Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the	)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991	)	
	)	
Petition of Kohll's Pharmacy & Homecare, Inc.	)	
for Declaratory Ruling and Waiver	)	

ORDER

Adopted: December 21, 2016 **Released: December 21, 2016**

By the Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this Order, we deny the Petition for a Declaratory Ruling and Waiver filed by Kohll's Pharmacy & Homecare, Inc. (Kohll's).[1] In its Petition, Kohll's asks us to declare that the facsimiles it sent are not advertisements as defined by the Telephone Consumer Protection Act (TCPA) and therefore did not violate the TCPA's prohibition on sending unsolicited fax advertisements.[2] We find that Kohll's facsimiles are unsolicited advertisements under the TCPA, and the primary purpose of the facsimiles is to market flu vaccines and not merely to inform recipients about the health benefits of flu vaccines. In this Order, we apply the Commission's rules and precedents to confirm that facsimiles advertising the commercial availability or quality of any property, goods, or services constitute "advertisements" under the TCPA.[3] We therefore find that Kohll's facsimiles, to the extent they were sent without the recipient's prior express invitation or permission, are unsolicited advertisements in violation of the TCPA. Further, we find that the facsimiles do not fall under any healthcare-related exemption to the TCPA, and that the TCPA restrictions that we apply do not violate the First Amendment. Finally, we deny Kohll's request for waiver of the prohibition on sending unsolicited fax advertisements.

II. BACKGROUND

A. The Telephone Consumer Protection Act

2. In 1991, Congress enacted the TCPA to protect consumers from unwanted calls and faxes.[4] In relevant part, the TCPA prohibits the use of any telephone facsimile (fax) machine, computer,

[1] Petition of Kohll's Pharmacy & Homecare, Inc. for Declaratory Ruling and Waiver, CG Docket No. 02-278, at 1 (filed Mar. 24, 2016) (Petition). Under the Commission's rules, the Commission or its delegate may issue a declaratory ruling "terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2.

[2] *See* 47 U.S.C. § 227(b)(1)(C); 47 CFR § 64.1200(a)(4).

[3] *Id*.

[4] The TCPA is codified as section 227 of the Act, 47 U.S.C. § 227.

or other device to send an "unsolicited advertisement" to a telephone fax machine.[5] The TCPA defines an unsolicited advertisement 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, in writing or otherwise."[6] In 1992, the Commission adopted rules implementing the TCPA, including restrictions on the transmission of unsolicited fax advertisements.[7]

B. Kohll's Petition

3. On March 29, 2016, Kohll's filed a petition asking for a declaratory ruling that certain allegedly unsolicited facsimiles sent on its behalf, which state a price range and offer "free quote[s]" for flu vaccinations, do not violate the TCPA.[8] Specifically, Kohll's seeks a ruling stating that the facsimiles in question are not advertisements because they do not promote the sale of any property, goods, or services but rather, according to Kohll's, inform businesses of the health benefits of flu vaccinations.[9] In the alternative, Kohll's asks us to exempt these facsimiles from the TCPA's coverage based on the Commission's exemption for healthcare-related telephone calls subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[10] Kohll's argues that exempting healthcare-related telephone calls, but not facsimiles, violates the First Amendment as an overly burdensome restriction on commercial speech without a rational basis.[11] Finally, Kohll's states that if the Commission does not issue a declaratory ruling in its favor, the Commission should grant Kohll's a retroactive waiver of the TCPA rules for the subject faxes.[12]

4. On April 21, 2016, the Bureau sought comment on Kohll's petition.[13] Five entities filed comments[14] and Kohll's filed reply comments.[15] Three commenters, including the opposing party in a related court case, stated that the faxes are advertisements and that the Commission should deny the

[5] 47 U.S.C. § 227(b)(1)(C); 47 CFR § 64.1200(a)(4). As the legislative history explained, because fax machines "are designed to accept, process, and print all messages which arrive over their dedicated lines," fax advertising imposes burdens on unwilling recipients that are distinct from the burdens imposed by other types of advertising. *See* H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991). The exceptions listed at 47 U.S.C. §§ 227(b)(1)(C)(i)-(iii) are not relevant here because it is not claimed that the sender of the fax advertisement and the recipients of the fax had an established business relationship. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3791, para. 8 (2006) (2006 Order); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 05-338, 08-239, Order on Reconsideration, 23 FCC Rcd 15059, 15064, para. 11 (2008).

[6] 47 U.S.C. § 227(a)(5); 47 CFR § 64.1200(f)(15).

[7] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 (1992) (*1992 TCPA Order*); *see also* 47 C.F.R. § 64.1200(a)(4).

[8] *See* Petition at 2.

[9] *See id.*

[10] *Id.* at 11-16.

[11] *Id.* at 17.

[12] *Id.* at 18-19.

[13] *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Ruling and Waiver Filed by Kohll's Pharmacy & Homecare, Inc*., CG Docket No. 02-278, Public Notice, 31 FCC Rcd 3787 (CGB 2016).

[14] University of Nebraska Medical Center Comments; Ballard Nursing Center, Inc. Comments; Douglass County Health Department Comments; Carl Paulson Comments; National Consumer Law Center and the National Association of Consumer Advocates Comments.

[15] *See* Appendix A.

petition in its entirety.[16] Two commenters noted the importance of communications about flu vaccines[17] and one of these commenters "support[ed] Kohll's Petition and request for Waiver because in the balance of the equities, Kohll's should not be punished for attempting to educate human resources managers about the need to obtain flu vaccinations."[18] Kohll's Pharmacy and Ballard Nursing Home also made ex parte presentations.[19]

III. DISCUSSION

A. Request for Declaratory Ruling

5. *Whether the fax was an advertisement.* We deny Kohll's petition requesting that we declare that the fax Kohll's sent was not an unsolicited advertisement.[20] The Commission's rules define an "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services."[21] The Commission has elaborated on its rule. Specifically, it has also recognized that faxes "that contain only information . . . [are] not [] prohibited by the TCPA rules."[22] A non-advertising, informational fax is designed to inform a consumer about a subject without "advertising the commercial availability or quality of any property, goods, or service."[23] The Commission also considers the "primary purpose of the communication."[24] Faxes containing *de minimis* advertising do not trigger the TCPA's prohibitions.[25] For example, a company logo or business slogan on an account statement—a "*de minimis* amount of advertising information"—does not convert a communication into an unsolicited advertisement if, for example, the primary purpose is to relay account information to the fax recipient.[26] In determining whether an advertisement is incidental to an informational communication, the Commission may consider, among other things, the amount of space devoted to advertising versus the amount of space used for information or transactional messages,[27] and has stated that "[a]n incidental advertisement contained in [an informational fax such as a] newsletter does not convert the entire communication into an advertisement."[28]

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[16] *See generally* Carl Paulson Comments; National Consumer Law Center and the National Association of Consumer Advocates Comments; Ballard Nursing Center, Inc. Comments.

[17] University of Nebraska Medical Center Comments; Douglass County Health Department Comments.

[18] Douglass County Health Department Comments.

[19] Letter from James C. Vlahakis, Counsel to Kohll's Pharmacy and Homecare Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed Nov. 30, 2016); Letter from James C. Vlahakis, Counsel to Kohll's Pharmacy and Homecare Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (Sept. 2, 2016); Letter from James C. Vlahakis, Counsel to Kohll's Pharmacy and Homecare Inc., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (July 26, 2016); Letter from Julie Clark, Counsel to Ballard Nursing Home, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at Exhibit B, 76 (filed Dec. 8, 2016).

[20] Petition at 2.

[21] 47 C.F.R. § 64.1200(f)(1); *see also iHire, LLC, Petition for Declaratory Ruling, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* Declaratory Ruling, 30 FCC Rcd 8628, 8630, para. 7 (CGB 2015) (*iHire Declaratory Ruling*).

[22] *See 2006 Order*, 21 FCC Rcd at 3814, para. 53.

[23] 47 CFR § 64.1200(f)(1).

[24] *2006 Order* at 3814, para. 51.

[25] *See iHire Declaratory Ruling*, 30 FCC Rcd at 8630, para. 7; *2006 Order*, 21 FCC Rcd at 3814, para. 53.

[26] *See 2006 Order*, 21 FCC Rcd at 3814, para. 51.

[27] *Id.*

[28] *Id*. at para. 53.

6. Applying this precedent, we conclude that Kohll's faxes clearly constitute unsolicited advertisements for the primary purpose of selling flu shots. First, we find that much of the language in the fax at issue meets the Commission's definition of "advertisement." As reproduced in Appendix B, the Kohll's fax reads in bold, highlighted print, "Corporate Flu Shots" and "Only $16-$20 per vaccination,"[29] which are the service and the price, key elements indicating their "commercial availability" pursuant to the Commission's definition of "advertisement." The word "only" as a modifier of the $16-$20 price range evidences that the purpose of the fax is not just to convey neutral facts, but rather the purpose is to encourage sales. The inclusion of price in the fax is strongly probative when determining whether the language is an "advertisement" because the primary purpose of including price will almost always be to convince the fax recipient that the price for the product or service is reasonable and that a purchase should be considered.

7. We next "consider the amount of space devoted to advertising versus the amount of space used for non-advertising information."[30] As reproduced in Appendix B, the largest area on Kohll's fax features bold, highlighted advertising language, "Corporate Flu Shots" and "Only $16-$20 per vaccination,"[31] which, as we have just noted, are the product and the price, key elements indicating "commercial availability." In the only section of the fax arguably containing non-advertising information, the fax mentions, in much smaller print, the economic harms of flu infections and the commercial advantages of purchasing vaccinations for the employees of a business.[32] Yet, even that language can be read as encouraging a purchase of Kohll's vaccination service so as to avoid the negative effects of the flu. "Call for a free quote today" follows incentivizing lines of text urging recipients to "vaccinate your employees," and the fax concludes with the company's contact information.[33] Even if the statements "10 employees sick from the flu costs you $877.10" and "[e]ach flu infection results in 3-5 missed work days and up to 2 weeks of low work productivity" could be considered solely "informational" – which is not the case – we find that the amount of space devoted to the commercial availability of Kohll's flu vaccination service and instructions for getting a free price quotation show that the faxes are not *bona fide* informational communications.[34]

8. We also find that the primary purpose of the faxes is to sell flu vaccines rather than any informational purpose. Thus, the advertisement is not merely a *de minimis* or incidental portion of these faxes.[35] Although Kohll's claims that the fax delivers a "healthcare message," within the overall content of this fax, it appears to mention economic concerns only in order to incentivize businesses to purchase flu shots.[36] Indeed, the fax omits actual health information regarding the flu. The company's actions before and after sending out the fax illustrate that the fax's primary purpose was to advertise flu vaccines. Kohll's purchased the list of fax machine numbers from a marketing company called Red Door Marketing.[37] Internal emails within Kohll's pharmacy referred to "the requirements of sending fax advertisements" with the subject line of the emails reading "fax advertisements."[38] Within the same email

[29] Petition at 3.

[30] *2006 Order* at 3814, para. 53 n.187.

[31] Petition at 3.

[32] *Id*.

[33] *Id*.

[34] *See iHire Declaratory Ruling*, 30 FCC Rcd at 3, para. 7; Petition at 3.

[35] *See 2006 Order*, 21 FCC Rcd at 3814, para. 51.

[36] *Petition* at 11.

[37] Comments of Ballard Nursing Inc., at Exhibit F.

[38] Letter from Julie Clark, Counsel to Ballard Nursing Home, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at Exhibit B, 76 (filed Dec. 8, 2016).

chain, Kohll's Pharmacy's Director of Business Development stated that "everyone is aware, had printed out and highlighted the phone call protocol on their cube walls and they are ready and waiting for the phone to ring. Great! So let'r rip!"[39] Kohll's cites *Physicians Healthsource, Inc*, *v. Janssen Pharmaceuticals* (*Janssen*), which held that "the inclusion of marketing logos also does not transform faxes into advertisements."[40] The Kohll's fax in question does not contain a mere incidental logo that could provide commercial gain, like the fax in *Janssen*, but rather relays the price range and commercial availability of corporate flu shots from Kohll's.[41]

9. Further, in the underlying court action against Kohll's, the Illinois Supreme Court stated that "the fax *advertises* the defendant's 'Corporate Flu Shots.'"[42] While we are not bound to agree with the court's description, we find it apt. Kohll's relies on a Sixth Circuit case that held a fax listing medications available in health plans of the providers' patients was not an advertisement, but fails to acknowledge that, unlike Kohll's fax, the fax in the Sixth Circuit case did not include a probative price element, nor did it promote the medications for sale with incentivizing language.[43] Reviewing the fax on its face in light of Commission precedent, evidence in the record, and relevant court decisions, it is clear that Kohll's fax is an advertisement that is prohibited under the TCPA if sent without the recipient's prior express invitation or permission.[44]

10. *Whether the Commission's healthcare exemption should be extended to these faxes.* Kohll's separately argues that the fax is a healthcare message and that the Commission should extend the exemption for healthcare-related calls subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to healthcare-related faxes.[45] In 2012, pursuant to section 227(b)(2)(B) of the Communications Act,[46] the Commission exempted "from our consent, identification, time-of-day, opt-out, and abandoned call requirements all prerecorded health care-related calls to residential lines that are subject to HIPAA."[47] Section 227(b)(2)(B), the basis for the exemption Kohll's cited, allows the Commission to establish an exemption from the prohibition in section 227(b)(1)(B) on telephone calls for "any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party . . ." if such calls will not adversely affect consumer privacy rights and do not include an unsolicited advertisement.[48] The Commission has separately granted an exemption, for certain healthcare-related messages, which do not include solicitations or advertisements,

[39] *See id.*

[40] *Petition* at 7 (citing *Physicians Healthsource, Inc*. *v. Janssen Pharmaceuticals*, 2013 WL 486207, *5 (D. N.J. Feb. 6, 2013)).

[41] *Id.* at 3.

[42] *Ballard RN Center, Inc. v. Kohll's Pharmacy and Homecare, Inc.*, 48 N.E.3d 1060, 1062 (Ill. 2015) (emphasis added), *reproduced as Petition Exhibit G* at p. 2, para 7. (The underlying case involves the same faxes at issue in the petition.)

[43] *See Sandusky Wellness Center, LLC v. Medco Health Solutions, Inc.*, 788 F.3d 218 (6th Cir. 2015); Petition at 10.

[44] *See* 47 U.S.C. § 227(a)(5) (defining "unsolicited advertisement").

[45] Petition at 11-12.

[46] 47 U.S.C. § 227(b)(2)(B).

[47] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 27 FCC Rcd 1830, 1852, para. 57 (2012) (emphasis added) (*2012 Report and Order*).

[48] 47 U.S.C. § 227(b)(2)(B) (providing that the Commission "may by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection . . . (i) calls that are not made for a commercial purpose and (ii) calls made for commercial purposes where the FCC determines that the call (I) will not adversely affect the privacy rights intended to be protected by the TCPA and (II) does not include the transmission of any unsolicited advertisement"); *2012 Report and Order*, 27 FCC Rcd at 1853, para. 60.

to cell phones pursuant to the exemption authority in section 227(b)(2)(C).[49] Neither section 227(b)(2)(B) nor 227(b)(2)(C), however, authorize the Commission to grant exemptions from the TCPA's prohibition on sending unsolicited advertisements to a telephone facsimile machine as set forth in section 227(b)(1)(C), and Kohll's does not identify any other provision authorizing the Commission to grant exemptions from section 227(b)(1)(C). Accordingly, Kohll's has not offered any basis for extending the previously granted exemptions for healthcare-related messages to its unsolicited advertisement faxes. The statutory authority used to grant earlier healthcare-related exemptions does not expressly give the Commission authority to grant an exemption from the prohibition in 227(b)(1)(C) on unsolicited advertisements.

11. *First Amendment argument*. Kohll's also argues that "[a]pplying the TCPA to the facsimile at issue while simultaneously exempting 'health care' related calls to phones and text messages violates the First Amendment because there is no rational bases to restrict 'health care' related facsimiles."[50] We disagree. As indicated above, our decision not to extend prior exemptions to the faxes here at issue is consistent with the language of the TCPA and hence is entirely rational. Indeed, as the Supreme Court previously stated, "administrative agencies are to presume that the statutes that Congress directs them to implement are constitutional."[51] In addition, numerous courts have held that the government has a substantial interest in protecting consumers from bearing the costs of unwanted facsimile advertisements.[52] Finally, there is no merit to Kohll's suggestion that the Commission is unfairly targeting or burdening healthcare-related faxes as opposed to calls. The exemptions the Commission has previously granted under 227(b)(2)(B) and 227(b)(2)(C) were limited to calls that did not constitute unsolicited advertisements. Here, it would be inconsistent with the previous exemptions to exempt faxes that do constitute unsolicited advertisements. Stated another way, in both cases, restrictions on advertisements were left in place. We are therefore affording identical treatment to the various types of communication.

12. *Balance of equities argument*. One commenter argues that "in the balance of the equities, Kohll's should not be punished for attempting to educate human resources managers about the need to obtain flu vaccinations."[53] We must apply the Commission-established tests to the facts at issue here by looking at whether the fax contains language that meets the definition of "advertisement," the amount of space devoted to advertising versus non-advertising language, and the primary purpose of the fax, as set out in the preceding discussion.[54] In other words, questions of punishment or balancing equities has not been part of the Commission's inquiry, and, thus, they are not part of our analysis here.

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[49] *See 2012 Report and Order*, 27 FCC Rcd at 1852, para. 57.

[50] Petition at 17.

[51] *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (quoting *Oestereich v. Selective Service Board*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdictions of administrative agencies.")).

[52] *See, e.g., Missouri ex rel. Nixon v. Am. Blast Fax, Inc.,* 323 F.3d 649, 658 (8th Cir. 2003); *see also 21st Century Fax(es) LTD. aka 20th Century Fax(es)*, Forfeiture Order, 17 FCC Rcd 1384, at 1386 n.16 (2002) (*21st. Century*) (citing *Destination Ventures v. FCC*, 46 F.3d 54, 55-57 (9th Cir. 1995)). The court in *Destination Ventures* determined that the TCPA's ban on unsolicited fax advertisements does not violate the advertiser's First Amendment rights given that the TCPA restrictions reasonably fit the government's interest in preventing the shifting of advertisement costs to consumers. *Destination* Ventures, 46 F. 3d at 55-57. *See also 21st Century Fax(es)*, 17 FCC Rcd at 1388, para 8 (citing *Kenro, Inc. v. Fax Daily, Inc.*, 962 F.Supp. 1162, 1167-69 (S.D. Ind. 1997)). The court determined in *Kenro* that the TCPA's ban on unsolicited fax advertisements is narrowly tailored to achieve the government's intended purpose and does not violate the First Amendment guarantee of commercial free speech.

[53] Douglass County Health Department Comments.

[54] *See iHire Declaratory Ruling*, 30 FCC Rcd at 8630, para. 7.

B. Waiver Request

13. Finally, Kohll's seeks a retroactive waiver for the 4,142 faxes it sent to various recipients.[55] We note that the Commission may waive any of its rules for good cause shown.[56] A waiver may be granted if: (1) special circumstances warrant a deviation from the general rule, and (2) the waiver would better serve the public interest than would application of the rule.[57] We conclude that Kohll's has failed to meet this standard. As discussed above, we do not agree with Kohll's argument that the fax was informational with only a "nominal" mention of cost, and that it would "violate the First Amendment" and be "inequitable" to view the fax as an advertisement and to deny Kohll's a heathcare-related exemption.[58] We also do not agree with Kohll's that a waiver is warranted because it is in the midst of a lawsuit in which the plaintiff suffered no harm beyond the cost of printing the fax. The sending of unsolicited fax advertisements, which Kohll's apparently did, is exactly the kind of action the TCPA was enacted to prevent. In short, Kohll's does not state any special circumstance that would warrant deviation for the rule, nor does it put forth any reason the public interest would be better served by waiver of the rule. We therefore decline to grant Kohll's waiver request.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to sections 1-4, and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, sections 1.2, 1.3, and 64.1200 of the Commission's rules, 47 CFR §§ 1.2, 1.3, 64.1200, and the authority delegated in sections 0.141 and 0.361 of the rules, 47 CFR §§ 0.141, 0.361, that the Petition for Declaratory Ruling and Waiver filed by Kohll's Pharmacy & Homecare Inc. in CG Docket No. 02-278 on March 14, 2016, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Alison Kutler
Chief
Consumer and Governmental Affairs Bureau

[55] Petition at 18. To the extent Kohll's seeks a waiver of section 227(b)(1)(C) of the Act, the Commission may not grant this request because the Commission may not waive statutory requirements. *See, e.g., Kojo Worldwide Corp*., Memorandum Opinion and Order, 24 FCC Rcd 14890, 14895–96, paras. 10–11 (2009).

[56] 47 CFR § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

[57] *See Northeast Cellular*, 897 F.2d at 1166.

[58] Petition at 18-19.

Appendix A

List of Commenters

The following parties filed comments in response to the March 29, 2016 Public Notice (CG Docket 02-278):

Commenter	Abbreviation
Kohll's Pharmacy & Homecare Inc.*	**Kohll's**
University of Nebraska Medical Center	Nebraska
Douglass County Health Department	Douglass
Carl Paulson	Paulson
National Consumer Law Center and National Association of Consumer Advocates	NCLC and NACA

* bold - reply comments only

Appendix B

3/3/10 15:25 402-408-2414 HR Exec 1/1

Corporate Flu Shots

Only $16-$20 per vaccination

Did you know....

10 employees sick from the flu costs you $877.10

Each flu infection results in 3-5 missed work days and up to 2 weeks of low work productivity

How much is the flu REALLY costing your company?

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