



# PUBLIC NOTICE

Federal Communications Commission  
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DA 14-556  
April 25, 2014

## 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: May 9, 2014  
Reply Comment Date: May 16, 2014

Three petitions have recently been filed seeking a declaratory ruling 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.<sup>1</sup> With this Public Notice, we seek comment on these petitions as described below.

The petitioners seek a declaratory ruling clarifying that section 64.1200(a)(4)(iv) of the Commission's rules does not apply to fax advertisements sent with the prior express permission of the recipient because such faxes constitute "solicited" faxes that they argue cannot be required to include opt-out notices.<sup>2</sup> Alternatively, the petitioners request that the Commission clarify that the statutory basis for this rule is not section 227 of the Communications Act, as amended.<sup>3</sup> Should the Commission decline these requests for declaratory ruling, the petitioners seek a retroactive waiver for fax advertisements sent where prior express consent has been obtained from the recipient.<sup>4</sup> In support of this request, Best Buy contends that strict compliance with section 64.1200(a)(4)(iv) with respect to solicited faxes would be "inequitable, unduly burdensome, and contrary to the public interest."<sup>5</sup> Magna contends that a waiver is

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<sup>1</sup> See *Petition of Magna Chek, Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed Mar. 28, 2014) (Magna Petition); *Petition for Declaratory Ruling and/or Waiver of Masimo Corporation*, CG Docket Nos. 02-278, 05-338 (filed Apr. 1, 2014) (Masimo Petition); *Petition of Best Buy Builders, Inc. for Declaratory Ruling and/or Waiver*, CG Docket No. 05-338 (filed Apr. 7, 2014) (Best Buy Petition) (collectively "Petitions"); see also 47 C.F.R. § 64.1200(a)(4)(iv).

<sup>2</sup> See Best Buy Petition at 6-8; Magna Petition at 3-8; Masimo Petition at 6-8 (suggesting that even if the rule were interpreted to require opt-out notices that the faxes it sends are in "substantial compliance" with that requirement).

<sup>3</sup> Best Buy Petition at 10-11; Magna Petition at 8; Masimo Petition at 10-13.

<sup>4</sup> Best Buy Petition at 11-12; Magna Petition at 9-12; Masimo Petition at 13-18.

<sup>5</sup> See Best Buy Petition at 12.

in the public interest because the faxes it sent “caused no harm to its recipients.”<sup>6</sup> Masimo contends that “a limited waiver with respect to solicited faxes. . . would serve the public interest by avoiding an abuse of the private right of action created by the TCPA, thus preventing the imposition of penalties plainly disproportionate to any possible harms purportedly caused by Masimo’s consensual communications.”<sup>7</sup>

We note that the Commission has recently sought comment on several related petitions that raise similar issues to those set forth in these Petitions.<sup>8</sup> As a result, commenters need not refile comments already submitted in response to those prior Public Notices for consideration in this matter.

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](mailto: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.<sup>9</sup> Persons making *ex parte* presentations must file a

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<sup>6</sup> *See* Magna Petition at 11 (also contending “the public will greatly benefit from the prevention of litigation against companies such as Magna Chek and the other petitioners”).

<sup>7</sup> *See* Masimo Petition at 11.

<sup>8</sup> *See Consumer and Governmental Affairs Bureau Seeks Comment on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338, Public Notice, DA 14-120 (rel. Jan. 31, 2014); *Consumer and Governmental Affairs Bureau Seeks Comment on Crown Mortgage Company Petition Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements*, CG Docket Nos 02-278, 05-338, Public Notice, DA 14-416 (rel. Mar. 28, 2014).

<sup>9</sup> 47 C.F.R. §§ 1.1200 *et seq.*

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 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](mailto:Richard.Smith@fcc.gov).

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