

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

In the Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Petition of Cannon & Associates LLC d/b/a)	
Polaris Group for Declaratory Ruling)	
and/or Waiver)	

COMMENTS OF CANNON & ASSOCIATES LLC D/B/A POLARIS GROUP

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EXECUTIVE SUMMARY

Cannon & Associates LLC d/b/a Polaris Group (“Polaris”) is currently facing a putative class action lawsuit as a result of sending a total of nine identified faxes over a period of 18 months – only one of which the parties agree was an “advertisement” – to a recipient that had consented to receive them. Moreover, after the plaintiff opted out of receiving faxes at a particular number, the plaintiff never received a single additional fax at that number. As the basis for this lawsuit, the plaintiff, Pines Nursing Home (77), Inc. (“Pines”), relies on the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005 (the “JFPA”) (together, the “TCPA”), and the Commission’s implementing rules. At issue in this lawsuit is whether those solicited faxes violated the JFPA or the Commission’s implementing rules.

Polaris files these comments in support of its Petition and respectfully reiterates its request that the Commission address this narrow issue with an appropriate declaratory ruling, or in the absence of such a ruling, provide Polaris with a retroactive waiver of Section 64.1200(a)(4)(iv) from the effective date of the regulation for any solicited fax it sent with the consent of the recipient.

At issue in this case is a confusing and inconsistent Commission rule requiring that certain opt-out notification language appear on faxes, but its scope and applicability are unclear. Polaris urges the Commission to resolve this uncertainty by clarifying that Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements. Such a clarification would resolve numerous petitions filed with the Commission, including Polaris’s Petition that is the subject of these comments.

Even if the Commission were to decline to clarify that Section 64.1200(a)(4)(iv) does not apply to solicited faxes, Polaris urges the Commission to clarify that the faxes sent by Polaris in this case satisfy the opt-out notice requirements under Sections 64.1200(a)(4)(iii) and (iv). Polaris maintains that of the nine identified faxes at issue in this case, eight were informational and only a single fax was an advertisement. All of the nine identified faxes – including those that were

informational, and which did not require an opt-out notice under any interpretation of the Commission's rules – contained on their first page a clear and conspicuous opt-out notice. This notice substantially complied with the requirements of Section 64.1200(a)(4)(iii), and demonstrably allowed the recipient of the fax to opt out. Indeed, Pines used the opt-out notice to successfully opt out of receiving future fax advertisements from Polaris at the requested opt-out fax number. Accordingly, even if the Commission declines to clarify that Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements, Polaris requests that the Commission issue a declaratory order clarifying that the opt-out notice requirements of Section 64.1200(a)(4)(iii) of the Commission's rules are satisfied when a solicited fax advertisement includes an opt-out notice that substantially complies with the requirements of that rule section and demonstrably allows the recipient of the fax to successfully opt out.

Alternatively, Polaris requests that the Commission, at a minimum, issue a declaratory ruling that Section 227(b) of the Communications Act is not the statutory basis for Section 64.1200(a)(4)(iv). Such a ruling would clarify the Commission's authority for this rule section while making clear that solicited faxes sent without the precise opt-out notification language requirements listed in the rule cannot form the basis of a private action under the TCPA.

Finally, in the absence of any of the declaratory rulings requested above, Polaris requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) from the effective date of the regulation for any solicited fax sent by Polaris with the consent of the recipient.

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To: The Commission

COMMENTS OF CANNON & ASSOCIATES LLC D/B/A POLARIS GROUP

Cannon & Associates LLC d/b/a Polaris Group (“Polaris”) respectfully submits these comments in support of its Petition for Declaratory Ruling and/or Waiver in the above-captioned proceedings.¹ Polaris urges the Commission to 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 consent of the recipient. In the alternative, Polaris requests the Commission to clarify that the requirements of Section 64.1200(a)(4)(iii) of the Commission’s rules are satisfied when a solicited fax includes an opt-out notice that substantially complies with the requirements of that rule section and demonstrably allows the recipient of the fax to successfully opt out. As a second alternative, Polaris asks that the Commission clarify that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b). Polaris further requests that, in the absence of one of these three declaratory

¹ Cannon & Associates LLC d/b/a Polaris Group, *Petition for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed May 15, 2014)(“Polaris Petition” or “Petition”); *see also Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, Public Notice DA 14-734, May 30, 2014, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0530/DA-14-734A1.pdf.

rulings and pursuant to Section 1.3 of its rules,² the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) from the effective date of the regulation for any solicited fax sent by Polaris.

I. INTRODUCTION

Polaris is currently facing a putative class action lawsuit as a result of sending a total of nine identified faxes – only one of which Polaris agrees was an advertisement – to a recipient that had consented to receive them.³ As the basis for this lawsuit, the plaintiff, Pines Nursing Home (77), Inc. (“Pines”), relies on the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005 (the “JFPA”) (together, the “TCPA”),⁴ and more specifically, the Commission’s implementing rules.

Specifically at issue in this case is Section 64.1200(a)(4)(iv) of the Commission’s implementing rules. This rule section requires that opt-out language appear on fax advertisements, but its scope and applicability are unclear. This uncertainty has led to legal disputes, numerous petitions filed with the Commission, and confusion regarding application of the rule’s opt-out notice requirements. Accordingly, consistent with the TCPA’s text and legislative history, in its Petition, Polaris joins a growing number of petitioners urging the Commission to resolve this uncertainty by clarifying that Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements.⁵

² 47 C.F.R. § 1.3.

³ *Pines Nursing Home (77), Inc. v. RehabCare Group, Inc., et al.*, No. 14-20039 (S.D. Fla.). In its Complaint, Pines disputes that it provided prior express consent to receive fax advertisements from Polaris. Pines also asserts that all of the faxes sent by Polaris were advertisements. Polaris maintains that Pines provided consent to receive such faxes, and asserts that all but one of the nine identified faxes were informational and not advertisements. These disputed issues, however, will be resolved by the court and do not impact the issues addressed in this petition.

⁴ 47 U.S.C. § 227.

⁵ See, e.g., *Petition of Douglas Paul Walburg and Richie Enterprises, LLC for Declaratory Ruling and/ or Waiver*, CG Docket Nos. 02-278, 05-338 (filed Aug. 19, 2013); *Petition of Futuredontics, Inc. for Declaratory Ruling and/ or Waiver*, CG Docket Nos. 02-278, 05-338 (filed Oct. 18, 2013); *Petition of All Granite & Marble*

Furthermore, as explained in its Petition, even if the Commission were to decline to clarify that Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements, Polaris urges the Commission to clarify that the solicited fax advertisement it sent in this case satisfies the opt-out notice requirements under Sections 64.1200(a)(4)(iii) and (iv).⁶ All of the identified faxes that were attached as exhibits to the lawsuit filed by Pines contained, on their first page, a clear and conspicuous opt-out notice. This opt-out notice substantially complied with the requirements of Section 64.1200(a)(4)(iii), and demonstrably allowed the recipient of the faxes to opt out. Indeed, Pines used the opt-out notice to successfully opt out of receiving any future faxes from Polaris at the requested opt-out fax number. Accordingly, even if the Commission declines to clarify that Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements, Polaris requests that the Commission issue a declaratory order clarifying that the opt-out notice requirements of Section 64.1200(a)(4)(iii) of the Commission's rules are satisfied when a solicited fax includes an opt-out notice that substantially complies with the requirements of that rule section and demonstrably allows the recipient of the fax to successfully opt out.

Alternatively, Polaris requests that the Commission, at a minimum, issue a declaratory ruling that Section 227(b) of the Communications Act is not the statutory basis for Section 64.1200(4). Such a ruling would clarify the Commission's authority for this rule section and make clear that

Corp. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278, 05-338 (filed Oct. 28, 2013); *Purdue Pharma L.P., Petition for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed Dec. 12, 2013); *Petition of TechHealth, Inc. for Declaratory Ruling and/or Waiver*, CG Docket No. 02-278 (filed Jan. 6, 2014); *Petition of Crown Mortgage Company for Declaratory Rulings and/or Waiver of the "Opt Out" Requirement*, CG Docket Nos. 02-278, 05-338 (filed Feb. 21, 2014), *Petition of Magna Chek, Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed Mar. 28, 2014); *Petition for Declaratory Ruling and/or Waiver of Masimo Corp.*, CG Docket Nos. 02-278, 05-338 (filed Apr. 1, 2014); *Petition of S&S Firestone, Inc. d/ b/ a S&S Tire for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed May 7, 2014); Polaris Petition at pgs. 6-9.

⁶ Polaris has stated that of the nine identified solicited faxes at issue, eight were informational and only a single fax was an advertisement. *See* Amended Answer and Affirmative Defenses of Defendant Cannon & Associates, LLC, Claim of Unconstitutionality, No.1:14-20039, Document 39, at 5 (filed March 26, 2014); Petition at pgs. 9-11.

solicited faxes sent with opt-out language that substantially complies with the Commission’s rules cannot form the basis of a private action under the TCPA.

Finally, in the absence of any of the declaratory rulings requested above, Polaris requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) from the effective date of the regulation for any solicited fax sent by Polaris.

II. BACKGROUND

The TCPA prohibits, under certain circumstances, the use of a fax machine to send an “unsolicited advertisement.”⁷ An “unsolicited advertisement” is “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.”⁸ The JPFA applies expressly only to *unsolicited* fax advertisements, and not to “all” fax advertisements – accordingly, the TCPA’s general prohibition against fax advertisements does not apply to solicited faxes.

After passage of the JFPA, the Commission adopted rules implementing the statute’s requirements. Even though the TCPA expressly applies only to unsolicited faxes, the Commission adopted a rule indicating that even solicited fax advertisements must comply with the opt-out notice requirements of Section 64.1200(a)(4)(iii).

Since adoption of Section 64.1200(a)(4)(iv), plaintiffs have seized on the ambiguity of this rule section to bring numerous class action lawsuits under Section 227(b) of the TCPA, which authorizes a private right of action.⁹ Such lawsuits have been brought against legitimate companies for engaging in consensual communications where the fax recipients had provided consent to receive faxes. Many of these class action lawsuits seek millions of dollars in damages based solely on

⁷ 47 U.S.C. §§ 227(a)(5) & (b)(1)(C).

⁸ 47 U.S.C. § 227(a)(5).

⁹ 47 U.S.C. § 227(b)(3)(A)-(C).

the ambiguity of Section 64.1200(a)(4)(iv) and under the theory that the *solicited* faxes at issue contained opt-out notices that did not strictly meet each technical specification listed under Section 64.1200(a)(4)(iii), even when the process for opting out is clear and the notice is conspicuous (as in the case of Polaris, as detailed in its Petition).¹⁰

As previously noted, Polaris is currently subject to such a lawsuit. Polaris is a Tampa-based company with approximately 50 employees that provides consulting services to skilled nursing facilities (“SNFs”).

The identified faxes sent by Polaris to Pines – as well as virtually all other faxes sent by Polaris to other SNFs – contained an opt-out clause stating: “To be removed from our fax list, please call 1-800-404-2972 and follow the prompts or fax us at 1-813-886-6045.” The opt-out clause was (a) on the first page of the fax; (b) clear and conspicuous; (c) written in plain English; and (4) informed each SNF of a toll-free way to opt out 24 hours a day from receiving future faxes. The opt-out clause worked and worked well. Of the 15,089 SNFs that were on the master list, 6,749 SNFs opted out, including Pines. The opt-out clause clearly served its purpose. Yet Pines claims that the opt-out language is not sufficient under 47 C.F.R. §§ 64.1200(a)(4)(iii) and (iv).

Polaris sent a single fax advertisement to Pines, and that fax was solicited.¹¹ Pines opted out on January 2, 2013. After January 2, 2013, Pines received no more fax advertisements from Polaris at the requested opt-out fax number, a testament to the efficacy of Polaris’s opt-out process.

Despite the fact that Pines had consented to receive such faxes, and despite Pines’ successful use of the opt-out notice on the first page of the faxes, Pines asserts that Polaris failed to satisfy the

¹⁰ Petition at pg. 5.

¹¹ Pines and Polaris disagree regarding whether the other eight faxes at issue (which involved information regarding changes in Medicare reimbursement and related training through a seminar) were “advertisements,” and also disagree regarding whether the faxes were solicited or unsolicited. *See* Amended Answer and Affirmative Defenses of Defendant Cannon & Associates, LLC, Claim of Unconstitutionality, No.1:14-20039, Document 39, at 5 (filed March 26, 2014); *see also supra*, n. 3.

opt-out notice requirements under the Commission’s rules. Pines received zero faxes at the requested opt-out fax number after it opted out in the over 10 months before it decided to sue Polaris.

As explained in the Petition, the issue of whether Section 64.1200(a)(4)(iv) applies to solicited faxes is the subject of a recent Eighth Circuit Court of Appeals decision, *Nack v. Walburg*.¹² In *Nack*, the Eighth Circuit recognized that “it is questionable whether the regulation at issue (thus interpreted) properly could have been promulgated under the statutory section that authorizes a private cause of action,” but the court found that the Hobbs Act precluded it from holding the regulation invalid outside of the statutory procedure mandated by Congress.¹³ The court, however, indicated that the defendants in *Nack* might obtain relief from the Commission.¹⁴ Subsequently, the defendants in that case moved to stay the litigation and filed a Petition for Declaratory Ruling and/or Waiver with the Commission.¹⁵

Polaris similarly asks the Commission to issue one of the declaratory rulings detailed in its Petition and reiterated herein or, in the alternative, retroactively waive Section 64.1200(a)(4)(iv) from the effective date of the regulation for any fax sent by Polaris with the consent of the recipient.

III. ARGUMENT

A. The Commission Should Clarify That Section 64.1200(a)(4)(iv) Does Not Apply to Faxes Sent With the Consent of the Recipient.

The Commission should issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) does not apply to solicited faxes for the following reasons: (i) the plain language of the rule and the

¹² Petition at pgs. 5-6; 715 F.3d 680 (8th Cir. 2013).

¹³ *Id.* at 682.

¹⁴ *Id.* at 687.

¹⁵ *Petition of Douglas Paul Walburg and Richie Enterprises, LLC for Declaratory Ruling and/or Waiver* (filed Aug. 19, 2013) (“Walburg Petition”).

Commission's order implementing the rule are ambiguous with respect to the provision's scope and applicability; (ii) applying Section 64.1200(4)(iv) to faxes sent with the consent of the recipient would exceed the Commission's authority under the Communications Act; and (iii) interpreting the provision to apply to solicited faxes would raise significant First Amendment concerns.

- i. **The plain language of Section 64.1200(a)(4)(iv) and the Commission's implementing order are unclear in their scope and applicability; excluding solicited faxes is consistent with the express statutory language of the TCPA and Congress's intent to regulate unsolicited faxes.**

Given the punctuation and inconsistent sentence structure of Section 64.1200(a)(4)(iv), the rule is confusing and does not make sense as drafted. In relevant part, the rule states:

No person or entity may: ...

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

A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph a(4)(iii) of this section.¹⁶

Given the confusing references in the rule, it is impossible to decipher solely from the rule's plain text whether the rule is intended to reach solicited faxes.

Furthermore, the Commission's order promulgating this rule is also inconsistent with the rule at issue.¹⁷ The *JFPA Order* explicitly confirms that "the facsimile advertising rules apply to a fax communication that constitutes an '*unsolicited advertisement*' as defined in the TCPA."¹⁸ And in a separate section, the *JFPA Order* also explicitly confirms that "the opt-out notice requirement only

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

¹⁷ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) ("*JFPA Order*").

¹⁸ *JFPA Order* at ¶ 44 (emphasis added).

applies to communications that constitute *unsolicited advertisements*.”¹⁹ Yet later, the *JFPA Order* indicates that the opt-out notice requirements would apply to solicited fax advertisements sent to consumers from whom they received permission or consent, but that the applicable notice for a solicited fax advertisement would only be required to contain the sender’s “opt-out notice” and “contact information.”²⁰ Based on the ambiguous text of Section 64.1200(a)(4)(iv) and the inconsistency with the *JFPA Order*, as well as the inconsistency among various sections of the *JFPA Order*, it is impossible to decipher whether or not this rule section applies to solicited fax advertisements. The Commission should resolve this confusion by clarifying, consistent with the express text of the TCPA that Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements.

Furthermore, nothing in the TCPA’s text or legislative history indicates that Congress intended to apply TCPA requirements to faxes sent with the recipients’ consent. Moreover, the Commission never indicated in its notice of proposed rulemaking implementing the JFPA provisions of the TCPA that it was considering applying Section 64.1200(a)(4)(iv) or any other regulation to faxes sent with the recipients’ consent. Accordingly, as Polaris explained in its Petition, the Commission should clarify that Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements.²¹

¹⁹ *Id.* at ¶ 42, n.154 (emphasis added).

²⁰ *Id.* at ¶ 48.

²¹ Petition at pgs. 6-9.

ii. The Commission lacks the statutory authority to apply Section 64.1200(a)(4)(iv) to solicited faxes.

The Commission lacks the statutory authority to apply Section 64.1200(a)(4)(iv) to solicited faxes.²² The Commission itself has recognized that the TCPA’s scope is limited to unsolicited fax advertisements.²³ Accordingly, as Polaris also emphasized in its Petition, the Commission should clarify that application of Section 64.1200(a)(iv)(4) to solicited faxes is impermissible under the Commission’s statutory authority.²⁴

iii. Applying Section 64.1200(a)(4)(iv) to solicited faxes raises significant First Amendment concerns.

Finally, as Polaris highlighted in its Petition, the Supreme Court has made clear that truthful commercial speech may be burdened only where the government can show that the proposed restriction directly advances a substantial government interest and that the regulation “is not more extensive than is necessary to serve that interest.”²⁵ Here, the Commission has failed to meet this standard with respect to applying Section 64.1200(a)(4)(iv) to regulate solicited fax advertisements. Indeed, the Commission has not even attempted to build a record to justify application of this rule section to solicited fax advertisements, and has not explained how applying the opt-out notice requirements to solicited fax advertisements would directly advance an important government interest or why a less burdensome requirement could not serve that interest. Because the Commission has not met its First Amendment burden of justifying the application of Section

²² See, e.g., *Am. Library Ass’n v. FCC*, 406 F.3d 689, 705 (D.C. Cir. 2005) (“[T]he Commission can only issue regulations on subjects over which it has been delegated authority by Congress.”); *ACLU v. FCC*, 823 F.2d 1554, 1571 (D.C. Cir. 1987) (where Congress has addressed a question with a “specific statutory provision,” the Commission lacks the authority to “weigh in” with a contrary regulation on the same subject).

²³ See, e.g., *JFPA Order* at ¶¶ 1-3, 7.

²⁴ Petition at pg. 8.

²⁵ Petition at pg. 8; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

64.1200(a)(4)(iv) to solicited fax advertisements, the Commission should clarify that the scope of the rule does not apply to solicited fax advertisements.

B. Alternatively, the Commission Should Clarify That the Requirements of Section 64.1200(a)(4)(iii) Are Satisfied When a Fax Includes an Opt-Out Notice That Substantially Complies With the Rule’s Requirements, and Demonstrably Allows the Fax Recipient to Opt Out.

Even if the Commission declines not to clarify that Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements, as Polaris urged in its Petition, the Commission should clarify that the opt-out notice requirements of Section 64.1200(a)(4)(iii) are satisfied when the faxes in question include an opt-out notice that substantially complies with the rule section and demonstrably allows the recipient to successfully opt out.²⁶ This clarification would be consistent with the Commission’s statement in the *JFPA Order* that solicited fax advertisements are required to include only the sender’s “opt-out notice” and “contact information.”²⁷

The identified solicited fax advertisement sent by Polaris in this case – as well as the eight informational faxes that did not require an opt-out notice under any interpretation of the Commission’s rules – fully satisfied the Commission’s standard set forth in the *JFPA Order* by including Polaris’s opt-out notice and contact information. Moreover, the faxes substantially met the requirements of Section 64.1200(a)(4)(iii). Indeed, the faxes included on their first page an opt-out notice that read: “To be removed from our fax list, please call 1-800-404-2972 and follow the prompts or fax us at 1-813-886-6045.” The notice substantially complied with the requirements of 64.1200(a)(4)(iii) because it was clear and conspicuous on the first page of the fax, written in plain English, and informed the recipient of a toll-free method to opt out 24 hours a day from receiving future faxes. Additionally, the opt-out notice was demonstrably effective as numerous fax recipients

²⁶ Petition at pgs. 9-11.

²⁷ *JFPA Order* at ¶ 48.

successfully opted out of receiving future fax advertisements from Polaris at the requested opt-out fax number by following those clear and simple instructions.

Furthermore, while the opt-out notice did not include every detail of Section 64.1200(a)(4)(iii), the opt-out notice met the core requirements and fulfilled the fundamental purpose of the rule. As the Commission recently explained, the purpose of requiring a solicited fax advertisement to include an opt-out notice would be “to ensure that the consumer has the necessary contact information to opt out of future fax transmissions, and to ensure that the fax sender can account for all such requests and process them in a timely manner by ensuring that consumers use the contact information specified by the sender on the opt-out notice.”²⁸ The solicited fax advertisements sent by Polaris clearly satisfy this standard, as demonstrated by Pines and other fax recipients successfully opting out of receiving future fax advertisements from Polaris at the requested opt-out fax number.

As Polaris noted in its Petition, in other contexts, the Commission has recognized that “absolute compliance with each component of the rules may not always be necessary to fulfill the purposes of the statute.”²⁹ In this case, where the opt-out notice was not even required under the statute, and demonstrably served the purpose of the rules, penalizing Polaris for failing to achieve absolute compliance with each technical component of the rule would do nothing to protect consumers. To the contrary, such a rigid application of the requirements would subject legitimate businesses that act in good faith to provide opt-out notices – notices that demonstrably served the recipients of their faxes – to potentially crippling levels of statutory damages as a result of technical

²⁸ *Junk Fax Prevention Act of 2005; Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission’s Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient’s Prior Express Consent*, CG Docket No. 05-338, Order, 27 FCC Rcd 4912, ¶ 7 (2012).

²⁹ Petition at pg. 10; *Provisions of Improved Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 20 FCC Rcd 5433, 5445, ¶ 31 (2005) (internal quotations omitted) (noting a TRS provider may be eligible for TRS Fund reimbursement “if it has substantially complied with Section 64.604”).

faults that in no way prevented the fax recipients from opting out. This cannot be a result that the Commission intends. Accordingly, the Commission should clarify that the opt-out requirements of Section 64.1200(a)(4)(iii) are satisfied when the faxes in question include an opt-out notice that substantially complies with the rule section and demonstrably allows the recipient to opt out.

C. Alternatively, the Commission Should Clarify that the Statutory Basis of Section 64.1200(a)(4)(iv) Is Not 47 U.S.C. § 227(b).

In the event the Commission declines to issue one of the declaratory rulings requested in the Petition, the Commission, at a minimum, should clarify that Section 227(b) of the Communications Act is not the statutory basis for Section 64.1200(a)(4)(iv). Such a declaration would provide clarity on the basis for this rule section and the Commission's authority to apply it. Moreover, the declaratory ruling would clarify for courts and potential litigants that fax advertisements sent with recipients' consent, but without the precise opt-out language set forth in Section 64.1200(a)(4)(iii), do not provide a basis for a private action under the TCPA.

This clarity would be particularly helpful given that the Commission cited eleven statutory provisions in the *JFPA Order* as the basis for the numerous amendments made to Section 64.1200, but failed to specify the statutory basis for Section 64.1200(a)(4)(iv).³⁰

As Polaris explained in its Petition, by clarifying that Section 64.1200(a)(4)(iv) is not grounded in the Commission's authority under Section 227(b), the Commission has the opportunity to ensure fair treatment for the parties impacted by this rule while also upholding the Commission's interests.³¹ Clarifying that this rule section is not based on Section 227(b), and that there is no private right of action for violations of this rule section, would help to ensure fair treatment for the

³⁰ See *JFPA Order* at ¶ 64 (adopting order “pursuant to the authority contained in sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended ...”).

³¹ Petition at pg. 11; *Cf. Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (requiring agencies to articulate the basis for its rules can “assist judicial review” and help to ensure “fair treatment for persons affected by rule.”).

legitimate businesses that would otherwise be subject to potentially devastating class action lawsuits based merely on sending fax advertisements to recipients who had consented to receiving them. Further, clarifying the statutory basis for the rule section would enable the Commission to more effectively implement and achieve the rule's objective while not subjecting small businesses to staggering lawsuits where no actual harm was caused. Without the clarification requested in Polaris's Petition, courts will be left to guess at the Commission's jurisdictional authority, injecting greater uncertainty into the many pending lawsuits that have arisen from this rule section's ambiguity and depriving defendants of a clear defense.

D. Alternatively, Polaris Should Be Granted a Waiver.

If the Commission declines to issue any of the declaratory orders requested in its Petition, Polaris respectfully requests a retroactive waiver of Section 64.1200(a)(4)(iv) for any faxes sent since the effective date of the rule for which Polaris obtained consent. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause therefore is shown.³² Generally, the Commission may grant a waiver of its rules in a particular case if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.³³ Furthermore, waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.³⁴ The circumstances of this case, as shown in Polaris's Petition, clearly meet this standard.³⁵

³² See 47 C.F.R. § 1.3.

³³ See *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

³⁴ See *Northeast Cellular Telephone Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990); see also *In re Rath Microtech Complaint Regarding Electronic Micro Sys., Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 16710, 16714, ¶ 15 (2005).

³⁵ See Petition at pg. 5.

First, grant of a waiver would in no way undermine the policy objectives of Section 64.1200(a)(4)(iv) or any of the Commission's regulations implementing the TCPA. Moreover, all of the identified faxes included an opt-out notice that substantially complied with the requirements of Section 64.1200(a)(4)(iii) and demonstrably allowed the recipient of the faxes to opt out. Thus, Polaris accomplished the rule's policy objective of ensuring that fax recipients are able to opt out at their discretion of receiving unwanted faxes.

Furthermore, Polaris explained in its Petition that the public interest would be better served by grant of a waiver than by strict adherence to the rule.³⁶ Indeed, in light of the ambiguity and confusion regarding the scope and applicability of Section 64.1200(a)(4)(iv), requiring strict compliance with the rule's inconsistent requirements with respect to solicited fax advertisements would be inequitable. Doing so would unduly subject businesses to devastating class action lawsuits merely as a result of sending consenting recipients faxes that included on their front page an opt-out notice that substantially complied with the requirements under 64.1200(a)(4)(iii). Where, as in Polaris's case, the recipient of the fax had provided consent, had a clear and simple means to revoke that consent by utilizing Polaris's substantially compliant opt-out notice, utilized the opt-out procedures to successfully opt out of receiving any additional fax advertisements at the requested opt-out fax number, and suffered no actual harm, requiring strict compliance with Section 64.1200(a)(4)(iv) and exposing small businesses that acted in good faith to tremendous class action liability cannot be in the public interest. Accordingly, if the Commission declines to issue any of the declaratory rulings requested in Polaris's Petition, the Commission should serve the public interest by granting Polaris the requested waiver.

³⁶ Petition at pgs. 12-13.

IV. CONCLUSION

As described herein and further detailed in its Petition, Polaris 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 solicited fax advertisements. In the alternative, Polaris respectfully requests that the Commission clarify that the requirements of Section 64.1200(a)(4)(iii) of the Commission's rules are satisfied when a fax advertisement includes on its first page an opt-out notice that substantially complies with the requirements of that rule section and demonstrably allows the recipient of the fax advertisement to opt out. As a second alternative, Polaris respectfully requests that the Commission clarify that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b). In the absence of one of these three declaratory rulings, the Polaris respectfully requests that, pursuant to Section 1.3 of the Commission's rules, the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) from the effective date of the regulation for any solicited fax sent by Polaris.

Respectfully submitted,



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