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July 11, 2014

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

ACCEPTED/FILED

JUL 11 2014

Federal Communications Commission  
Office of the Secretary

**Re: Petition for Declaratory Ruling and/or Waiver  
CG Docket Nos. 02-278, 05-338**

Dear Ms. Dortch:

On behalf of CARFAX, Inc. ("CARFAX"), please find enclosed the original and four copies of CARFAX's Petition for Declaratory Ruling and/or Waiver.

Should you have any questions regarding this filing, please do not hesitate to contact me.

Respectfully submitted,



Mark W. Brennan

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

ACCEPTED/FILED

JUL 11 2014

Federal Communications Commission  
Office of the Secretary

In the Matter of	)	
	)	CG Docket No. 02-278
Petition of CARFAX, Inc. for Declaratory	)	
Ruling and/or Waiver of Section	)	CG Docket No 05-338
64.1200(a)(4)(iv) of the Commission's Rules	)	

**PETITION OF CARFAX, INC. FOR  
DECLARATORY RULING AND/OR WAIVER OF  
SECTION 64.1200(a)(4)(IV) OF THE COMMISSION'S RULES**

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July 11, 2014

## EXECUTIVE SUMMARY

CARFAX, Inc. (“CARFAX”) respectfully requests that the Federal Communications Commission (“FCC”) issue a declaratory ruling that Section 64.1200(a)(4)(iv) of its rules, 47 C.F.R. § 64.1200(a)(4)(iv), does not apply to faxes sent with the “prior express invitation or permission” of the recipient. The language of Section 64.1200(a)(4)(iv) and the FCC’s implementing order is unclear and inconsistent with Congressional intent. The FCC also lacks the statutory authority to apply Section 64.1200(a)(4)(iv) to such “solicited” faxes. In addition, applying Section 64.1200(a)(4)(iv) to solicited faxes raises significant First Amendment concerns. In the alternative, CARFAX asks the FCC to issue a declaratory ruling that 47 U.S.C. § 227(b) is not the statutory basis of Section 64.1200(a)(4)(iv).

If the FCC declines to issue a declaratory ruling, CARFAX respectfully requests that the agency grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by CARFAX after the effective date of that regulation. There is no public interest benefit to enforcing Section 64.1200(a)(4)(iv) with respect to recipients that have already provided “prior express invitation or permission” to receive fax advertisements.

To the extent that the FCC determines that any declaratory ruling, waiver or other relief may be warranted for fax advertisements that are sent without the “prior express invitation or permission” of the recipient but are sent to a recipient with whom the sender has an established business relationship, CARFAX respectfully requests that it also be granted such relief.

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**Before the  
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64.1200(a)(4)(iv) of the Commission's Rules	)	

**PETITION OF CARFAX, INC.  
FOR DECLARATORY RULING AND/OR WAIVER OF  
SECTION 64.1200(a)(4)(IV) OF THE COMMISSION'S RULES**

Pursuant to Sections 1.2 and 1.3 of the Federal Communication Commission's ("FCC's" or "Commission's") rules,<sup>1</sup> CARFAX, Inc. ("CARFAX") respectfully requests that the FCC issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of its rules<sup>2</sup> does not apply to facsimile advertisements that are sent with the recipient's "prior express invitation or permission" ("solicited faxes"). Such a clarification would be consistent with the plain language of the Telephone Consumer Protection Act ("TCPA"), as codified in 47 U.S.C. § 227 and amended by the Junk Fax Prevention Act of 2005 ("JFPA").<sup>3</sup> Alternatively, the Commission should issue a declaratory ruling clarifying that the statutory basis for implementing Section 64.1200(a)(4)(iv) is not Section 227(b) of the Communications Act.<sup>4</sup> A declaratory ruling is necessary to reduce the amount of confusion and litigation that has been generated by uncertainty about the rule, which not only unfairly burdens organizations that have sent solicited faxes in

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<sup>1</sup> 47 C.F.R. §§ 1.2, 1.3.

<sup>2</sup> *Id.* § 64.1200(a)(4)(iv).

<sup>3</sup> See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) ("TCPA"); Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005) ("JFPA"). The TCPA and the JFPA are codified at 47 U.S.C. § 227.

<sup>4</sup> 47 U.S.C. § 227(b).

good faith but also wastes judicial resources on resolving claims that Congress never intended to create.

Should the FCC decline to issue either of the requested declaratory rulings, CARFAX respectfully requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited facsimile sent by CARFAX or its affiliates or subsidiaries (or sent on its or their behalf) after the effective date of the regulation. There is no public interest benefit to enforcing Section 64.1200(a)(4)(iv) with respect to recipients that have already provided “prior express invitation or permission” to receive fax advertisements. In contrast, enforcement against CARFAX could prevent businesses and consumers from receiving important and requested product safety information, and impose staggering aggregate liability for rule infractions that Congress never intended to apply to solicited faxes.

To the extent that the Commission determines that any declaratory ruling, waiver, or other relief<sup>5</sup> may be warranted for fax advertisements that are sent without the “prior express invitation or permission” of the recipient but are sent to a recipient with whom the sender has an established business relationship, CARFAX respectfully requests that it be granted such relief on the bases described in this Petition.

## **I. INTRODUCTION AND BACKGROUND**

CARFAX is a Pennsylvania corporation that provides vehicle history information to buyers and sellers of used cars and light trucks. CARFAX began offering CARFAX Vehicle History Reports to the dealer market in 1986. Today, using the unique 17-character vehicle identification number, a CARFAX Report can be generated instantly to provide prospective buyers with information provided to CARFAX by various third parties regarding vehicle

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<sup>5</sup> See *infra* note 19 (referencing the FCC public notices associated with other similar filings).

ownership history, occurrence of accidents, total loss or salvage title history, odometer readings, service records, and other useful data points.

As one way of obtaining information for its vehicle history database, CARFAX enters into agreements with automotive dealers and repair shops that agree to provide certain vehicle history information to CARFAX. As part of these agreements, dealers and repair shops participate in the CARFAX Service Network and receive additional benefits, including free advertising on CARFAX Reports. CARFAX has been sued under the TCPA by an automotive shop that received a fax advertisement from CARFAX that was sent with the shop's "prior express invitation or permission."<sup>6</sup>

The TCPA, as codified in 47 U.S.C. § 227 and amended by the JFPA, prohibits, under certain circumstances, the use of a fax machine to send an "unsolicited advertisement."<sup>7</sup> 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.*"<sup>8</sup> Significantly, the JFPA expressly applies only to *unsolicited* fax advertisements, and not to all faxes.<sup>9</sup> Accordingly, the TCPA's general prohibition against fax advertisements does not apply to *solicited* faxes that were sent with the recipient's "prior express invitation or permission."

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<sup>6</sup> See *Mark Sherman Enterprises, Inc., dba GTM Automotive and Muffler v. CARFAX, Inc.*, Case No. 1:14-CV-04686 (N.D. Ill.). The parties to the litigation dispute, *inter alia*, whether the fax was solicited. However, it is not necessary for the Commission to resolve that dispute in acting on this petition. The disputed factual issues in the case will be resolved by the court and do not impact the issues raised in this petition.

<sup>7</sup> 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).

<sup>8</sup> *Id.* § 227(a)(5) (emphasis added).

<sup>9</sup> See generally the JFPA.

Although the JFPA expressly applies only to unsolicited faxes, in 2006 the Commission promulgated rules implementing the JFPA's requirements.<sup>10</sup> It adopted Section 64.1200(a)(4)(iv), which purports to impose opt-out notice requirements on solicited fax advertisements.<sup>11</sup> Since the FCC adopted Section 64.1200(a)(4)(iv), a steady stream of plaintiffs has seized on the ambiguity of this rule to bring numerous class action lawsuits under Section 227(b) of the TCPA.<sup>12</sup> These lawsuits have been brought against companies acting in good faith and engaging in solicited communications in which the fax recipients had provided "prior express invitation or permission," had an established business relationship, or both, to send the faxes. Many of these class action lawsuits seek millions of dollars in damages based solely on the opt-out requirements contained in Section 64.1200(a)(4)(iv).

A recent Eighth Circuit Court of Appeals decision, *Nack v. Walburg*, squarely addressed the issue of whether Section 64.1200(a)(4)(iv) applies to solicited faxes.<sup>13</sup> In *Nack*, the defendant transmitted a single solicited fax that failed to contain the opt-out language that the plaintiff claimed was required by the FCC's rules.<sup>14</sup> The Eighth Circuit in *Nack* recognized that it was "questionable" whether the FCC could have properly promulgated Section 64.1200(a)(4)(iv) under the authority granted to the agency by the TCPA, but found that the Administrative Orders Review Act ("Hobbs Act")<sup>15</sup> precluded it from holding the regulation

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<sup>10</sup> See generally *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*").

<sup>11</sup> See 47 C.F.R. § 64.1200(a)(4)(iv) (requiring that a solicited fax advertisement include an opt-out notice in compliance with the unsolicited fax advertisement opt-out notice requirements in 47 C.F.R. § 64.1200(a)(4)(iii)).

<sup>12</sup> 47 U.S.C. § 227(b)(3)(A)-(C).

<sup>13</sup> 715 F.3d 680 (8th Cir. 2013).

<sup>14</sup> *Id.* at 682.

<sup>15</sup> 28 U.S.C. § 2342 *et seq.*

invalid outside of the statutory procedure mandated by Congress.<sup>16</sup> The *Nack* court suggested that the defendants might obtain relief directly from the Commission,<sup>17</sup> and the defendants subsequently filed a Petition for Declaratory Ruling and/or Waiver with the Commission that remains pending.<sup>18</sup> More than fifteen other parties that have been the subject of similar lawsuits have also filed substantively similar petitions, seeking relief from class action lawsuits brought under a misguided interpretation of the FCC's rules.<sup>19</sup> Consistent with the concerns raised in those petitions, CARFAX requests that the Commission issue a declaratory ruling clarifying Section 64.1200(a)(4)(iv) or, in the alternative, grant CARFAX a retroactive waiver of Section 64.1200(a)(4)(iv).

## II. DISCUSSION

### A. The Commission Should Issue a Declaratory Ruling That Section 64.1200(a)(4)(iv) Does Not Apply to Faxes Sent with the "Prior Express Invitation or Permission" of the Recipient.

The Commission should issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) does not apply to solicited facsimiles sent with the "prior express invitation or permission" of the receiving party. Specifically, the FCC should find that: (i) the plain language of the rule and the Commission order implementing the rule is unclear with respect to the provision's scope and applicability, and inconsistent with the TCPA; (ii) applying Section 64.1200(4)(iv) to solicited faxes sent with the "prior express invitation or permission" of the recipient would exceed the Commission's authority under the JFPA and the Communications

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<sup>16</sup> *Nack v. Walburg*, 715 F.3d at 682.

<sup>17</sup> *Id.* at 687.

<sup>18</sup> 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).

<sup>19</sup> See, e.g., *Consumer and Governmental Affairs Bureau Seeks Comment on Petition Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, CG Dockets Nos. 02-278 and 05-338, Public Notice, DA 14-923 (rel. June 27, 2014); Public Notice, DA 14-734 (rel. May 30, 2014); Public Notice, DA 14-556 (rel. Apr. 25, 2014); Public Notice, DA 14-416 (rel. Mar. 28, 2014); Public Notice, DA 14-120 (rel. Jan. 31, 2014).

Act; and (iii) interpreting Section 64.1200(a)(4)(iv) to apply to solicited faxes would raise significant First Amendment concerns.

**1. The language of Section 64.1200(a)(4)(iv) and the Commission's implementing order is unclear and inconsistent with Congressional intent.**

The FCC should clarify the ambiguous language of Section 64.1200(a)(4)(iv) and the Commission's implementing order, which on their face cannot be interpreted in a manner that is consistent, either internally or with the TCPA. In relevant part, the Commission's rule provides that "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.<sup>20</sup>

The plain language of the rule begins by establishing a prohibition on unsolicited advertisements and then creates exceptions to that prohibition based on the existence of an established business relationship<sup>21</sup> and the provision of an opt-out notice.<sup>22</sup> The text then inexplicably references solicited fax advertisements in the context of those exceptions for unsolicited advertisements.<sup>23</sup>

The Commission's order implementing Section 64.1200(a)(4)(iv) also contributes to the confusion. The *JFPA Order* plainly states the requirement to provide an opt-out notice "only applies to communications that constitute unsolicited advertisements."<sup>24</sup> However, later in the *JFPA Order*, the FCC also provides that "entities that send facsimile advertisements to consumers from whom they obtained permission must include on the advertisements their opt-

<sup>20</sup> 47 C.F.R. § 64.1200(a)(4) (emphasis added).

<sup>21</sup> *Id.* § 64.1200(a)(4)(i).

<sup>22</sup> *Id.* § 64.1200(a)(4)(iii).

<sup>23</sup> *Id.* § 64.1200(a)(4)(iv).

<sup>24</sup> *JFPA Order* ¶ 42 n.154.

out notice.”<sup>25</sup> Accordingly, it is impossible to definitively conclude, based on the plain text of the rule or the implementing order, that Section 64.1200(a)(4)(iv) is intended to reach solicited faxes.

Nothing in the text of the TCPA or the legislative history of that statute indicates that Congress intended to apply such requirements to solicited faxes.<sup>26</sup> 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 solicited faxes sent with the recipient’s “prior express invitation or permission.”<sup>27</sup> The TCPA, as codified in 47 U.S.C. § 227 and amended by the JFPA, plainly only applies to unsolicited faxes, and the Commission should clarify that Section 64.1200(a)(4)(iv) does not apply to solicited fax advertisements.

**2. The FCC lacks the statutory authority to apply Section 64.1200(a)(4)(iv) to solicited faxes.**

Congress specifically limited Section 227(b) of the TCPA to unsolicited advertisements. In doing so, Congress also restricted the Commission’s jurisdiction to promulgate new regulations regarding that particular type of communication.<sup>28</sup> Indeed, the Commission itself has recognized that the TCPA’s scope is limited to unsolicited fax advertisements. For example, the

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<sup>25</sup> *Id.* ¶ 48.

<sup>26</sup> *See, e.g.*, 47 U.S.C. § 227(b)(1),(2); S. Rep. No. 102-178 at 3 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970; S. Rep. No. 109-76 at 1 (2005), reprinted in 2005 U.S.C.C.A.N. 319.

<sup>27</sup> *See generally Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19758 (2005).

<sup>28</sup> *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 establish a contrary regulation on the same subject).

FCC notes in the *JFPA Order* that it “amend[s] the Commission’s rules on *unsolicited* facsimile advertisements as required by the [JFPA].”<sup>29</sup>

Absent an express grant of jurisdiction from Congress, an agency is not free to promulgate new rules.<sup>30</sup> As the Supreme Court recently reminded another federal agency, an agency’s “power to execute laws does not include the power to revise clear statutory terms.” In interpreting ambiguous statutory language, an agency must operate “within the bounds of reasonable interpretation.”<sup>31</sup> As neither the TCPA nor the JFPA directed the FCC to adopt rules requiring an opt-out message for solicited facsimiles, applying Section 64.1200(a)(iv)(4) to faxes sent with the “prior express invitation or permission” of the recipient is impermissible under the Commission’s statutory authority.

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

The Supreme Court has established that lawful and truthful commercial speech may be subject to regulation only where the government can show that the proposed restriction directly advances a substantial government interest and that the rule “is not more extensive than is necessary to serve that interest.”<sup>32</sup> The Commission cannot meet this standard by applying Section 64.1200(a)(4)(iv) to solicited fax advertisements.

Courts that have applied that test to *unsolicited* faxes under Section 227(b) have upheld the FCC’s requirements by recognizing the existence of “a substantial interest in restricting

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<sup>29</sup> See, e.g., *JFPA Order* ¶ 1 (emphasis added); see also *id.* ¶ 2 (“[T]he TCPA prohibits the use of any telephone facsimile machine ... to send an ‘unsolicited advertisement.’”); *id.* ¶ 7 (“On December 9, 2005, the Commission released a Notice of Proposed Rulemaking proposing modifications to the Commission’s rules on unsolicited facsimile advertisements to implement the amendments required by the [JFPA].”).

<sup>30</sup> See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); see also, e.g., *Am. Library Ass’n*, 406 F.3d at 705; *ACLU*, 823 F.2d at 1571.

<sup>31</sup> *Util. Air Regulatory Grp. v. EPA*, 573 U.S. \_\_\_, 2014 U.S. LEXIS 4377, at \*17, 19-20 (2014) (“[A]n agency interpretation that is ‘inconsisten[t] with the design and structure of the statute as a whole... does not merit deference.’”); see also *City of Arlington, Tex. v. FCC*, 133 S.Ct 1863, 1869-71 (2013).

<sup>32</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising places on the recipient.”<sup>33</sup> But the Eighth Circuit found in *Nack* that interest had not been demonstrated in the context of *solicited* faxes.<sup>34</sup>

The FCC has not established that its rule requiring solicited faxes to include opt-out notices satisfies the test established by the Supreme Court not to be “more extensive than is necessary” to advance a substantial governmental interest.<sup>35</sup> Indeed, the Commission has not attempted to build a record to justify application of this rule to solicited fax advertisements and has not explained how applying the opt-out notice requirement to solicited fax advertisements would directly advance an important government interest or why a less burdensome requirement could not serve that interest. For these reasons, the Commission should clarify that the rule does not apply to solicited fax advertisements.

**B. In the Alternative, the FCC Should Issue a Declaratory Ruling that 47 U.S.C. § 227(b) Is Not the Statutory Basis of Section 64.1200(a)(4)(iv).**

If the Commission declines to issue the declaratory ruling as set forth above, it should issue a declaratory ruling clarifying that Section 227(b) of the Communications Act is not the statutory basis for Section 64.1200(a)(4)(iv). Although the Commission cited eleven statutory provisions in the *JFPA Order* as the basis for the numerous amendments made to Section 64.1200, it failed to specify the statutory basis for Section 64.1200(a)(4)(iv).<sup>36</sup>

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<sup>33</sup> *Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655 (8<sup>th</sup> Cir. 2003).

<sup>34</sup> See *Nack*, 715 F.3d at 687 (“[T]he analysis and conclusion as set forth in *American Blast Fax* would not necessarily be the same if applied to the agency’s extension of authority over solicited advertisements.”); see also H.R. Rep. No. 102-317, 1991 WL 245201, at \*10 (1991) (recognizing concerns regarding governmental restrictions on commercial speech).

<sup>35</sup> *Hudson Gas*, 447 U.S. at 566.

<sup>36</sup> See *JFPA Order* ¶ 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”).

A declaratory ruling confirming that Section 227(b) is not the statutory basis for Section 64.1200(a)(4)(iv) would benefit the FCC, as it would eliminate the need for parties to continue to file petitions with the Commission to resolve this ongoing issue. A declaratory ruling would also benefit the courts and the public by clarifying that solicited fax advertisements sent with the recipient's "prior express invitation or permission" do not provide a basis for a private action under the TCPA. Clarifying that there is no private right of action for violations of this rule section would also help to ensure fair treatment for businesses acting in good faith that could otherwise be subject to potentially devastating class action lawsuits based merely on sending fax advertisements to recipients who had given "prior express invitation or permission" to receive them, or invited the sender to provide them.

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.<sup>37</sup> Clarifying the statutory basis for the rule section would enable the Commission to implement and achieve the rule's objective more effectively while not subjecting small businesses or other organizations to class action lawsuits with staggering penalties. Without the requested clarification, courts will be left to guess at the Commission's jurisdictional authority and intent for the rule, injecting greater uncertainty into the many pending lawsuits that have arisen as a result of the ambiguity of Section 64.1200(a)(4)(iv) and potentially depriving defendants of a valid defense.

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<sup>37</sup> *Cf. Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (requiring agencies to articulate the basis for their rules can "assist judicial review" and help to ensure "fair treatment for persons affected by rule.").

C. **In the Alternative, the FCC Should Grant CARFAX a Retroactive Waiver To Provide Business with Certainty that Sending Consented-To Fax Advertisements Will Not Subject Them to Massive Financial Penalties.**

If the Commission declines to issue either of the declaratory orders requested in this Petition, CARFAX respectfully requests that the Commission nonetheless grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by CARFAX after the effective date of the regulation. Section 1.3 of the Commission's rules permits the Commission to grant a waiver for good cause shown,<sup>38</sup> and 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.<sup>39</sup> Furthermore, courts have found that waiver of a Commission regulation 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.<sup>40</sup> The circumstances of this case meet this standard.

Granting a waiver to CARFAX is in the public interest. The TCPA and the Commission's TCPA rules were intended "to allow consumers to stop *unwanted* faxes in the future."<sup>41</sup> The fax advertisement that CARFAX sent, on the other hand, was sent with the "prior express invitation and permission" to a recipient that had entered into an agreement with CARFAX. The recipient was also aware of how to reach CARFAX in the event it desired to opt out of future fax communications.

CARFAX's service provides consumers with important product safety information and is a significant tool in assisting purchasers of used vehicles to determine whether the vehicle that they are considering buying has a history of routine service maintenance. In addition, businesses

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<sup>38</sup> 47 C.F.R. § 1.3.

<sup>39</sup> See *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); 47 C.F.R. § 1.925.

<sup>40</sup> See *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>41</sup> *JFPA Order* ¶ 48.

that repair and sell motor vehicles rely on CARFAX's services to provide their customers with informed, high-quality products and services. Requiring strict compliance with Section 64.1200(a)(4)(iv) with respect to solicited faxes, and exposing CARFAX and other good faith actors to significant class action liability would be inequitable, unduly burdensome, and contrary to the public interest. As discussed above, in light of the ambiguity and confusion regarding the scope and applicability of Section 64.1200(a)(4)(iv), denial of a waiver could also impose substantial harm on CARFAX and other organizations.

As a final matter, to the extent that the Commission determines that any declaratory ruling, waiver, or other relief may be warranted for fax advertisements that are sent without the "prior express invitation or permission" of the recipient but are sent to a recipient with whom the sender has an established business relationship, CARFAX respectfully requests that it be granted such relief on the bases described in this Petition.

### **III. CONCLUSION**

For the reasons stated above, CARFAX 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, CARFAX 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 event the Commission declines to issue a declaratory ruling, as requested in this petition, CARFAX respectfully requests that the Commission nonetheless grant CARFAX a retroactive waiver of Section 64.1200(a)(4)(iv) from the effective date of the regulation for any solicited fax sent by CARFAX. To the extent that the Commission determines that any declaratory ruling, waiver, or other relief may be warranted for fax advertisements that are sent without the "prior express invitation or permission" of the recipient but are sent to a recipient

with whom the sender has an established business relationship, CARFAX respectfully requests that it be granted such relief on the bases described in this Petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark W. Brennan", written over a horizontal line.

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July 11, 2014