



PUBLIC NOTICE

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CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON PETITIONS CONCERNING THE COMMISSION'S RULE ON OPT-OUT NOTICES ON FAX ADVERTISEMENTS

CG Docket No. 02-278

CG Docket No. 05-338

Comment Date: February 14, 2014

Reply Comment Date: February 21, 2014

Several petitions have been filed seeking a declaratory ruling, rulemaking, and/or waiver concerning section 64.1200(a)(4)(iv) of the Commission's rules, which requires fax advertisements sent to a consumer who has provided prior express invitation or permission to include an opt-out notice.¹ With this Public Notice, we seek comment on these petitions as described below.

¹ See *Petition of Forest Pharmaceuticals, Inc., for Declaratory Ruling and/or Waiver Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) of the Commission's Rules and for Declaratory Ruling Regarding the Statutory Basis for the Commission's Opt-Out Notice Rule with Respect to Faxes Sent with the Recipient's Prior Express Invitation or Permission*, CG Docket No. 05-338 (filed June 27, 2013) (Forest Petition); *Petition of Staples, Inc. and Quill Corporation for a Rulemaking to Repeal Rule 64.1200(a)(3)(iv) and for a Declaratory Ruling to Interpret Rule 64.1200(a)(3)(iv)*, CG Docket Nos. 02-278, 05-338 (filed July 19, 2013) (Staples Petition); *Petition for Declaratory Ruling and/or Waiver of Gilead Sciences, Inc., and Gilead Palo Alto, Inc., Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) of the Commission's Rules and for Declaratory Ruling Regarding the Statutory Basis for the Commission's Opt-Out Notice Rule with Respect to Faxes Sent with the Recipient's Prior Express Invitation or Permission*, CG Docket Nos. 02-278, 05-338 (filed Aug. 9, 2013) (Gilead Petition); *Petition of Douglas Paul Walburg and Richie Enterprises, LLC, for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver*, CG Docket Nos. 02-278, 05-338 (filed Aug. 19, 2013) (Walburg Petition); *Petition of Futuredontics, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver*, CG Docket Nos. 02-278, 05-338 (filed Oct. 18, 2013) (Futuredontics Petition); *Petition of All Granite & Marble Corp. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver*, CG Docket Nos. 02-278, 05-338 (filed Oct. 28, 2013) (All Granite Petition); *Purdue Pharma Petition for Declaratory Ruling Regarding the Statutory Basis for the Commission's Opt-Out Notice Rule with Respect to Solicited Faxes, and/or Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) and (iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (filed Dec. 12, 2013) (Purdue Pharma Petition); *Petition of Prime Health Services, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver*, CG Docket Nos. 02-278, 05-338 (filed Dec. 17, 2013) (Prime Health Petition); *Petition of TechHealth, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver*, CG Docket Nos. 02-278, 05-338 (filed Jan. 6, 2013) (TechHealth Petition); see also 47 C.F.R. § 64.1200(a)(4)(iv). We note that the numbering of the opt-out notice rule has recently been changed and petitioners referencing section 64.1200(a)(3)(iv) appear to mean current section 64.1200(a)(4)(iv). We thus find good cause to treat the petition as such.

All the petitioners request a declaratory ruling that the Commission lacked the statutory authority to adopt the rule or, alternatively, that section 227 of the Communications Act of 1934, as amended, was not the rule's statutory basis. We seek comment on these requests.

In addition, All Granite, Forest, Futuredentics, Gilead, Walburg, Purdue Pharma, Prime Health, and TechHealth seek retroactive waivers of the rule.² Forest and Gilead state that a waiver “would serve the public interest by avoiding an abuse of the private right of action created by the TCPA.”³ Walburg states that a waiver is justified because strict compliance with respect to solicited faxes would be “inequitable, unduly burdensome, and contrary to the public interest.”⁴ Purdue Pharma seeks a “limited waiver” for faxes “sent pursuant to the recipients’ prior express invitation or permission ... each of which included a demonstrably effective opt-out notice on the first page describing cost-free opt-out mechanisms.”⁵ Prime Health maintains that “[w]here, as here, recipients of fax advertisements explicitly agreed to receive them, had the means and ability to revoke their consent at any time, and never expressed any interest or desire to do so, requiring strict compliance with Section 64.1 200(a)(3)(iv) would be both tremendously burdensome and inequitable.”⁶ TechHealth similarly states that it “sent fax advertisements to business partners that had consented to receiving communications from TechHealth” and that “those recipients knew how to reach TechHealth and could have easily requested that TechHealth stop sending faxes. ... Under such circumstances, the goal of allowing consumers to stop unwanted faxes would not have been furthered by including opt-out notices on the faxes...”⁷ We seek comment on whether these individual waiver requests should be granted and whether, alternatively, a broader waiver should be granted to all affected parties and, if so, on what basis.

Finally, Staples requests that the Commission initiate a rulemaking to repeal section 64.1200(a)(3)(iv), arguing that it reflects “poor policy that unfairly threatens companies and individuals with massive liability for the transmission of solicited fax ads” and “plainly exceeds the agency’s statutory authority.”⁸ In addition, Staples argues that application of this requirement violates the First Amendment to the extent that it requires solicited faxes to contain an opt-out notice.⁹ In particular, Staples contends that the Commission failed to identify a governmental interest advanced by the rule, explain how the rule advances those interests, and provide a reason why a less restrictive rule would not

² See All Granite Petition at 10; Forest Petition at 11; Futuredentics Petition at 13-14; Gilead Petition at 11; Walburg Petition at 13-15; Purdue Pharma Petition at 17-19; Prime Health Petition at 13-15; TechHealth Petition at 15-16.

³ See Forest Petition at 11; Gilead Petition at 11.

⁴ Walburg Petition at 14.

⁵ Purdue Pharma Petition at 18.

⁶ Prime Health Petition at 14-15.

⁷ TechHealth Petition at 16.

⁸ Staples Petition at 7-10. In addition, the Staples Petition includes a discussion as to why Staples believes litigants in a civil action can challenge the substantive validity of the Commission rules as a defense to a TCPA lawsuit. This discussion, however, does not request any specific Commission action, and therefore we do not seek comment on that issue. *Id.* at 20-26.

⁹ *Id.* at 11-15.

have sufficed.¹⁰ Separately, Purdue Pharma asks the Commission to confirm that “substantially compliant” opt-out notices satisfy the Commission’s rules.¹¹ We seek comment on these requests.

Pursuant to sections 1.415 and 1.419 of the Commission’s rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission’s Electronic Comment Filing System (ECFS). *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

The proceeding this Notice initiates shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.¹² Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission

¹⁰ *Id.* at 14.

¹¹ Purdue Pharma Petition at 13-17.

¹² 47 C.F.R. §§ 1.1200 *et seq.*

staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

FOR FURTHER INFORMATION CONTACT: Richard D. Smith, Consumer and Governmental Affairs Bureau, Federal Communications Commission, (717) 338-2797 or Richard.Smith@fcc.gov.

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