Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, DC 20554

In the Matter of:	)
	)
Petition of Best Buy Builders, Inc.	)
For Declaratory Ruling TO Clarify Scope	)
and/or Statutory Basis for	)
Rule 64.1200(a)(3)(iv) and/or for Waiver	)

PETITION OF BEST BUY BUILDERS, INC. FOR DECLARATORY RULING AND/OR WAIVER

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PETITION OF BEST BUY BUILDERS, INC. FOR DECLARATORY RULING AND/OR WAIVER

Pursuant to Section 1.2 of the Federal Communications Commission ("Commission" or "FCC") rules (47 CFR Section 1.2), Best Buy Builders, Inc. ("Petitioner") respectfully requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission's rules does not apply to fax advertisements sent with the prior express consent or permission of the recipient ("solicited faxes"). In the alternative, Petitioner respectfully requests that the Commission clarify that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 USC Section 227(b). If the Commission declines to issue either declaratory ruling, Petitioner respectfully requests that, pursuant to Section 1.3 of the FCC's rules (47 CFR Section 1.3), the Commission grant retroactive waivers of Section 64.1200(a)(4)(iv) with respect to faxes which have been transmitted by Petitioner with the express prior consent or permission of the recipients.

INTRODUCTION AND EXECUTIVE SUMMARY

Petitioner is a small business currently facing a class action lawsuit seeking millions of dollars in damages because it sent faxes to customers who had expressly consented to receive them. The basis for this lawsuit is the Telephone Consumer Protection Act ("TCPA" or the "Act"), which prohibits sending an "unsolicited advertisement" by fax and provides a private cause of action for violation of the statute or implementing rules promulgated by the FCC. The plaintiff suing Petitioner relies on a regulation, Section 64.1200(a)(4)(iv), issued by the Commission in an order implementing amendments to the TCPA. The regulation requires that certain opt-out language appear on the faxes, but its scope is unclear. It is part of a rule expressly limited to *unsolicited* faxes, but confusingly also references recipients *that have agreed* to receive such faxes. Uncertainly as to the meaning of Section 64.1200(a)(4)(iv), as well as whether it should be considered grounded in the TCPA, have led to disputes across the country and numerous petitions filed with this Commission.

Petitioner asks the Commission to resolve this uncertainty by clarifying that Section 64.1200(a)(4)(iv)'s ambiguous language should be limited to unsolicited faxes, as that reading best accords with the TCPA's language and legislative history, and avoids an interpretation that would render the rule unlawful under basic principles of administrative law and the First Amendment. Alternatively, Petitioner asks the Commission to clarify that the statutory basis for Section 64.1200(a)(4)(iv) is not the TCPA. Through either of these actions, he Commission can ensure that its rules are consistent with Congress' intent, in addition to providing much needed guidance to courts and litigants. If the Commission declines to issue either declaratory ruling, Petitioner asks for retroactive waivers of Section 64.1200(a)(4)(iv) with respect to solicited

faxes. Neither the Commission's goals nor the public interest are served by subjecting Petitioner's small business to million dollar lawsuits from plaintiffs who have suffered no actual harm.

BACKGROUND

The TCPA prevents the use of a telephone facsimile machine to send an "unsolicited advertisement".(47 USC Sections 227(a)(5) and (b)(1)(C)). Since the passage of the TCPA in 1991, Congress has exempted solicited fax advertisements from regulation under the Act. Specifically, the TCPA defines an "unsolicited advertisement" 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*." 47 USC Section 227(a)(5). Through its enactment of the Junk Fax Prevention Act of 2005 ("JFPA"), Congress amended the TCPA to permit the transmission of unsolicited faxes to a person with whom the sender has an established business relationship ("EBR")so long as such an advertisement contains an "opt-out" notice. 47 USC Sections 227(b)(1)(C)(i)-(iii). Importantly, however, the TCPA, as amended, continues to cover only fax advertisements that are transmitted without an individual's "express invitation or permission". Thus, by its terms, the TCPA's general prohibition against fax advertisements and the exception to that prohibition (allowing faxes to be sent pursuant to an EBR, if they contain an appropriate opt-out notice) simply do not apply to faxes transmitted with the recipient's prior express consent.

Following passage of the JFPA, the Commission sought comment on proposed implementing regulations and, in 2006, issued a final order ("JFPA Order") that "amend[ed] the Commission's rules on unsolicited facsimile advertisements". Despite the TCPA's express

limitation to unsolicited faxes, one of the rule adopted by the Commission, Section 64.1200(a)(4)(iv), references opt-out for faxes "sent to a recipient that *has* provided prior express invitation and permission". (47 CFR Section 64.1200(a)(4)(iv)). The scope of that provision is unclear, however, as it is confusingly worded as part of a rule that also references *unsolicited* faxes. The JFPA Order also contains contradictory language regarding the scope of Section 64.1200(a)(4)(iv), simultaneously explaining that " the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements" and that an opt-out notice is required for solicited faxes "to allow consumers to stop unwanted faxes in the future". The administrative record sheds no light on the scope of the rule because the Commission never sought comment on applying the TCPA to solicited faxes. Although the Office of the General Counsel has argued that Section 64.1200(a)(4)(iv) should be read to apply to solicited faxes, the Commission itself has yet to opine on the issue.

Meanwhile, Section 64.1200(a)(4)(iv), has had unintended and unjust consequences, subjecting Petitioner, as well as numerous others, to lawsuits seeking damages for engaging in consensual communications with their customers which are entirely permissible under the TCAP. Indeed, notwithstanding the facts that solicited faxes are expressly excluded from coverage under the TCPA, plaintiff suffering no actual harm have seized upon Section 64.1200(a)(4)(iv)'s reference to solicited faxes to bring class action lawsuits under Section 227(b) of the TCPA, which authorizes a private right of action to recover statutory damages based on a violation of "this subsection or the regulations prescribed under this subsection".(47 USC Section 227(b)(3)(A)-(B)). Many of these lawsuits seek millions of dollars in damages,

despite the fact that plaintiffs expressly agreed to receive the faxes. Instead, these lawsuits are premised solely on the fact that the fax advertisements at issue do not contain opt-out notices or contain opt-out notices that plaintiffs deem inadequate.

Petitioner is a defendant in one such suit. Best Buy Builders, Inc. is a small roofing contractor in the St. Louis, MO metropolitan area. Best Buy sent one fax to the named plaintiff, which expressly consented to receipt of the fax and gave Best Buy Builder's telemarketer its fax number for that purpose. Nevertheless, Best Buy Builders is now facing a putative class action lawsuit, alleging millions of damages, a claim for which it has no insurance coverage and no ability to pay, because faxes Best Buy sent with express permission did not contain an opt-out notice. As a result, Best Buy is subjected to a million dollar purported class action lawsuit even though it received prior express consent to send the fax in question.

Petitioner has argued to the St. Louis County Circuit Court that the TCPA cannot provide a basis for liability where, as here, the plaintiff expressly agreed to receive the fax advertisement at issue. In light of the issue presented by this petition and other similar petitions addressing the same issue, Petitioner has asked the court to stay that litigation until the Commission addresses this and other petitions. The court has agreed to do so.

ARGUMENT

1. The Commission Should Issue A Declaratory Ruling To Eliminate Uncertainty Regarding The Scope of and Statutory Basis for Section 64.1200(a)(4)(iv)

Congress has granted to the Commission the "sound discretion" to issue a declaratory ruling in order to "terminate a controversy or remove uncertainly". (5 USC Section 554(e)) Here, there is both controversy and uncertainty over the scope of and statutory basis for Section 64.1200(a)(4)(iv). That uncertainty is confirmed both by the spate of lawsuits that have proliferated around the country involving solicited faxes and the numerous petitions that have been filed with the Commission. Accordingly, the Commission should issue a declaratory ruling to clarify that fax advertisements transmitted after express consent was obtained from the recipient are not required to contain an opt-out notice, or, in the alternative, that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 USC Section 227(b).

A. The Commission Should Clarify That Section 64.1200(a)(4)(iv) Does Not Apply to Solicited Faxes

The Commission should interpret Section 64.1200(a)(4)(iv) to apply only to unsolicited faxes for at least three reasons: (1) the plain language of the rule and the order promulgating that rule is unclear on the provision's scope, and excluding solicited faxes best comports with the text and legislative history of the TCPA; (2) interpreting Section 64.1200(a)(4)(iv) to apply to solicited faxes would exceed the Commission's statutory authority under the Act, and (3) reading the provision to reach solicited faxes would violate the First Amendment.

1. The Commission should interpret Section 64.1200(a)(4)(iv) to apply only to unsolicited faxes because the language of the rule is unclear in its scope, and excluding solicited faxes best comports with Congress' s intent to regulate *unsolicited* faxes.

In relevant part, Section 64.1200(a)(4)(iv) states as follows:

> No person or entity may:
>
> …Use a telephone facsimile machine, computer, or other device to send an unsolicited Advertisement to a telephone facsimile machine, unless-
> …A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements of (a)(4)(iii) of this section." (47 CFR Section 64.1200(a)(4)(iv))

Given the punctuation and varied sentence structure of the rule, the plain text of Section 64.1200(a)(4)(iv) does not make sense as drafted. And because the rule contains references to both unsolicited faxes and faxes sent with express permission, it is impossible to tell from the text alone whether the rule is intended to reach solicited as well as unsolicited faxes.

The JFPA Order is equally confusing. The Order makes almost no mention of the rule codified in Section 64.1200(a)(4)(iv)-there is just one short paragraph mentioning the new rule and absolutely no explanation or discussion of the basis for that rule, other than that an opt-out notice is required "to allow consumers to stop unwanted faxes in the future" But as the Eighth Circuit has recognized, the JFPA Order is internally contradictory, because elsewhere the Commission explained that the "opt-out notice requirement only applies to communications that constitute unsolicited advertisements". *Nack v. Walberg*, 715 F 3d (8th Cir. 201) Given these ambiguities, there is legitimate uncertainty regarding whether Section 64.1200(a)(4)(iv) applies to solicited faxes.

The Commission should end that uncertainty and make clear that Section 64.1200(a)(4)(iv) does not apply to fax advertisements that were sent with the prior express consent of the recipient, as that interpretation best accords with the test and history of the TCPA. As explained above, the TCPA is limited to "unsolicited advertisement[s]", the definition of

which expressly excludes any fax sent with the recipient's "prior express invitation or permission". Likewise, the legislative history of the original TCPA enactment makes clear that the purpose of the Act was to address the problem of "*unsolicited"* fax advertisements. And he legislative history of the JFPA is no different, showing that Congress meant only to "[c]reate a limited [EBR] statutory exception to the current prohibition against the faxing of unsolicited advertisements", and for those "unsolicited advertisements" to require "notice of a recipient's ability to opt out of receiving any future faxes containing unsolicited advertisements". There is no indication whatsoever that Congress was concerned about communication between businesses and their consenting customers. It is thus unsurprising that the Commission never provided notice, in its notice of proposed rulemaking or elsewhere, that it was even considering applying any regulation to solicited faxes. Accordingly, the Commission should interpret Section 64.1200(a)(4)(iv) to apply only to unsolicited faxes.

2. Moreover, because Section 227(b) of the TCPA is limited to unsolicited advertisements, interpreting Section 64.1200(a)(4)(iv) to apply to solicited faxes would render that regulation unlawful.

By excluding solicited faxes from the reach of Section 227(b), Congress has limited the Commission's regulatory jurisdiction to unsolicited fax advertisements. Indeed, the Commission itself had recognized-in the JFPA Order and elsewhere-that the TCPA is limited to unsolicited fax advertisements. If Section 64.1200(a)(4)(iv) were nevertheless applied to solicited faxes, then the rule must be invalidated as *ultra vires* because, simply put, the TCPA does not give the Commission authority to regulate faxes transmitted with the prior express consent of the recipient. Interpreting Section 64.1200(a)(4)(iv) of the Commission's rules to apply only to

unsolicited fax advertisements is thus the only proper reading of the rule.

3. Finally, applying Section 64.1200(a)(4)(iv) to faxes sent with prior express consent would violate the First Amendment, which provides an independent reason to interpret the provision to apply only to *unsolicited* fax advertisements.

Under well-established Supreme Court precedent, truthful commercial speech may be burdened only where the government can show that the proposed restriction advances a substantial governmental interest and that the regulation "is not more extensive than necessary to serve that interest". The Commission has not even tried to meet its burden of building a record to justify applying Section 64.1200(a)(4)(iv) to solicited advertisements, nor has it articulated how requiring an opt-out notice for a solicited fax directly advances an important governmental interest or why any such interest could not be as well served by a less restrictive requirement. As the Eighth Circuit has suggested and other petitions to the Commission have explained, the balancing of interests regarding unsolicited faxes (the regulation of which has withstood First Amendment scrutiny) and solicited faxes (which the Commission has never tried to defend) is different. Indeed, the government's interest is much weaker where, as here, the consenting customer has already agreed to receive the advertisement and therefore has a simple and effective method of communicating an opt-out request to the sender, And even assuming that the aame government interest articulated in the context of unsolicited faxes could support the application of Section 64.1200(a)(4)(iv) to solicited faxes (i.e. the government's interest in preventing advertising cost-shifting from businesses to consumers), the opt-out requirement is hardly necessary to meet that interest.

B. Alternatively, the Commission Should Clarify that the Statutory Basis of Section 64.1200(a)(4)(iv) Is Not 47 USC Section 227(b)

If the Commission declines to interpret Section 64.1200(a)(4)(iv) to exclude fax advertisements for which the sender had obtained prior express consent, the Commission should at least issue a declaratory ruling that Section 227(b) of the TCPA is not the statutory basis for its rule. Such a ruling would clarify the Commission's authority for Section 64.1200(a)(4)(iv) while making clear to litigants and the courts that solicited faxes sent without the precise opt-out language described in the Commissions' rules cannot form the basis of a private action under the TCPA.

The statutory basis for Section 64.1200(a)(4)(iv) is not clear. The Commission cited eleven different statutory provisions in the JFPA Order as authority for the multiple amendments it made to Section 64.1200, of which the addition of Section 64.1200(a)(4)(iv) was only one. It is therefore unclear whether the Commission relied upon its authority under Section 227 (which contains the private right of action provision) in promulgating Section 64.1200(a)(4)(iv), or on one of the other cited provisions.

A clarification by the Commission that its basis for promulgating Section 64.1200(a)(4)(iv) was some statutory provision other than Section 227(b) would serve both the Commission's interest and promote the public's interest in fairness and justice. By making clear that Section 64.1200(a)(4)(iv) is not grounded in the Commission's authority under Section 227(b), the Commission could assist small businesses by removing the threat of massive class action lawsuits based solely on communications with consenting customers. At the same time, articulating a different statutory basis for the rule would preserve the Commission's ability to enforce the rule as appropriate using its broad, flexible enforcement powers. Purported violations

of the rule where there is no actual harm could then still be addressed, but would not be subject to million dollar statutory damage claims. By contrast, declining to clarify the basis of Section 64.1200(a)(4)(iv) leaves the courts to guess at the Commission's exercise of jurisdictional authority, complicating the class action suits that are pending around the country and prejudicing litigants who could otherwise have a clear defense.

II. Alternatively, Petitioner Should Be Granted Waivers

If the Commission declines to issue a declaratory ruling as discussed above, then Petitioner respectfully requests a retroactive waiver of Section 64.1200(a)(4)(iv) for fax advertisements sent since the effective date of the rule for which Petitioner obtained prior express consent. Section 1.3 of the Commission's rules permits the Commissions to grant a waiver for good cause shown, and the Commission should grant a waiver if, after considering all relevant factors, a waiver is in the public interest. Among other things, a waiver is appropriate where "[t]he underlying purpose of the rule(s) would not be served" or "unique or unusual factual circumstances" mandate a waiver to avoid an application of the rule that would be "inequitable, unduly burdensome or contrary to the public interest". Here, a waiver is appropriate for both reasons.

The only purpose the Commission has articulated for Section 64.1200(a)(4)(iv) is that an opt-out notice is required "to allow consumers to stop unwarranted faxes in the future". Here, Petitioner sent faxes to individuals that had expressly agreed to accept them. There are no allegations that the recipients were unaware that they could opt out or that any opt out request was not honored in a timely way. Indeed, plaintiff does not even allege that it actually wanted to opt out of the advertisements. Thus, even assuming that the goal of Section 64.1200(a)(4)(iv) is

to allow customers to easily revoke prior express consent to receive fax advertisement, that goal would not be served by applying the rule to Petitioner in these circumstances.

At the same time, requiring strict compliance with Section 64.1200(a)(4)(iv) with respect to solicited faxes in these circumstances would be inequitable, unduly burdensome and contrary to the public interest. Petitioner is facing a million dollar class action lawsuit for an alleged failure to include appropriate opt out notices on faces sent to plaintiff who has suffered no actual harm. Where, as here, recipients of fax advertisements had explicitly agreed to receive them, had the means and ability to revoke their consent at any time, and never expressed any interest or desire to do so, requiring strict compliance with Section 64.1200(a)(4)(iv)would b both tremendously burdensome and inequitable. It would be contrary to the public interest, as exposing fax senders to massive class action liability for engaging in consensual communications with their customers would work an economic injustice on small businesses and the consumers they serve.

CONCLUSION

For the reasons stated above, the Commission should issue a declaratory ruling clarifying (1) that Section 64.1200(a)(4)(iv) of the Commission's rules applies only to unsolicited fax advertisements and/or (2)that Section 227(b) of the TCPA is not the statutory basis for Section 64.1200(a)(4)(iv) of the Commission's rules. In the absence of such a ruling, the Commission should grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any fax sent by Petitioner with the recipient's prior express consent.

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