

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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| In the Matter of: |) | |
| |) | CG Docket No. 02-278 |
| Petition of MedLearning, Inc. |) | |
| And Medica Inc. for Declaratory Ruling |) | CG Docket No. 05-338 |
| To Clarify Scope and/or Statutory Basis |) | |
| For Rule 64.1200(a)(3)(iv) |) | |
| And/or for Waiver |) | |
| |) | |

PETITION FOR DECLARATORY RULING AND/OR WAIVER

Pursuant to Section 1.2 of the Federal Communications Commission (“the Commission”) rules, MedLearning, Inc. (“MedLearning”) and Medica, Inc. (“Medica”) (collectively, “the petitioners”), respectfully request that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) (“the Rule”) of the Commission’s regulations does not apply to fax advertisements sent with the prior express consent or permission of the recipient. In the alternative, the petitioners respectfully request that the Commission clarify that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b). At a minimum, the Commission should clarify that solicited faxes sent with effective opt-out notices do not violate the Rule or any other regulation promulgated by the Commission under the TCPA.

In the absence of either ruling, the petitioners respectfully request that, pursuant to Section 1.3 of the Commission’s rules, the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) with respect to faxes that have been transmitted by or on behalf of

MedLearning and Medica with the prior express consent or permission of the recipients or their agents.

INTRODUCTION

MedLearning and Medica each face a putative class action lawsuit, brought pursuant to the Telephone Consumer Protection Act (“TCPA”), based on the sending of solicited faxes that contained an effective opt-out notice. Despite the fact that the plaintiffs in these actions consented to receive the faxes at issue, and suffered no harm as a result of receiving the faxes at issue, the plaintiffs in those lawsuits now seek millions of dollars on behalf of the putative class, claiming that the petitioners violated the Rule because the opt-out language on the faxes allegedly was not strictly compliant with the Rule’s requirements.

47 U.S.C § 227(b) codifies, in part, the TCPA. The plain language and scope of Section 227(b) is expressly limited to unsolicited faxes, which the statute defines to exclude faxes sent with consent. Thus, no regulation adopted under Section 227(b) properly could extend to solicited faxes.

However, the scope and applicability of the Rule are unclear as it contains confusing and inconsistent language regarding the opt-out notice requirements. This confusion and uncertainty regarding the Rule’s opt-out notice requirements have led to numerous legal disputes and petitions to the Commission. The present petitioners therefore urge the Commission to resolve this uncertainty by clarifying that the Rule does not apply to solicited fax advertisements.

In the alternative, the petitioners request that the Commission issue a declaratory ruling that Section 227(b) of the TCPA is not the statutory basis for the Rule. Such a ruling would clarify the Commission's authority for this Rule 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.

Should the Commission decline to issue the declaratory rulings sought above, the Commission at least should clarify that a fax that is transmitted pursuant to the prior express invitation or permission of a fax recipient, and includes an effective opt-out notice, does not violate any Commission regulation promulgated pursuant to any provision of the TCPA.

Finally, in the absence of any of the declaratory rulings requested above, the petitioners request that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) from the effective date of the Rule for any fax transmitted by or on behalf of the petitioners with the consent of the recipient. Subjecting the present petitioners to class action lawsuits brought by plaintiffs who agreed to receive the fax transmissions would not serve the Commission's goals, the public interest, or the legislative intent of the TCPA.

BACKGROUND

MedLearning and Medica are each currently defending a lawsuit brought by a serial TCPA-class action plaintiff. In Kaye v. Merck & Co., Inc. et al., 3:10cv1546(RNC) (D.Conn.), filed on Sept. 29, 2010, the fax at issue, which is attached to the plaintiff's complaint, is addressed to plaintiff Roger Kaye, M.D., and invited him to attend an interactive telesymposium on "important clinical information about schizophrenia and

bipolar disorder.” The bottom of this fax contained the following statement: “To be removed from the fax list for this program, please initial here ___ and fax this form back to (207) 288-2307 or call (877) 963-3532.” The plaintiff in Kaye does not allege that he received any other faxes or that he attempted to utilize the opt-out mechanism without success.

On behalf of Merck & Co., Inc. (“Merck”), MedLearning reached out to the physicians invited to the telesymposium. To ensure that it did not send any unsolicited faxes, MedLearning placed a phone call to each invitee to determine consent before sending a fax invitation. Despite this careful process to ensure that only solicited faxes were sent to the invitees of the telesymposium, Merck and MedLearning have been subject to a class action lawsuit seeking millions of dollars in damages. The Kaye plaintiff’s primary theory of liability is that the Commission’s Rule requires an extensive and precise opt-out notice on every fax, even where express consent was obtained prior to sending. Thus, Merck and MedLearning face a lawsuit even though the harm to the recipients of the faxes is nonexistent.

Similarly, in Physicians Healthsource, Inc. v. Boehringer Ingelheim Pharmaceuticals, Inc. et al., 3:14cv00405(SRU) (D.Conn., filed March 30, 2014) the fax at issue, which is attached to the plaintiff’s complaint, is addressed to Dr. Jose Martinez, and invited him to attend a meeting “to discuss Female Sexual Dysfunction (“FSD”), including Hypoactive Sexual Desire Disorder (“HSDD”) including pathophysiology models, epidemiology, and diagnosis.” The bottom of this fax contained the following statement: “To be removed from the fax list, please initial here ___ and fax this form back to (207) 288-2307 or call (866) 503-

3008.” The plaintiff in Physicians Healthsource does not allege that it received any other faxes or that it attempted to utilize the opt-out mechanism without success.¹

On behalf of Boehringer Ingelheim Pharmaceuticals, Inc. (“Boehringer”), Medica reached out to certain invitees to the discussion on FSD and HSDD. Medica followed the same process described above whereby it placed a phone call to ensure consent before sending any fax. Despite this careful process to ensure consent, and despite the fact that the fax at issue contains an effective opt-out notice, Medica and Boehringer also face a class action lawsuit seeking millions of dollars in damages, as the Physicians Healthsource plaintiff claims that the fax did not contain a proper opt-out notice pursuant to the Rule.

The district court in Kaye has phased discovery, prioritizing precertification discovery on the issue of whether the subject telesymposia faxes were solicited or unsolicited.² The court has stayed additional discovery proceedings in the case pending the completion of the initial round of discovery and/or “the outcome of proceedings before the Federal Communications Commission concerning the Commission’s regulation of solicited faxes under the TCPA.”³ Before ordering the partial stay, the court expressed serious concern about the application of the opt-out notice requirements to solicited faxes.

¹ Despite the fact that the fax at issue in Physicians Healthsource is addressed to Dr. Jose Martinez, he is not a party to that lawsuit.

² See Kaye, 3:10cv1546, Docket No. 114, p. 1 and Docket No. 126, p. 7.

³ Kaye, 3:10cv1546, Docket No. 114, p. 1. The Court also stayed those additional proceedings pending the result of the certiorari petition in the U.S. Supreme Court in Nack v. Walburg, 715 F.3d 680 (8th Cir. 2013). The Supreme Court denied certiorari in Nack. See Nack v. Walburg, 134 S. Ct. 1539 (Mar 24, 2014).

In Physicians Healthsource, Medica and Boehringer have moved to dismiss the plaintiff's claim on the ground that the fax concerning the discussion of FSD and HSDD is not an advertisement.⁴ The plaintiff has filed an objection to these motions and the parties are awaiting a ruling from the Court.

ARGUMENT

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

The Commission has discretion to issue a declaratory ruling where, as here, such ruling would remove unnecessary uncertainty. 5 U.S.C. § 554(e), 47 C.F.R. § 1.2(a). The uncertainty as to scope and statutory basis of the Rule is demonstrated by the numerous filings in federal district courts and before the Commission. Private lawsuits that rely on the Rule unnecessarily burden defendants and the courts with claims Congress never intended to create. The Commission should therefore issue a declaratory ruling to clarify the scope and statutory basis of the Rule.

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

The Commission should clarify that the Rule applies only to unsolicited faxes because the Rule and other guidance from the Commission is ambiguous. In addition, excluding solicited faxes from the TCPA's ambit aligns with the legislative intent and plain

⁴ In Kaye, Merck and MedLearning also deny that the fax at issue constitutes an advertisement under the TCPA.

language of the TCPA; namely, to regulate unsolicited faxes. The Rule states, in pertinent part:

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)(iv) (emphasis added).

The Rule does not make sense on its face. Because the Rule begins by limiting the scope to unsolicited faxes, yet later references faxes sent with express permission, it is impossible to tell whether the Rule is intended to reach solicited as well as unsolicited faxes. The JFPA Order only adds to the confusion. The Order first explains that “the opt-out notice requirement only applies to communications that constitute unsolicited advertisements.” JFPA Order, ¶ 42 n.154. Only later, in a paragraph dealing with the issue of faxes sent based on consent received prior to the effective date of the rules, does the Order state that an opt-out notice would be required “to allow consumers to stop unwanted faxes in the future.” *Id.* at ¶ 48. A reasonable interpretation of this provision is that, to the extent any opt-out notice requirement was intended by the Commission to apply to faxes sent with consent, it was intended to apply only where that consent was obtained prior to the effective date of the rules. In any event, given these ambiguities and contradictions, there is legitimate uncertainty regarding whether Section 64.1200(a)(4)(iv) applies to solicited faxes. Entities

such as Medica and MedLearning should not be required to defend costly and time-consuming putative class action lawsuits which seek millions of dollars in damages, where such lawsuits are based on an ambiguous and contradictory regulation.

The Commission should clarify that the Rule does not apply to fax advertisements that were sent with the permission or consent of the recipient as such an interpretation comports with the text and legislative history of the TCPA. Indeed, both the text and the legislative history make clear that The TCPA's opt-out requirements apply only to unsolicited advertisements. See 47 U.S.C. § 227(b)(1)&(2); id. § 227(a)(5) (definition of "unsolicited advertisement," expressly excludes any fax advertisement sent with the recipient's "prior express invitation or permission."). See also 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 (showing that, in enacting JFPA, 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 intended to regulate solicited advertisements.

Moreover, interpreting the Rule to apply to solicited fax advertisements would render it invalid. By limiting Section 227(b) to unsolicited fax 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 ...”). Accordingly, the Commission did not obtain the authority to regulate solicited faxes when Congress passed a statute regulating unsolicited faxes. Thus, the Rule is invalid to the extent it purports to regulate solicited faxes and is promulgated pursuant to the Commission's authority under Section 227. The Commission should construe the Rule to avoid these problems.

Finally, interpreting the Rule to apply to solicited faxes would raise significant constitutional concerns. Imposing an opt-out notice requirement on consensual communications between fax senders and recipients would not be consistent with the First Amendment. Assessing potentially massive statutory damages based on alleged technical deficiencies in such notices, under circumstances where the recipient has expressly invited or consented to the fax, also raises substantial Due Process concerns. Accordingly, the Rule should be interpreted in a manner to avoid these constitutional problems.

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

If the Commission declines to interpret Section 64.1200(a)(4)(iv) to exclude fax advertisements for which the sender has obtained prior express consent, the Commission should issue a declaratory ruling that Section 227(b) of the TCPA is not the statutory basis for the Rule, in order to clarify the Commission's authority for the Rule and to make clear that the Rule cannot form the basis of a private lawsuit.

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 if the Commission relied on 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 interests 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 businesses by removing the threat of massive class action lawsuits based solely on communications with consenting consumers. 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 multi-millions of dollars in statutory damages 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.

The Commission therefore should issue a declaratory ruling clarifying that the statutory provision the Commission relied on in promulgating Section 64.1200(a)(4)(iv) of its rules was *not* Section 227(b).

II. THE COMMISSION SHOULD CONFIRM THAT SUBSTANTIALLY COMPLIANT OPT-OUT NOTICES ON SOLICITED FAXES SATISFY SECTIONS 64.1200(A)(4)(III) AND (IV) OF THE COMMISSION’S RULES.

Even if the Commission maintains that it has authority under Section 227(b) to regulate solicited faxes, the Commission should recognize that strict compliance with the notice requirements specified for *unsolicited* faxes is not necessary for faxes expressly invited or consented to by the recipient. When Congress enacted the TCPA, one of its purposes was to establish restrictions on the use of fax machines to transmit “unsolicited advertisements” — that 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.” 47 U.S.C. § 227(a)(5). Among other topics, Section 64.1200 of the Commission’s rules sets out various requirements for companies that transmit unsolicited faxes, including authority to transmit unsolicited faxes to parties with whom the sender has an established business relationship, provided the faxes include an opt-out notice and comply with other requirements. 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(4).

The MedLearning and Medica faxes at issue in the Connecticut district court actions are far different from the unsolicited advertisements Congress sought to restrict. In the first place, nothing on the face of those faxes promotes the commercial availability or quality of

any good or service; nor do those faxes contain the name of any commercially available product. Rather, the MedLearning fax is an invitation to a “telesymposium on important clinical information about schizophrenia and bipolar disorder,” and the Medica fax is an invitation to attend a meeting “to discuss Female Sexual Dysfunction (“FSD”), including Hypoactive Sexual Desire Disorder (“HSDD”) including pathophysiology models, epidemiology, and diagnosis.”

Assuming *arguendo* that these faxes constituted “advertisements,” they were sent with permission. In each instance, MedLearning or Medica placed a personal phone call to the office of each fax recipient and followed a careful process to ensure consent before sending any fax. The recipients’ fax numbers were obtained through those calls. If the physicians or other health care professionals’ offices did not provide the fax number and consent to send the fax, then no fax was sent. Moreover, each fax contained a clear and conspicuous opt-out notice on the first page with all the necessary information to effect a cost-free opt-out. See § 64.1200(a)(4)(iii). Neither Kaye nor Physicians Healthsource has alleged an attempt to use this opt-out process unsuccessfully.

In the absence of the broader declaratory ruling requested herein, the Commission should at least clarify that a fax sent pursuant to the recipient’s prior express invitation or permission and that includes a demonstrably effective opt-out notice complies substantially with 47 C.F.R. § 64.1200, whether or not the opt-out notice is in precise conformity with the opt-out notice required for *unsolicited* faxes. Here, the opt-out notice provided in the faxes that are the subject of the Connecticut district court actions fulfilled the purposes of

the TCPA by protecting consumers and businesses from unsolicited faxes and ensuring that fax advertisers provide effective opt-out mechanisms. Requiring strict compliance with the technical details of opt-out notice rules does nothing to protect consumers. Instead, such a rigid interpretation exposes legitimate enterprises who acted in good faith to potentially staggering levels of statutory damages based on minor technical faults.

III. MEDLEARNING AND MEDICA SHOULD BE GRANTED A WAIVER.

In the alternative to the above requests, the petitioners respectfully request that the Commission waive strict compliance Sections 64.1200(a)(4)(iii) and (iv) with respect to the MedLearning and Medica faxes discussed herein. 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 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). See also 47 C.F.R. § 1.3 (the Commission may waive any provision of its rules “for good cause shown” when it concludes that a waiver would serve the public interest, considering all relevant factors).

The stated purpose of the Rule is to allow consumers to stop unwanted faxes in the future. This purpose is not served where entities such as MedLearning and Medica are subjected to massive liability on the basis of faxes sent with the express permission of the recipients and where those recipients could have easily, and without cost, opted out of future communications. A waiver would serve the public interest by avoiding an abuse of the private right of action created by the TCPA, as an allegedly minor technical defect should

not be a basis for serial TCPA-class action plaintiffs, such as Kaye and Physicians Healthsource, to institute expensive and time-consuming litigation, exposing businesses, such as the present petitioners, to millions of dollars in liability.

CONCLUSION

For the reasons stated above, the Commission should issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission's regulations does not apply to solicited faxes, or, alternatively, that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b). At a minimum, the Commission could clarify that solicited faxes sent with effective opt-out notices do not violate the Rule or any other regulation promulgated by the Commission under the TCPA.

Finally, if the Commission declines to issue the requested declaratory rulings, the Commission should grant MedLearning and Medica a waiver of Sections 64.1200(a)(4)(iii) and (iv) of the Commission's rules under the circumstances described herein.

Respectfully submitted,

MedLearning, Inc. and Medica, Inc.

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