



**FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

October 15, 2004

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED
AND FACSIMILE

Creative Communications
Attn: Christopher G. Nottoli, President
155 North 400 West, Suite 100
Salt Lake City, UT 84103

RE: EB-04-TC-138

Dear Mr. Nottoli:

This is an official **CITATION** and **LETTER OF INQUIRY**¹ related to violations of the Communications Act of 1934, as amended, and the Federal Communications Commission's rules that govern telephone solicitations and unsolicited advertisements.² As explained below, future violations of the Act or Commission's rules in this regard may subject you to monetary forfeitures.

It has come to our attention that you are involved in transmitting to telephone facsimile machines unsolicited advertisements for property, goods, or services offered by another entity (see attachments).³ As explained in detail below, section 227(b)(1)(C) of the Communications Act and section 64.1200(a)(3) of the Commission's rules generally prohibit the delivery of unsolicited advertisements to telephone facsimile machines.

¹These actions are taken pursuant to 47 U.S.C. §§ 154(i), 403, 503(b)(5).

² 47 U.S.C. § 227; 47 C.F.R. § 64.1200. A copy of these provisions is enclosed for your convenience. Section 227 was added to the Communications Act by the Telephone Consumer Protection Act of 1991 and is most commonly known as the TCPA. The TCPA and the Commission's parallel rules restrict a variety of practices that are associated with telephone solicitation and use of the telephone network to deliver unsolicited advertisements, including fax advertising.

³ The facsimile advertisement(s) promotes Health Plans on behalf of an unidentified entity and Virtual Media Machines on behalf of Virtual Media Systems, Hollywood, Florida. According to common carrier billing information, your company holds the opt-out number provided on the advertisements. An unidentified fax number of the unidentified entity and Virtual Media System holds the contact number contained in the advertisements.

We direct you to respond to this Citation and Letter of Inquiry by providing the information and documents specified below no later than 30 days after the date of this correspondence.

**I. CITATION FOR VIOLATIONS OF 47 U.S.C. § 227(b)(1)(C)
AND 47 C.F.R. § 64.1200(a)(3)**

Section 227(b)(1)(C) of the Communications Act makes it “unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States . . . to use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.”⁴ The term “unsolicited advertisement” is defined in the Act and the Commission’s rules as “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.”⁵ Under Commission rules and orders currently in effect, the Commission considers an established business relationship between a fax sender and recipient to constitute prior express invitation or permission to send a facsimile advertisement.⁶ Mere distribution or publication of a fax number, however, does not establish consent to receive advertisements by fax.⁷

⁴ 47 U.S.C. § 227(b)(1)(C); *see also* 47 C.F.R. § 64.1200(a)(3) (providing 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). Both the TCPA and the Commission’s rules define “telephone facsimile machine” as “equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.” 47 U.S.C. § 227(a)(2); 47 C.F.R. § 64.1200(f)(8). The Commission has stated that “[t]he TCPA’s definition of ‘telephone facsimile machine’ broadly applies to any equipment that has the capacity to send or receive text or images.” Thus, “faxes sent to personal computers equipped with, or attached to, modems and to computerized fax servers are subject to the TCPA’s prohibition on unsolicited faxes. . . [although] the prohibition does not extend to facsimile messages sent as email over the Internet.” *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14131-32 (2003) (*2003 TCPA Report and Order*).

⁵ 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(10).

⁶ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12405 (1995) (*1995 TCPA Reconsideration Order*). In June 2003, the Commission amended its rules to specify that prior express invitation or permission to receive a facsimile advertisement must be recorded in a “signed written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient’s consent to receive such facsimile advertisements from the sender.” *2003 TCPA Report and Order*, 18 FCC Rcd at 14124-28 (adopting new section 64.1200(a)(3)(i). This new provision, which supercedes the established business relationship exception, is scheduled to take effect January 1, 2005. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order on Reconsideration, 18 FCC Rcd 16972 (2003); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order, FCC 03-230 (rel. Oct. 3, 2003). The Commission currently is considering petitions that seek to retain the established business relationship exception or require methods other than a signed written statement to demonstrate prior express consent to receive fax advertising.

⁷ *1995 Reconsideration Order*, 10 FCC Rcd at 12408-09; *see also* *2003 TCPA Report and Order*, 18 FCC Rcd at 14128 (concluding that publication of a fax number in a trade publication or directory does not demonstrate consent to receive fax advertising).

Although entities that merely transmit or ‘broadcast’ facsimile messages on behalf of others are not generally liable for compliance with the prohibition on faxing unsolicited advertisements, the exemption from liability does not exist when a facsimile broadcaster⁸ has “a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.”⁹ Supplying the telephone facsimile numbers to which messages are sent or influencing the content of the fax message, among other things, evidence a high degree of involvement. Therefore, in certain circumstances, fax broadcasters may be held liable for unsolicited advertisements that they transmit to telephone facsimile machines on behalf of other entities. You may be subject to monetary forfeitures if, among other things, you: (1) are highly involved in sending unsolicited facsimile advertisements on behalf of any party, as evidenced by such actions as supplying the telephone facsimile numbers to which you transmit unsolicited advertisements or influencing the content of fax messages; or (2) continue to transmit facsimile advertisements for the entity or entities for whom the Company faxed the advertisements that are attached to this correspondence without taking steps to ensure that either that entity or your company has an established business relationship with each recipient or has otherwise obtained each recipient’s permission to fax advertisements.

Finally, section 63.318(d) of the Commission’s rules requires that a fax broadcaster with a high degree of involvement in the messages it transmits include on each message the name under which it is registered to conduct business with the relevant State Corporation Commission or comparable regulatory authority. The attached materials indicate that you have failed to include this information on the faxes at issue. This omission violates the Commission’s rules and may subject you to monetary forfeitures if, in fact, you are highly involved in your customers’ sending of facsimile messages, as evidenced by the factors outlined above.

If, after receipt of this citation, you violate the Communications Act or the Commission’s rules in any manner described herein, the Commission may impose monetary forfeitures not to exceed \$11,000 for each such violation or each day of a continuing violation.¹⁰

You may respond to this citation within 30 days from the date of this letter either through (1) a personal interview at the Commission’s Field Office nearest to your place of business, or (2) a written statement. Your response should specify the actions that you are taking to ensure that you do not violate the Commission’s rules governing telephone solicitation and unsolicited advertisements, as described above.

⁸ The term “facsimile broadcaster” means “a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.” 47 C.F.R. § 64.1200(f)(4).

⁹ 47 C.F.R. § 64.1200(a)(3)(ii). *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Order on Reconsideration, 18 FCC Rcd 16972 (2003).

¹⁰ See 47 C.F.R. § 1.80(b)(3).

The nearest Commission field office appears to be the Denver Office in Denver, Colorado. Please call Al McCloud at (202) 418-2499 if you wish to schedule a personal interview. You should schedule any interview to take place within 30 days of the date of this letter. You should include any written statement with your answers to the inquiries set forth in section II of this correspondence.

Reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need including as much detail as you can. Also include a way we can contact you if we need more information. Please allow at least 5 days advance notice; last minute requests will be accepted, but may be impossible to fill. Send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau:

For sign language interpreters, CART, and other reasonable accommodations:
202-418-0530 (voice), 202-418-0432 (tty);

For accessible format materials (braille, large print, electronic files, and audio format): 202-418-0531 (voice), 202-418-7365 (tty).

II. INQUIRY REGARDING FAX BROADCASTING ACTIVITIES

We direct your Company, pursuant to sections 4(i), 4(j), and 403 of the Act, 47 U.S.C. §§ 154(i), 154(j), 403, to provide the information and Documents, where relevant, specified herein within 30 calendar days from the date of this letter.

Instructions

If the Company requests that any information or Documents, as defined herein, responsive to this letter be treated in a confidential manner, it shall submit, along with all responsive information and Documents, as defined herein, a statement in accordance with Section 0.459 of the Commission's rules. 47 C.F.R. § 0.459. Requests for confidential treatment must comply with the requirements of Section 0.459, including the standards of specificity mandated by Section 0.459(b). Accordingly, "blanket" requests for confidentiality of a large set of documents are unacceptable. Pursuant with Section 0.459(c), the Bureau will not consider requests that do not comply with the requirements of Section 0.459.

If the Company withholds any information or Documents under claim of privilege, it shall submit, together with any claim of privilege, a schedule of the items withheld that states, individually as to each such item, the numbered inquiry to which each item responds and the type, title, specific subject matter, and date of the item; the names, addresses, positions, and organizations of all authors and recipients of the item; and the specific ground(s) for claiming that the item is privileged.

Each requested Document not subject to a claim of privilege shall be submitted in its entirety, even if only a portion of that Document is responsive to an inquiry made herein. This means that the Document shall not be edited, cut, or expunged, and shall include all appendices, tables, or other attachments, and all other Documents referred to in the Document or

attachments. All written materials necessary to understand any Document responsive to these inquiries must also be submitted.

If a Document responsive to any inquiry made herein existed but is no longer available, or if the Company is unable for any reason to produce a Document responsive to any inquiry, identify each such Document by author, recipient, date, title, and specific subject matter, and explain fully why the Document is no longer available or why the Company is otherwise unable to produce it.

With respect only to Documents responsive to the specific inquiries made herein and any other Documents relevant to those inquiries, the Company is directed to retain the originals of those Documents for twenty-four (24) months from the date of this letter unless (1) the Company is directed or informed by the Enforcement Bureau in writing to retain such Documents for some other period of time or (2) the Enforcement Bureau and/or the Commission releases any item on the subject of this investigation, including, but not limited to, a Notice of Apparent Liability for Forfeiture or an order disposing of the issues in the investigation, in which case, the Company must retain all such Documents until the matter has been finally concluded by payment of any monetary penalty, satisfaction of *all* conditions, expiration of all possible appeals, conclusion of any collection action brought by the United States Department of Justice or execution and implementation of a final settlement with the Commission or the Enforcement Bureau.

The specific inquiries made herein are continuing in nature. The Company is required to produce in the future any and all Documents and information that are responsive to the inquiries made herein but not initially produced at the time, date and place specified herein. In this regard, the Company must supplement its responses (a) if the Company learns that, in some material respect, the Documents and information initially disclosed were incomplete or incorrect or (b) if additional responsive Documents or information are acquired by or become known to the Company after the initial production. The requirement to update the record will continue for twenty-four (24) months from the date of this letter unless (1) the Company is directed or informed by the Enforcement Bureau in writing that the Company's obligation to update the record will continue for some other period of time or (2) the Enforcement Bureau and/or the Commission releases an item on the subject of this investigation, including, but not limited to, a Notice of Apparent Liability for Forfeiture or an order disposing of the issues in the investigation, in which case the obligation to update the record will continue until the release of such item.

For each Document or statement submitted in response to the inquiries below, indicate, by number, to which inquiry it is responsive and identify the person(s) from whose files the Document was retrieved. If any Document is not dated, state the date on which it was prepared. If any Document does not identify its author(s) or recipient(s), state, if known, the name(s) of the author(s) or recipient(s). The Company must identify with reasonable specificity all Documents provided in response to these inquiries.

Unless otherwise indicated, the period of time covered by these inquiries begins one year before the date of this letter and ends with the date of the Company's response.

Definitions

For purposes of this letter, the following definitions apply:

"Any" shall be construed to include the word "all," and the word "all" shall be construed to include the word "any." Additionally, the word "or" shall be construed to include the word "and," and the word "and" shall be construed to include the word "or." The word "each" shall be construed to include the word "every," and the word "every" shall be construed to include the word "each."

"Document" shall mean the complete original (or in lieu thereof, exact copies of the original) and any non-identical copy (whether different from the original because of notations on the copy or otherwise), regardless of origin or location, of any taped, recorded, transcribed, written, typed, printed, filmed, punched, computer-stored, or graphic matter of every type and description, however and by whomever prepared, produced, disseminated, or made, including but not limited to any advertisement, book, pamphlet, periodical, contract, correspondence, letter, facsimile, e-mail, file, invoice, memorandum, note, telegram, report, record, handwritten note, working paper, routing slip, chart, graph, photograph, paper, index, map, tabulation, manual, guide, outline, script, abstract, history, calendar, diary, agenda, minute, marketing plan, research paper, preliminary drafts, or versions of all of the above, and computer material (print-outs, cards, magnetic or electronic tapes, disks and such codes or instructions as will transform such computer materials into easily understandable form).

"Company" shall include the Company as noted on page 1 of this letter, and any predecessor-in-interest, successor-in-interest, affiliate, parent company, any wholly or partially owned subsidiary, or other affiliated company(s) or business(es), and all owners, including but not limited to, partners or principals, and all directors, officers, employees, or agents, including consultants and any other persons working for or on behalf of the foregoing at any time during the period covered by this letter.

Information to be provided

1. Discuss in detail the Company's involvement in transmitting to telephone facsimile machines the advertisements that are attached to this correspondence and identify, including name(s), business telephone number(s), and address(es) of, the entity or entities for which the Company transmitted such advertisements. Discuss any other services that the Company provides to the entity or entities whose property, goods, or services are promoted in the attached advertisements. Provide all relevant documents, including any contracts, agreements, or any other materials that address or memorialize the terms and conditions under which the Company transmits telephone facsimile messages for, or provides any other services to, the entity or entities whose property, goods, or services are promoted in the attached advertisements.
2. Has the Company disclosed to the entity or entities whose property, goods, or services are promoted in the attached advertisements, or any other entities for which it transmits

telephone facsimile messages, that sending unsolicited advertisements to telephone facsimile machines is unlawful? Provide all relevant documents.

3. Has the Company had any control over or involvement in influencing the content of the attached advertisements or any other advertisements that the Company transmits by facsimile? Does the Company offer any type of editing or graphic design services for advertisements that it transmits by facsimile? Describe all such control, involvement, or services in detail. Provide all relevant documents.
4. Who provided, compiled, or generated the distribution list(s) of telephone facsimile numbers used to transmit the attached advertisements or any other advertisements that the Company transmits by facsimile? Provide all relevant documents.
5. If the Company has been involved in any way in providing, compiling, generating, or editing the distribution list(s) of telephone facsimile numbers used to transmit the attached advertisements or any other advertisements that the Company transmits by facsimile, describe in detail the process by which the Company obtains, produces, or participates in the generation of such list(s). Does the Company employ or compensate any individuals or entities outside the Company for any service, activity, assistance, or facilities used in connection with providing, compiling, generating, or editing of such list(s)? Describe such arrangements in detail. Provide all relevant documents.
6. If the Company has been involved in any way in providing, compiling, generating, or editing the distribution list(s) of telephone facsimile numbers used to transmit the attached advertisements or any other advertisements that the Company transmits by facsimile, what steps has the Company taken to ensure that the telephone facsimile numbers belong to individuals or entities who have agreed, by explicit consent or by virtue of an established business relationship, to receive the advertisement(s)? Describe in detail the manner in which the Company records consumers' consent or the existence of an established business relationship. Provide all relevant documents.
7. Does the Company advertise facsimile transmittal services or any other services associated with facsimile advertisements, and, if so, by what means? Provide copies of all print, audio, and video materials that have been used within the past year to promote such services. For each advertisement, list the media in which the advertisement appeared and the date(s) of such appearance(s).

We direct the Company to support its responses with an affidavit or declaration under penalty of perjury, signed and dated by an authorized officer of the Company with personal knowledge of the representations provided in the Company's response, verifying the truth and accuracy of the information therein and that all of the Documents and information requested by this letter which are in the Company's possession, custody, control or knowledge have been produced. If multiple Company employees contribute to the response, in addition to such general affidavit or declaration of the authorized officer of the Company noted above, provide separate affidavits or declarations of each such individual that identify clearly to which responses the affiant or declarant is attesting. All such declarations provided should comply with section

1.16 of the Commission's rules, 47 C.F.R. § 1.16, and be substantially in the form set forth therein.

The Company should direct its response to the attention of

Kurt A. Schroeder
Deputy Chief
Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W., Rm. 4-C222
Washington, DC, 20554.

Include the file number, EB-04-TC-138, in any correspondence.

Under the Privacy Act of 1974, 5 U.S.C. § 552(a)(e)(3), we are informing you that the Commission's staff will use all relevant material information before it to determine what, if any, enforcement action is required to ensure your compliance with the TCPA and the Commission's rules. This will include any information that you disclose in your interview or written statement in response to the Citation and Letter of Inquiry.

The knowing and willful making of any false statement, or the concealment of any material fact, in reply to this Citation and Letter of Inquiry is punishable by fine or imprisonment under 18 U.S.C. § 1001.

Thank you in advance for your anticipated cooperation.

Sincerely,

Kurt A. Schroeder
Deputy Chief, Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission

Enclosures