



# PUBLIC NOTICE

Federal Communications Commission  
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DA 16-436  
Released: April 21, 2016

**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**

**Comment Date: May 23, 2016**

**Reply Comment Date: June 6, 2016**

With this Public Notice, we seek comment on a petition for declaratory ruling and waiver filed by Kohll's Pharmacy & Homecare Inc. (Kohll's).<sup>1</sup> Kohll's seeks a declaratory ruling that certain facsimiles sent on its behalf did not violate the Telephone Consumer Protection Act (TCPA).<sup>2</sup>

In its petition, Kohll's claims that the facsimiles in question did not promote the sale of any good or service but rather informed businesses of the health benefits of flu vaccinations.<sup>3</sup> Kohll's therefore requests that Commission issue a declaratory ruling that the facsimiles are not prohibited unsolicited advertisements pursuant to the TCPA.<sup>4</sup> In the alternative, Kohll's seeks a declaratory ruling that these facsimiles should be exempted from the TCPA based on the reasoning underlying the exceptions for healthcare-related calls subject to the Health Insurance Portability and Accountability Act of 1996, which the Commission adopted in a 2012 rulemaking.<sup>5</sup> Kohll's also argues that exempting healthcare-related calls, but not facsimiles, would violate the First Amendment because it would be an overly burdensome restriction on commercial speech without a rational basis.<sup>6</sup> Finally, Kohll's requests that if the

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<sup>1</sup> Petition for Declaratory Ruling and Waiver, CG Docket No. 02-278 (filed Mar. 24, 2016) (*Petition*).

<sup>2</sup> The TCPA is codified as 47 U.S.C. § 227. The Commission's implementing rules are codified as 47 CFR § 64.1200. Among other things, the TCPA and the related rules prohibit the use of a "telephone facsimile machine, computer, or other device" to send an unsolicited advertisement to a telephone facsimile machine. 47 U.S.C. § 227(b)(1)(C); 47 CFR § 64.1200(a)(4). The TCPA defines "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." 47 U.S.C. § 227(a)(5); 47 CFR § 64.1200(f)(15).

<sup>3</sup> *Petition* at 11.

<sup>4</sup> *Id.* at 10-11.

<sup>5</sup> *Id.* at 11-16.

<sup>6</sup> *Id.* at 17.

Commission does not issue a declaratory ruling, it should grant Kohll's a retroactive waiver of the TCPA rules for the subject facsimiles.<sup>7</sup>

We seek comment on these and any other issues raised in the *Petition*.

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 the 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 Street, 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 & 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>8</sup> 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

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<sup>7</sup> *Id.* at 18-19.

<sup>8</sup> 47 CFR §§ 1.1200 *et seq.*

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:** Josh Zeldis, Consumer and Governmental Affairs Bureau, Federal Communications Commission, (202) 418-0715 or [Josh.Zeldis@fcc.gov](mailto:Josh.Zeldis@fcc.gov).

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