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June 23, 2014

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW - Room TW-A325
Washington, DC 20554

Re: Notification of Ex Parte Presentation, CG Docket Nos. 05-338 and 02-278,
Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax
Advertisements

Dear Madam Secretary,

On June 19, 2014, Brian J. Wanca and Glenn L. Hara of the law firm of Anderson + Wanca ("A+W") met with the following: from Commissioner Clyburn's office, Adonis Hoffman and Laura Arcadipane; Chairman Wheeler's office, Maria Kirby; Commissioner Pai's office, Nicholas Degani; Commissioner O'Rielly's office, Amy Bender; Commissioner Rosenworcel's office, Valery Galasso. A+W represents the plaintiffs in pending private TCPA actions against many of the petitioners seeking to challenge the opt-out-notice regulation in 47 C.F.R. § 64.1200(a)(4)(iv).¹ A+W also represent the plaintiff in a private TCPA action against Anda, Inc., whose application for review of the Bureau order dismissing its petition is currently before the full Commission.²

¹ A+W is plaintiffs' counsel in civil actions against petitioners Best Buy Builders, Inc.; Crown Mortgage Company; Forest Pharmaceuticals, Inc.; Gilead Sciences, Inc.; Masimo Corporation; Prime Health Services, Inc.; Purdue Pharma, Inc.; Staples, Inc. and Quill Corporation; Stericycle, Inc.; TechHealth, Inc.; and Douglas Walburg and Richie Enterprises. A+W also represent the plaintiff against Howmedica Osteonics Corp., which submitted comments in support of the petitions. *See In the Matter of Comment on Petitions Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, Comment of Howmedica Osteonics Corp., CG Docket Nos. 02-278, 05-338 (Feb. 14, 2014).

² *See Application for Review, 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 (filed May 14, 2012).

In each of our meetings, we discussed the growing body of caselaw enforcing the opt-out-notice regulation, including decisions from the Seventh and Eighth circuits in *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682 (7th Cir. 2013), and *Nack v. Walburg*, 715 F.3d 680 (8th Cir. 2013). Earlier this month, the Sixth Circuit vacated an order denying class certification for failing to consider “whether the facsimiles transmitted by the defendants contained opt-out notices or whether those opt-out notices were adequate.” *In re: Sandusky Wellness Ctr., LLC*, No. 14-0301 (6th Cir. June 12, 2014). A copy of the order is contained as Exhibit A in the Exhibits to TCPA Plaintiffs’ Notice of Ex Parte Meeting June 19, 2014, filed herewith. We argued the surge of recent petitions reflects that the courts are enforcing the law, and the defendants are seeking to circumvent those rulings through impermissible retroactive rulemaking.

We discussed the petition recently filed by Stericycle, Inc.³ A+W intends to file comments in response to the Stericycle petition once the Commission sets a comment period. The Stericycle petition complains that, under the opt-out-regulation, “Stericycle cannot defend itself by asserting as an affirmative defense that recipients consented to receive faxes” and asks the Commission to grant retroactive relief so Stericycle can assert such a defense. (Stericycle Pet. at 11). We explained A+W has obtained evidence contradicting the implication that Stericycle obtained permission before sending its faxes. Rather, Stericycle purchased a list of fax numbers from a third party, directed the third party to scrub the list to remove Stericycle’s customers, and then sent faxes with non-compliant opt-out notice to those numbers. The documents reflecting these facts were redacted and labeled “confidential” pursuant to a protective order entered by the United States District Court for the Northern District of Illinois and are being filed with the Commission in paper form by mail.

We also discussed that Stericycle sent fax advertisements in 2011 and 2012 that contain opt-out language stating that the consumer has a legal right to opt out, that the consumer must use the means provided and identify the affected fax number, and that provide email, fax, and telephone options for opt-out requests. Those faxes are attached as Exhibit B. A+W did not file suit over these faxes, but the faxes in the current suit, attached as Exhibit C, contain almost none of the required information, merely providing a fax number.

In our meeting with Mr. Hoffman and Ms. Arcadipane, we discussed the faxes at issue in A+W’s pending litigation against Howmedica Osteonics Corp. (“Stryker”), which filed comments supporting the petitions on February 14, 2014. Mr. Hoffman requested copies of the faxes at issue in that case. We have attached the more than 100 faxes obtained in discovery as Exhibit D. None of the faxes contain any opt-out notice whatsoever.

³ Petition of Stericycle, Inc. for Declaratory Ruling and/or Waiver Regarding 47 C.F.R. § 64.1200(a)(4)(iv) (June 6, 2014).

In our meeting with Ms. Kirby, we discussed the unambiguous language of the regulation and the dozens of comments filed by consumers in response to the petitions urging the Commission to maintain the rule because legally enforceable opt-out notice is essential to giving consumers the tools they need to stop receiving unwanted faxes. *See, e.g.*, Ex. E (sample of consumer comments supporting opt-out-notice requirement filed in CG 02-278).

In our meeting with Mr. Degani, we argued the Commission had statutory authority to issue the rule, since it fleshes out the undefined statutory term “prior express permission or invitation.” We pointed out that the statute does not state whether permission may be revoked and, if so, *how* it may be revoked. The opt-out rule answers these questions, we argued, by providing that a consumer may revoke prior permission but only by following the instructions on the fax. This is why it is critical that the sender be required to provide those instructions. We also argued that, if the Petitioners are correct, then a consumer’s permission to receive faxes from a sender is permanent, since the Commission would be powerless to issue rules governing how (or even whether) permission can be revoked. We discussed the possibility of a rule allowing consumers to revoke permission by any means they choose, but that does not solve the problem, since the Commission would still be regulating “solicited faxes,” in the Petitioners’ view. Plus, the Commission rejected this suggestion in 2006, instead adopting the rule requiring consumers to use the means specified by the sender to opt out of both EBR faxes and permission-based faxes.⁴

We also discussed with Mr. Degani the legal principle *inclusio unius, exclusio alterius* (the “expression-exclusion rule”), which one commenter (Stryker) advanced as precluding the Commission from adopting the rule, since the JFPA expressly directs the Commission to adopt regulations requiring opt-out notice on EBR faxes but not permission-based faxes. We brought to Mr. Degani’s attention *Chevron USA Inc. v. Echazabal*, 536 U.S. 73, 80–81 (2002), holding that the expression-exclusion rule did not preclude an agency from adopting a regulation regarding employees who pose a threat *to themselves* on the basis that the authorizing statute expressly authorized the agency to issue regulations only with regard to employees who pose a threat *to others*. The Court reasoned the principle did not apply because (1) the “harm-to-others” clause was merely an example of the type of regulation allowed by the broad grant of authority in the statute, (2) there was no “series of two or more terms or things” from which harm-to-self was excluded, and (3) the narrow reading would have “no apparent stopping point,” for example, requiring the employer to hire Typhoid Mary because she might pose a risk to those *outside* the workplace as well as inside. A copy of *Echazabal* is attached as Exhibit F.

⁴ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 ¶ 34 & n.127, n.128 (rel. Apr. 6, 2006) (refusing to allow opt-out requests “to be made through other avenues not identified in the notice” for permission-based faxes because it would “impair an entity’s ability to account for all requests and process them in a timely manner”).

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In our meeting with Ms. Bender, we discussed the decision of the D.C. Circuit Court of Appeals in *Natural Res. Def. Council v. E.P.A.*, 749 F.3d 1055 (D.C. Cir. Apr. 18, 2014), holding (1) the EPA lacked authority to create an affirmative defense to a private right of action created by Congress, (2) the agency's authority extended "only to administrative penalties, not to civil penalties imposed by a court," and (3) the agency's role in "private civil suits" was limited to "intervenor" or "amicus curiae." We shared with Ms. Bender an article regarding the case, which is attached as Exhibit G.

Sincerely,

ANDERSON + WANCA

s/ Brian J. Wanca

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