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## FCC Order Confirms that TCPA Regulations Require Opt-Out Notice on All Fax Advertisements, Even Those Sent with Prior Express Permission

*U.S. Commercial Disputes and Telecom, Media and Technology Alert*

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### Introduction

On October 30, 2014, the Federal Communications Commission (“FCC”) released an Order<sup>1</sup> that “confirms” that opt-out notices complying with rules and regulations adopted by the FCC in 2006, pursuant to the authority granted to the FCC under the Telephone Consumer Protection Act of 1991, as amended by the Junk Fax Prevention Act of 2005 (“TCPA”), are required on all advertisements transmitted by facsimile, including advertisements transmitted with the prior express permission of the recipient. The FCC also granted retroactive waivers to parties that were reasonably uncertain about whether the opt-out notice requirement applied to faxes sent with prior express permission from the recipient. The FCC further stated that individual retroactive waivers may be extended to similarly situated parties that seek waiver requests prior to April 30, 2015.

### Background

The TCPA, codified at 47 U.S.C. § 227, prohibits the use of a fax machine to send an “unsolicited advertisement”<sup>2</sup> under certain circumstances. 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>3</sup> The TCPA expressly applies only to unsolicited faxes and not to all faxes.<sup>4</sup> Prior to 2006, courts regularly held that faxes sent with “prior express invitation or permission” were not prohibited by the TCPA or subject to regulations promulgated thereunder and were not required to bear opt-out notices.<sup>5</sup>

<sup>1</sup> *In The Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, FCC 14-164, 2014 WL 5493425 (Oct. 30, 2014) (hereinafter the “2014 Order”).

<sup>2</sup> 47 U.S.C. §§ 227(a)(5), (b)(1)(C).

<sup>3</sup> *Id.* at § 227(a)(5) (emphasis added).

<sup>4</sup> See generally 47 U.S.C. § 227.

<sup>5</sup> See *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995) (“the essential question of fact that each potential plaintiff must prove is whether a specific transmission to its machine was without express invitation or permission on its part”); see also *G.M. Sign, Inc. v. Franklin Bank, S.S.B.*, No. 06-CV-949, 2008 WL 2410427, at \*2 (N.D. Ill. June 11, 2008) (referring to lack of permission or consent as “an element of the prima facie case for a TCPA claim”).

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Even though the TCPA expressly applies only to unsolicited faxes, the FCC adopted an Order in 2006<sup>6</sup> that amended the rules concerning facsimile transmissions and adopted a rule that required that a fax advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.”<sup>7</sup> However, the 2006 Order also contained a footnote stating that “the opt-out notice requirement only applies to communications that constitute **unsolicited** advertisements.”<sup>8</sup> As a result, many plaintiffs have used this ambiguity of the 2006 Order to bring class action lawsuits seeking millions of dollars,<sup>9</sup> solely based on the defendant’s failure to include a compliant opt-out notice on facsimiles transmitted with prior express permission. Nevertheless, multiple courts held that Section 64.1200(a)(4)(iv) does not apply to faxes sent with the consent of the recipient.<sup>10</sup>

Anda, Inc. (“Anda”) filed a petition for declaratory ruling in November 2010, seeking a ruling that the FCC lacked authority to adopt a rule requiring opt-out notice on facsimiles sent with prior express permission. The FCC dismissed Anda’s petition in May 2012 because (i) it identified no controversy to terminate or uncertainty to remove, which is a condition precedent to declaratory ruling; and (ii) it was time barred because the petition was filed in 2010 and the 2014 Order was issued in 2006.<sup>11</sup> On May 14, 2012, Anda filed an Application for Review of FCC’s Order dismissing its petition for declaratory ruling, contending that the FCC erred in determining that there is no uncertainty to remove, and that section 227 contains no express language authorizing the FCC to adopt rules regarding solicited faxes.<sup>12</sup>

Since the filing of Anda’s Application for Review, multiple petitions have been filed with the FCC seeking various forms of relief from the 2006 Order.<sup>13</sup> The petitions generally contended that there is uncertainty over the scope of and statutory basis for Section 64.1200(a)(4)(iv) requiring opt-out notice on solicited facsimiles. The petitioners argued that Section 227(b) of the TCPA applies only to unsolicited advertisements, and that the FCC lacked authority to require the opt-out notification on facsimiles sent with prior express permission. They requested clarification to determine whether the rule is applicable to faxes sent with prior express permission and sought a declaratory ruling that a fax advertisement that complies substantially with Section 64.1200(a)(4)(iv) does not violate any regulation promulgated under the TCPA.

### The 2014 Order

On October 30, 2014, the FCC issued an order denying Anda’s application for review and related requests for declaratory ruling to the extent that they sought a ruling that the FCC lacked statutory authority to require opt-out information on facsimiles transmitted with prior

<sup>6</sup> 47 C.F.R. § 64.1200(a)(4)(iv) (hereinafter “Section 64.1200(a)(4)(iv)”); see also *In the Matter of 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 F.C.C.R. 3787 (2006) (hereinafter the “2006 Order”).

<sup>7</sup> Section 64.1200(a)(4)(iv); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, 71 Fed. Reg. 25967 (May 3, 2006).

<sup>8</sup> 2006 Order, 21 F.C.C.R. at 3810, n.154 (emphasis added).

<sup>9</sup> 47 U.S.C. § 227(b)(3)(A)-(C).

<sup>10</sup> See, e.g., *Fackelman v. Micronix*, No. 98320, 2012 WL 5987139, at \*2 (Ohio Ct. App. Nov. 29, 2012), *appeal not allowed*, 986 N.E.2d 30 (2013); *Miller v. Painters Supply & Equip. Co.*, No. 95614, 2011 WL 3557018, at \*4 (Ohio Ct. App. Aug. 11, 2011); see also *Clearbrook v. Rooflifters LLC*, No. 08-CV-3276, 2010 WL 2635781, at \*4 (N.D. Ill. June 28, 2010) (calling into question plaintiff’s argument that TCPA is applicable to solicited faxes).

<sup>11</sup> *In the Matter of Junk Fax Prevention Act of 2005*, 27 F.C.C.R. 4912, 4914 (2012).

<sup>12</sup> 2014 Order, 2014 WL 5493425, at \*3.

<sup>13</sup> 2014 Order, 2014 WL 5493425, at \*2-5.

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express permission, concluding that such requests raised no issue of controversy or uncertainty, that the requests were improper collateral challenges time barred by the FCC Rules, and that Section 227(b) of the TCPA provides the statutory basis for Section 64.1200(a)(4)(iv).<sup>14</sup> The FCC also denied the requests of those petitioners seeking a declaratory ruling that facsimile advertisements that “comply substantially” with Section 64.1200(a)(4)(iv) do not violate any regulation promulgated under the TCPA.<sup>15</sup> Instead, the FCC affirmed that “full compliance is required.”

The FCC confirmed that Section 64.1200(a)(4)(iv) requires that all fax advertisements contain a compliant opt-out notice, but recognized that the 2006 Order caused confusion regarding the applicability of this requirement to facsimiles sent with prior express permission “or created a false sense of confidence that the requirement did not apply.”<sup>16</sup> Specifically, a footnote in the 2006 Order stated that “the opt-out notice requirement only applies to communications that constitute **unsolicited** advertisements.”<sup>17</sup> The FCC further acknowledged that the notice of its intent to adopt Section 64.1200(a)(4)(iv) did not make explicit that the FCC contemplated an opt-out notice on facsimiles sent with prior express permission of the recipient.

The FCC concluded that this combination of factors established good cause for retroactive waiver<sup>18</sup> of Section 64.1200(a)(4)(iv), and indicated that it would entertain requests of additional retroactive waivers sought by “similarly situated parties.” The FCC emphasized, however, that “simple ignorance of the TCPA or the Commission’s attendant regulations is not grounds for waiver.” Thus, the FCC ordered that full compliance with Section 64.1200(a)(4)(iv) would be required on advertisements sent with prior express permission six months from the release date of the 2014 Order (October 30, 2014), that the waiver shall not apply to conduct that occurs more than six months after the release date of the 2014 Order, and that parties requesting additional retroactive waivers should “make every effort to file” within the same six-month period.

### Statements of Commissioners Pai and O’Rielly Dissenting in Part

Commissioners Ajit Pai and Michael O’Rielly each issued separate statements, concurring in part and dissenting in part.<sup>19</sup> Both commissioners dissented from the decision that the FCC has the statutory authority to require opt-out notices on solicited facsimiles. Commissioner Pai stated that the text of the TCPA does not give the FCC authority to prescribe rules as to solicited facsimiles, that the definition of “prior express invitation or permission” does not fill the “statutory gap,” and that the “public policy impetus just doesn’t exist.” Commissioner Pai further maintained that the FCC has never, prior to the 2014 Order, specifically addressed the statutory basis of the FCC’s decision to adopt a rule governing solicited faxes and described the 2014 Order as an “attempt to evade judicial review.” Commissioner O’Rielly similarly asserted that the 2014 Order improperly attempts to “shoehorn solicited fax ads into the statute.”

<sup>14</sup> 2014 Order, 2014 WL 5493425, at \*5-7.

<sup>15</sup> 2014 Order, 2014 WL 5493425, at \*10.

<sup>16</sup> 2014 Order, 2014 WL 5493425, at \*5, 7-9.

<sup>17</sup> 2006 Order, 21 F.C.C.R. at 3810, n.154 (emphasis added).

<sup>18</sup> 47 C.F.R. § 1.3.

<sup>19</sup> 2014 Order, 2014 WL 5493425, at \*11-12.

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### Impact

The 2014 Order will further strengthen private plaintiffs' arguments that all faxes constituting advertisements must contain opt-out notices strictly complying with FCC regulations. So long as the 2014 Order remains in force, any company that communicates by fax should carefully consider whether their communications constitute advertisements and should take steps to ensure that all such advertisements bear conforming opt-out notices. Companies might also consider whether it makes sense to seek a retroactive waiver before the April 30, 2015 deadline.

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