

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

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In the Matter of)	
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Petition of American CareSource Holdings, Inc. for Declaratory Ruling to Clarify the Scope and/or Statutory Basis for Rule 64.1200(a)(4)(iv) and/or for Waiver)	CG Docket No. 02-278
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)	CG Docket No. 05-338
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**PETITION OF AMERICAN CARESOURCE HOLDINGS, INC.
FOR DECLARATORY RULING AND/OR WAIVER**

Pursuant to 47 C.F.R. § 1.2, American CareSource Holdings, Inc. (“American CareSource”) respectfully requests that the Federal Communications Commission (the “Commission”) issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv)¹ of the Commission’s rules does not apply to solicited facsimile advertisements. In the alternative, American CareSource respectfully requests that the Commission clarify that 47 U.S.C. § 227(b) is not the statutory basis for Section 64.1200(a)(4)(iv). In the absence of either ruling, American CareSource respectfully requests that, pursuant to 47 C.F.R. § 1.3, the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) from the effective date of the regulation for any solicited facsimile communications sent by American CareSource.

¹ This rule was previously numbered Section 64.1200(a)(3)(iv).

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INTRODUCTION

American CareSource is facing a putative class action lawsuit — brought pursuant to the Telephone Consumer Protection Act (“TCPA”) by Sandusky Wellness Center (“Sandusky” or “Named Plaintiff”) — concerning facsimile messages, many of which were sent to customers who consented to receive communications from American CareSource. Named Plaintiff seeks to represent a class of all recipients of certain facsimile communications from American CareSource, whether or not such persons agreed to receive such communications. Further, Sandusky asserts that in defending this action, American CareSource is “precluded from asserting any prior express permission or invitation because of the failure to comply with the Opt-Out Notice Requirements.” Compl. ¶ 31, *Sandusky Wellness Ctr. v. Am. CareSource Holdings, Inc.*, No. 3:14-cv-874-JJH (N.D. Ohio filed Apr. 23, 2014). Presumably, Named Plaintiff grounds this assertion in a regulation promulgated by the Commission, 47 C.F.R. § 64.1200(a)(4)(iv) (the “Regulation”), which purports to extend the TCPA’s requirement that *unsolicited* faxes contain certain “opt-out” language, to also apply to *solicited* fax advertisements. 47 C.F.R. § 64.1200(a)(4)(iv). The scope of the Regulation presently is unclear, resulting in a torrent of class action lawsuits and myriad petitions with the Commission.

To resolve this ambiguity, American CareSource respectfully requests that the Commission issue a declaratory ruling clarifying that the Regulation does not apply to solicited facsimile advertisements. This reading is consistent with the plain language of the TCPA and avoids an interpretation that would render the rule unlawful under administrative law principles. In the alternative, American CareSource respectfully requests that the Commission make clear that 47 U.S.C. § 227(b) is not the statutory basis for the Regulation, which would clarify whether a private right of action is available for alleged violations of the Regulation. Finally, in the

absence of either ruling, American CareSource respectfully requests that, pursuant to 47 C.F.R. § 1.3, the Commission grant a retroactive waiver of the Regulation for any solicited facsimile transmissions by American CareSource. Subjecting American CareSource to lawsuits brought by plaintiffs who agreed to receive communications would not serve the Commission's goals, the public interest, or the legislative intent of the TCPA.

BACKGROUND

The TCPA mandates that an unsolicited fax advertisement include an opt-out notice, prescribes requirements with which the notice must comply, and directs the Commission to promulgate regulations implementing these requirements. 47 U.S.C. § 227(b)(1)(C)(iii); §227(b)(2)(D)(i)-(vi); *see id.* § 227(a)(5) (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, in writing or otherwise”). Although the statute’s directive to the Commission is specifically limited to unsolicited fax advertisements, the Commission promulgated the Regulation, which extends the opt-out notice requirements to apply to solicited fax advertisements:

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.

47 C.F.R. § 64.1200(a)(4)(iv). At least one court has suggested that in doing so, the Commission unlawfully exceeded its authority under the TCPA. *See Nack v. Walburg*, 715 F.3d 680, 682 (8th Cir. 2013) (“[I]t is questionable whether th[is] regulation . . . properly could have been promulgated under the statutory section that authorizes a private cause of action.”).

The Regulation does not make sense when read in context; it is a subsection of a regulation dealing only with unsolicited fax advertisements and does not grammatically cohere

with its preceding language. *See* 47 C.F.R. § 64.1200(a)(4)(i)-(iv) (“No person or entity may . . . [u]se 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.”) (emphasis added). Furthermore, the Commission’s 2006 final order amending the Commission’s rules on unsolicited fax advertisements contradictorily states on the one hand that “opt-out notice requirement only applies to communications that constitute unsolicited advertisements,” but on the other hand that “entities that send facsimile advertisements to consumers from whom they obtained permission must include on the advertisements their opt-out notice.” *See 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, 3810 n. 154, 3812 (Apr. 6, 2006); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25,967, 25,971-72 (May 3, 2006).

Sandusky’s lawsuit against American CareSource is just one in a nationwide flood of class action litigation alleging that facsimile advertisements violate the TCPA and the Regulation. Sandusky challenges the lawfulness of a fax message it allegedly did not give permission to receive from American CareSource, and which did not contain any “opt-out” language. Named Plaintiff alleges “on information and belief” that American CareSource sent similar faxes to other persons without their express invitation or permission. But many class members agreed to receive communications from American CareSource. In reliance on the

Regulation, Sandusky asserts that American CareSource is precluded from asserting any prior permission or invitation because of the failure to comply with the Act's opt-out requirements.

ARGUMENT

I. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING TO CLARIFY THE REGULATION

The Commission has discretion to issue a declaratory ruling where, as here, such ruling would remove uncertainty. 5 U.S.C. § 554(e), 47 C.F.R. § 1.2(a). The uncertainty as to the scope and statutory basis of the Regulation is demonstrated by the numerous filings in federal district courts and before the Commission.² Private lawsuits that rely entirely or in part on the

² See Petition of Stericycle, Inc. for Declaratory Ruling and/or Waiver Regarding 47 C.F.R. § 64.1200(a)(4)(iv), CG Docket Nos. 02-278 & 05-338 (filed June 6, 2014); Petition of Cannon & Assocs. LLC D/B/A/ Polaris Grp. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed May 15, 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); Petition for Declaratory Ruling and/or Waiver of Masimo Corp., CG Docket Nos. 02-278 & 05-338 (filed Apr. 1, 2014); Petition of Magna Chek, Inc. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed Mar. 28, 2014); Petition of Crown Mortg. Co. for Declaratory Rulings and/or Waiver of the "Opt Out" Requirement, CG Docket Nos. 02-278 & 05-338 (filed Feb. 21, 2014); Petition of TechHealth, Inc. for Declaratory Ruling and/or Waiver, CG Docket No. 02-278 (filed Jan. 6, 2014); Petition of Prime Health Servs., Inc. for Declaratory Ruling and/or Waiver, CG Docket No. 05-338 (filed Dec. 17, 2013); Petition of Best Buy Builders, Inc. for Declaratory Ruling and/or Waiver, CG Docket No. 05-338 (filed Dec. 13, 2013); Petition for Declaratory Ruling and/or Waiver [by Purdue Pharma L.P.], CG Docket Nos. 02-278 & 05-338 (filed Dec. 12, 2013); Petition of All Granite & Marble Corp. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed Oct. 28, 2013); Petition of FutureDontics, Inc. for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed Oct. 18, 2013); Petition of Douglas Paul Walburg & Richie Enters., LLC for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 & 05-338 (filed Aug. 19, 2013); Petition for Declaratory Ruling and/or Waiver [by Gilead Scis., Inc. & Gilead Palo Alto, Inc.], CG Docket Nos. 02-278 & 05-338 (filed Aug. 8, 2013); Petition of Staples, Inc. & Quill Corp. for Rulemaking and Declaratory Ruling, CG Docket Nos. 02-278 & 05-338 (filed July 19, 2013); Petition for Declaratory Ruling and/or Waiver [by Forest Pharm., Inc.], CG Docket No. 05-338 (filed June 27, 2013). Filings in federal district courts include *Physicians Healthsource, Inc. v. Masimo Corp.*, No. 8:14-cv-00001-JVS-AN (C.D. Cal. filed Jan. 2, 2014); *St. Louis Heart Ctr., Inc. v. Gilead Palo Alto, Inc.*, No. 4:13-CV-958-JAR (E.D. Mo. filed May 20, 2013); *St. Louis Heart Ctr., Inc. v. Forest Pharm., Inc.*, No. 4:12CV2224 JCH (E.D. Mo. filed Nov. 30,

Regulation unnecessarily burden defendants and courts with claims Congress never intended to create. Thus, for the reasons set forth below, the Commission should issue a declaratory ruling to clarify the scope and statutory basis of the Regulation.

A. The Commission Should Issue a Declaratory Ruling to Clarify that the Regulation Does Not Apply to Solicited Faxes

The Commission should clarify that the Regulation applies only to unsolicited faxes because the Regulation and other guidance from the Commission is ambiguous, and excluding solicited faxes from the TCPA's ambit aligns with the legislative intent and plain language of the TCPA; namely, to regulate unsolicited faxes. Put simply, the Regulation does not make sense on its face:

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.

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

Because the text of the Regulation begins by limiting the scope to unsolicited faxes, yet later references faxes sent with express permission, clarification from the Commission is necessary to disambiguate whether the Regulation is intended to reach solicited faxes. A 2006 final order amending the Commission's rules on unsolicited fax advertisements only adds to the confusion, stating on the one hand that "opt-out notice requirement only applies to

2012); *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, No. 3:12-CV-1208 SRU (D. Conn. filed Aug. 17, 2012); *Whiteamire Clinic, P.A., Inc. v. Quill Corp.*, No. 1:12-cv-05490 (N.D. Ill. filed July 12, 2012); *Burik v. Staples Contract & Commercial, Inc.*, No. 1:12-cv-10806-NMG (D. Mass. filed May 4, 2012); *Critchfield Physical Therapy, P.C. v. TechHealth, Inc.*, No. 4:12CV00268 AGF (E.D. Mo. filed Feb. 15, 2012); *Nack v. Walburg*, No. 4:10 CV 00478 AGF (E.D. Mo. filed Mar. 19, 2010).

communications that constitute unsolicited advertisements” but stating on the other that “entities that send facsimile advertisements to consumers from whom they obtained permission must include on the advertisements their opt-out notice.” *See 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, 3810 n. 154, 3812 (Apr. 6, 2006); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25,967, 25,971-72 (May 3, 2006).

The Commission should clarify that the Regulation does not apply to facsimile advertisements that were sent at the invitation or with the prior permission of the recipient, because that interpretation aligns with the text and history of the TCPA — both of which make clear that the Act’s purview is limited to unsolicited advertisements. 47 U.S.C. § 227(b)(1)&(2); *id.* § 227(a)(5); S. Rep. No. 102-178 at 3 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970 (“The bill as introduced proposed to ban artificial or prerecorded messages to residential consumers and to emergency lines, and to place restrictions on unsolicited advertisements delivered via fax machine.”); S. Rep. No. 109-76 at 1 (2005), reprinted in 2005 U.S.C.C.A.N. 319, 319. There is no indication whatsoever that Congress intended to regulate solicited advertisements.

Moreover, interpreting the Regulation to apply to solicited facsimile advertisements would render it unlawful. By limiting Section 227(b) to unsolicited facsimile advertisements, Congress restricted the Commission’s jurisdiction to that particular type of communication. *See 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. . . .”). Thus, if the Regulation purports to also apply to solicited facsimile

advertisements, it must be invalidated because the Commission would have exceeded its regulatory authority. *See Nack*, 715 F.3d at 682. Reading the Regulation to be limited to unsolicited facsimile advertisements is therefore its only lawful interpretation.

B. The Commission Should Issue a Declaratory Ruling to Clarify that 47 U.S.C. §227(b) Is Not the Statutory Basis for the Regulation

The Commission should issue a declaratory ruling that Section 227(b) of the TCPA is not the statutory basis for the Regulation, in order to clarify the Commission’s authority for the Regulation and to make clear that the Regulation cannot form the basis of a private lawsuit.

Section 227(b)(3) of the TCPA contains the provision of the Act conferring a private right of action. 47 U.S.C. § 227(b)(3). But because Section 227(b) proscribes certain “unsolicited advertisement[s],” it cannot form the statutory basis for the Regulation, which purports to place restrictions on solicited facsimile advertisements. Beyond Section 227, it is unclear what other specific authority underpins the Regulation. Eleven different statutory provisions were cited by the Commission as authority for the multiple amendments it made to Section 64.1200, one of which was the addition of the Regulation. *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, 3817 (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; 47 U.S.C. §§ 151-154, 201, 202, 217, 227, 258, 303(r), and 332; and sections 64.1200 and 64.318 of the Commission’s Rules, 47 C.F.R. §§ 64.1200 and 64.318”). Accordingly a clarification is necessary to assist the judiciary in ascertaining the Commission’s intent. Such clarification also would serve the interests of both the Commission and the public by removing the threat of massive class action lawsuits based on

solicited advertisements, while also preserving the Commission’s ability to enforce the Regulation.

**II. IN THE ABSENCE OF EITHER DECLARATORY RULING,
AMERICAN CARESOURCE SHOULD BE GRANTED A WAIVER**

If the Commission declines to issue the declaratory rulings requested above, American CareSource alternatively respectfully requests a retroactive waiver of the Regulation (from its effective date) for any alleged facsimile advertisements sent pursuant to a recipient’s agreement to receive such communications. The Commission should grant a waiver where, as here, “[t]he underlying purpose of the rule(s) would not be served” or the factual circumstances mandate a waiver to avoid an application of the rule that would be “inequitable, unduly burdensome or contrary to the public interest.” 47 C.F.R. § 1.925(b)(3)(i)-(ii).

The stated purpose of the Regulation is “to allow consumers to stop unwanted faxes in the future.” This purpose is not served where, as here, American CareSource sent faxes in order to facilitate commercial transactions to recipients that had requested or agreed to accept them. Such persons knew how to reach American CareSource and easily could have communicated their desire to opt out of future fax communications. Requiring strict compliance with the Regulation with respect to solicited faxes — and exposing American CareSource and other good faith actors to class action liability for an alleged failure to include opt-out notices on solicited facsimile communications — is inequitable, unduly burdensome and contrary to the public interest.

CONCLUSION

For the foregoing reasons, 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 facsimile 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 alternative, the Commission should grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited facsimile communications sent by American CareSource.

Dated: June 30, 2014

Respectfully submitted,

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