Regulation is not Subject to Strict Scrutiny for First Amendment Purposes

Petitioner Staples, among others, has tried to sound constitutional alarms by urging that the Opt Out Regulation violates the First Amendment, and goes so far as to insinuate that the Regulation should be subject to rigorous “strict scrutiny” analysis for First Amendment purposes. (Staples petition, pp. 12-13). That assertion is baseless, and indeed reckless, as no Court has ever so held in connection with any aspect of the TCPA. The only support Staples has provided for its argument that the Regulation is subject to strict scrutiny analysis are portions of quotes from dissents and concurring opinions in cases having nothing to do with the TCPA, and in which all but one court rejected First Amendment challenges to a variety of statutes and rules. (*Id.*, nn. 51-53).¹³

B. The Regulation is Subject Only to “Reasonable Relation” Scrutiny, and Satisfies that Standard

More accurately, the lowest level of First Amendment scrutiny articulated in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), which held that “an advertiser’s rights are adequately protected as long as disclosure requirements are *reasonably related* to the State’s interest in preventing deception of consumers,” would likely be the scrutiny used by a Court to evaluate the Opt Out Regulation for First Amendment purposes. (Emphasis added). That is because one of the purposes of the Regulation is to prevent those who send out fax advertisements from misleading recipients as to the specific things that a recipients

¹³ The one case that upheld a First Amendment challenge, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), involved a ban on advertising liquor prices, and thus has nothing to do with the Commission’s Opt Out Regulation.

must do in order to opt out of receiving additional fax advertisements. Because the fax advertising proponents lobbied for the specific opt-out requirements set forth in 47 C.F.R. § 64.1200(a)(4)(v) – which provides that a fax advertiser must honor an opt-out request “only if” the request satisfies all those requirements – one of the purposes of the Opt Out Regulation is to prevent fax advertisers from misleading recipients as to what must be done to opt out, and thereby being able ignore an invited deficient opt-out request. Just as fax advertisers must honor opt out requests “only if” the requests contain all the information required by 47 C.F.R. § 64.1200(a)(4)(v), the Regulation very sensibly requires that an opt-out notice must list all of the specific items that must be in a valid opt-out request. 47 C.F.R. § 64.1200(a)(4)(iii). Moreover, the Opt Out Regulation helps to deter unscrupulous fax advertisers from sending unwanted fax ads to consumers under the false pretense of having obtained those consumers’ consent to do so.

In the U.S. Supreme Court precedent most closely on point, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50 (2010), the Court ruled that a statute requiring debt relief agencies to disclose that their services included preparing bankruptcy filings was subject to, and passed constitutional muster under, the lowest level of “reasonable relation” scrutiny. The Court reasoned, as it had in *Zauderer*, that a party’s First Amendment interest “in *not* providing . . . required factual information is ‘minimal’”; that an “advertiser’s rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers”; and that “the disclosures entail only an accurate statement identifying the advertiser’s legal status and the character of the assistance provided, and they do not prevent debt relief agencies like Milavetz from conveying any additional information.” *Id.* at 249-50.

Much like the debt collection disclosure required in *Milavetz*, fax advertisers have a minimal, if not non-existent, interest in *not* providing the opt-out notice requirements of the Opt Out Regulation in a small space at the bottom of the first page their fax ads. Indeed, their only real conceivable interest in not providing that information (other than in losing a very small amount of space at the bottom of the first page of their fax ads) would be an illegal one – preventing persons who had not before consented, or who no longer wished to consent, to receiving fax ads from being able to exercise their rights under the TCPA to avoid receiving further fax ads. Plainly, the “speech” required by the Opt Out Regulation is reasonably related to preventing unscrupulous fax advertisers from misleading recipients on how to properly opt out, and more generally to preventing fax advertisers from transmitting unwanted fax ads.

C. Even If the Opt Out Regulation were Subject to Intermediate Scrutiny, Which Requires that It Be Directly Related to a Substantial Government Interest and Be Tailored to that Interest, the Regulation Satisfies that Standard as well

Finally on this point, although we are unaware of any published federal court decision addressing a First Amendment challenge to the Opt Out Regulation (and Staples has not cited any), the two federal Circuit Courts that have addressed First Amendment challenges to the entire fax advertising regime in the TCPA, *Missouri v. American Blast Fax, Inc.*, 323 F.3d 649, 660 (8th Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004), and *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54, 57 (9th Cir. 1995), have squarely rejected those First Amendment challenges.

In *Missouri v. American Blast Fax*, the Eighth Circuit reversed a district court’s holding that the TCPA’s restrictions on unsolicited faxes violated the First Amendment. 323 F.3d at 652. The Court endorsed the use of the *Central Hudson* test for assessing First Amendment challenges to the TCPA, which provides:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447

U.S. 557, 566 (1980). Applying the *Central Hudson* test, the Eighth Circuit concluded:

47 U.S.C. § 227(b)(1)(C) satisfies the constitutional test for regulation of commercial speech and thus withstands First Amendment scrutiny. There is a substantial governmental interest in protecting the public from the cost shifting and interference caused by unwanted fax advertisements, and the means chosen by Congress to address these harms directly and materially advances the governmental interest. The statute is also narrowly tailored to create a reasonable fit with its objective.

323 F.3d at 660.

The Ninth Circuit came to precisely the same conclusion in *Destination Ventures, Ltd. v. F.C.C.*, *supra*, 46 F.3d at 55. The Court succinctly ruled that “unsolicited fax advertisements shift significant advertising costs to consumers. . . . Therefore, we hold that the ban on unsolicited fax advertisements meets the *Central Hudson* and *Fox* test for restrictions on commercial speech.” *Id.* at 57.¹⁴

There is every reason to believe that a First Amendment challenge to the Opt Out Regulation under the *Central Hudson* test would fail for many of the same reasons that it has

¹⁴ In *Nack v. Walburg*, *supra*, 715 F.3d at 682, a case that held that the Hobbs Act precludes a federal district court from hearing a challenge to the Commission’s authority to promulgate the Opt Out Regulation, the Court refused to address an additional constitutional challenge to the Opt Out Regulation because it had not been raised in the district court. *Id.* at 687. Although the Eighth Circuit went on to remark that “the analysis and conclusion as set forth in *American Blast Fax* would not necessarily be the same if applied to the agency’s extension of authority over permission-based fax advertisements, *id.*, that remark is plainly *dicta*, and we believe that if the constitutionality of the Opt Out regulation were fully addressed and considered, the Eighth Circuit would not have made such a gratuitous remark.

failed against the TCPA itself – simply because both sets of rules are about preventing unwanted faxes from beginning or continuing. Once again, assuming that a fax advertisement constitutes commercial speech, the Opt Out Regulation is motivated by the same “substantial governmental interest in protecting the public from the cost shifting and interference caused by unwanted fax advertisements, and the means chosen by Congress to address these harms directly and materially advances the governmental interest.” Moreover, the Opt Out Regulation simply requires fax advertisers to place a small opt-out notice on their fax ads notifying recipients of the procedure for opting out, and does not in any way restrict the substantive content of a fax advertisement. As such, the Regulation is narrowly tailored to accomplish its salutary purpose. Accordingly, even if the Opt Out Regulation were subject to intermediate, *Central Hudson* scrutiny, it would pass muster under that standard as well.

POINT III

THE COURTS AND THE COMMISSION HAVE PREVIOUSLY REJECTED “SUBSTANTIAL COMPLIANCE” AS A DEFENSE TO THE TCPA’S OPT-OUT NOTICE REQUIREMENTS

As the Commission’s public notice summarized, several petitioners have criticized the requirement that fax advertisers strictly comply with the requirements of the Opt Out Regulation, seeking waivers based on those criticisms. However, the opt-out mechanism devised in the TCPA requires strict compliance, as both the Commission and the courts have found in rejecting “substantial compliance” as a defense to the TCPA.

A. The TCPA and the Opt Out Regulation Explicitly Require Strict Compliance with Opt-Out Requirements Through their “Only If” Language

First, and most importantly, the TCPA and the regulations promulgated thereunder explicitly require that *all* of the opt-out notice information listed in the statute and regulations be included on opt-out notices on fax advertisements. Specifically, 47 U.S.C. § 227(b)(2)(D)

provides that “a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph *only if* [the notice contains] – [a list of specific information].”

(Emphasis added). Similarly, 47 C.F.R. § 64.1200(a)(4)(iii) (which applies to permission-based advertisements through 47 C.F.R. § 64.1200(a)(4)(iv)) requires that “[a] notice contained in an advertisement complies with the requirements under this paragraph *only if* [the notice contains] [a list of specific information].” (Emphasis added).

Any interpretation not requiring strict compliance would be incompatible with the plain meaning of these “only if” provisions itemizing the specific information that must be conveyed in the opt-out notice, and would render that “only if” language superfluous – a result that is impermissible under well accepted rules of statutory and regulatory construction. *E.g.*, *Ransom v. FIA Card Services, N.A.*, 131 S. Ct. 716, 724 (2011); *Leocal v. Ashcroft*, *supra*, 543 U.S. at 12 (“we must give effect to every word of a statute whenever possible”); *Cammarano v. United States*, *supra*, 358 U.S. at 505 (refusing to read language in regulation as surplusage).¹⁵

B. The Commission and the Federal Courts have Rejected a Substantial Compliance Defense

Second, in *In the Matter of Response Card Marketing, Inc.*, 27 F.C.C.R. 3895, 3897 ¶¶ 6, 7 (April 10, 2012), the Commission specifically confirmed that an opt-out notice violates the TCPA if it “does not satisfy *all* of the statutory and regulatory requirements [of the TCPA],” and thereby rejected the notion that a party can avoid liability on the grounds that it substantially complied with some, but not all, of the specific opt-out notice requirements. (Emphasis added). The opt-out notice on the fax at issue in *Response Card* stated: “Fax removals are easy! 24 hour automated service, call 1-888-662-2677 and enter your reference ID . . . and you will be removed

¹⁵ Consistent with the notion that a fax advertiser must strictly comply with all of the requirements of the TCPA, the TCPA is a strict liability statute, *see, e.g.*, *Penzer v. Transportation Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008) (citing cases).

immediately.” *Id.* at 3898, ¶ 8. The Commission found that the opt-out notice violated the TCPA because, among other things, (1) it did not contain a facsimile number to which a recipient could send an opt-out request (*id.* at 3899, ¶ 10); (2) it did not inform the recipient that he or she must provide the particular telephone number of the facsimile machine to which the opt-out request relates (*id.* at 3898, ¶ 9); and (3) it did not inform the recipient that his or her opt-out request would be effective so long as the recipient did not subsequently consent to receiving fax advertisements from the sender (*id.*). Having made these specific findings, the Commission again underscored that because the opt-out notice “did not meet *all* of the [] requirements of the opt-out notice under the established business relationship exception,” the sender could not rely on that exception to shield it from TCPA liability. *Id.* at 3899, ¶¶ 11, 12.

Third, and most recently, a federal district court in the Southern District of New York rejected several defendants’ motion to dismiss based on their argument, notwithstanding that their opt-out notice lacked two of the items required by the Opt Out Regulation, that “substantial compliance with the TCPA’s opt-out requirements is a valid defense.” *Bais Yaakov of Spring Valley v. Alloy, Inc.*, 936 F. Supp.2d 272, 287 (S.D.N.Y. 2013). The Court squarely rejected the defense, ruling that “[b]y not including this information in its opt-out notice, Defendants failed to satisfy the terms of Section 227(b)(2)(D) and Section 64.1200(a)(3)(iii) [now 64.1200(a)(iv)(3)].” *Id.* at 288.

Accordingly, *In the Matter of Response Card Marketing* and *Bais Yaakov of Spring Valley v. Alloy*, together with the language of the TCPA and regulations requiring that *all* of the listed information be included in an opt-out notice, directly undermine any argument that the Commission should now relax its requirement of strict compliance with its Opt Out Regulation.¹⁶

¹⁶ Further, the Commission’s interpretation of the Opt Out Regulation is proper and defensible because under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, *supra*, 467 U.S.

POINT IV

THE PETITIONERS HAVE NOT SATISFIED, AND CANNOT SATISFY, THEIR HEAVY BURDEN TO SHOW SPECIAL CIRCUMSTANCES AND THAT IT WOULD BE IN THE PUBLIC INTEREST FOR THE COMMISSION TO WAIVE OF THE REQUIREMENTS OF THE OPT OUT REGULATION

A number of the petitioners have asked the Commission to retroactively waive the requirements of the Opt Out Regulation. Notwithstanding that the Opt Out Regulation has been in effect for almost eight years, and notwithstanding that the petitioners could have very easily complied with the regulation by putting a few sentences on the bottom of their fax advertisements, as other companies have, these petitioners claim that it is inequitable for them to face the possibility of large damage awards for their failure to abide by the regulation on thousands of occasions. The petitioners have utterly failed to show the extraordinary circumstances required to justify any type of waiver.

The Commission's rules generally provide that "[a]ny provision of the [Commission's] rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown." 47 C.F.R. § 1.3. However, a petitioner requesting a waiver of a Commission rule may not simply make a "generalized plea" for a waiver, but must show "special circumstances," "articulate a specific pleading, and adduce concrete support, preferably documentary" for a waiver. *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 n.9 (D.C. Cir. 1969); *NetworkIP, LLC v. F.C.C.*, 548 F.3d 116, 127 (D.C. Cir. 2008). Moreover, "before the FCC can invoke its good cause exception, it *both* 'must explain why deviation better serves the public interest, *and* articulate the nature of the special circumstances to prevent discriminatory application and to put

837, the Commission's interpretation is consistent with the TCPA and the Constitution, and is not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. Similarly, the Commission's interpretation of the opt-out notice requirements contained in its own regulations, 47 C.F.R. §§ 64.1200(a)(3)(iii), 64.1200(a)(3)(iv), would also have to be upheld because that interpretation is not "plainly erroneous or inconsistent with the regulation[s]." *Auer v. Robbins*, 519 U.S. 452, 461 (1997), *abrogated on other grounds as stated in Kaiser v. At The Beach, Inc.*, No. 08-CV-586-TCK-FHM, 2011 WL 6826577, *14 (N.D. Okla. Dec. 28, 2011).

future parties on notice as to its operation,” *Id.*, quoting *Northeast Cellular Telephone Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). “The reason for this two-part test flows from the principle ‘that an agency must adhere to its own rules and regulations,’ and ‘[a]d hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned, for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action.’” *Id.*, quoting *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, 950-51 (D.C. Cir. 1986).

None of the petitioners has provided concrete evidentiary support for a waiver, much less articulated a public interest that supports granting any waiver of application of the Opt Out Regulation. That is not surprising, as no public interest could be served by allowing fax advertisers not to inform the persons to whom they send their fax advertisements of the only effective method for opting out of receiving future unsolicited faxes. *See* 42 C.F.R. § 64.1200(a)(4)(v) (requiring that a request to opt-out of receiving future fax advertisements must abide by all of the requirements of § 64.1200(a)(3)(v), or else it can be ignored by sender of such fax advertisements). Indeed, the only interest that the petitioners have identified in support of their request for a waiver is their own *self-interest* in not being held financially liable for their thousands of violations of the TCPA – a private interest that is wholly insufficient to support a waiver.

Nor would such a waiver based on the vast number of violations a petitioner may have committed be fair to fax advertisers in general. Granting a waiver on that basis would effectively reward entities that have engaged in massive violations of the law, while leaving other entities that did not violate the law on that scale still open to liability, resulting in precisely the type of

“discriminatory application” of waivers that the Courts have admonished the Commission to avoid. *NetworkIP, LLC v. F.C.C.*, *supra*, 548 F.3d at 127.

Finally on the issue of waiver, some of the petitioners have intimated that it is the Commission’s burden of proof to articulate why it is in the public interest for petitioners to be subject to large financial liability for their thousands of violations of the Opt Out Regulation. To the contrary, and as demonstrated above, it is the *petitioners’* burden to articulate specific reasons, backed up by real evidence, as to why they should be granted any waiver – which they have not.

CONCLUSION

For all the foregoing reasons, the Commission should deny all of the petitions in their entirety.

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Respectfully submitted,

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