



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

AUGUST 13, 2002

BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Clarion Mortgage
c/o Fax.com
120 Columbia
Aliso Viejo, California 92656
Attention: Kevin Katz, President

RE: EB-02-TC-208

Dear Correspondent(s):

This is an official **CITATION** and **LETTER OF INQUIRY** related to your business's apparent violation of section 227 of the Communications Act of 1934, as amended, ("Communications Act"), 47 U.S.C. § 227, and section 64.1200 of Federal Communications Commission ("FCC" or "Commission") rules, 47 C.F.R. § 64.1200. These actions are taken pursuant to the provisions of sections 4(i), 403, and 503(b)(5) of the Communications Act, 47 U.S.C. §§ 154(i), 403, 503(b)(5).

Section 227 was added to the Communications Act by the Telephone Consumer Protection Act of 1991¹ 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. In order to ensure that telephone facsimile machines are available for their owner's use and that advertising costs are not shifted from advertisers to individuals or entities that receive ads, the TCPA generally prohibits the delivery of unsolicited advertisements to telephone facsimile machines.

It has come to our attention that you or your company sent one or more unsolicited advertisements to a telephone facsimile machine(s). These advertisements apparently were transmitted on your behalf by Fax.com. On August 7, 2002, this Commission issued the enclosed Notice of Apparent Liability for Forfeiture (NAL) finding that Fax.com is apparently liable for a forfeiture of \$5,412,000 for sending unsolicited fax advertisements on behalf of numerous business entities, including yours. The purpose of this correspondence is (1) to inform you of your potential liability for monetary forfeitures if you continue to send unsolicited advertisements to telephone facsimile machines, either through Fax.com, some other entity, or on

¹ Pub.L. No. 102-243, 105 Stat. 2394-2402 (1991) (codified at 47 U.S.C. § 227)

your own, and (2) to gather information regarding your involvement with Fax.com and your advertising practices that fall under the TCPA.

As set forth below, we direct you to respond to this Citation and Letter of Inquiry by providing the information and documents specified below no later than 21 days after the date of this correspondence.

I. CITATION FOR APPARENT VIOLATIONS OF THE TCPA

As indicated above, the TCPA and the Commission's rules make it unlawful to use a "telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."² The term "unsolicited advertisement" is defined in the TCPA 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."³ The Commission has specified that an established business relationship between a fax sender and recipient constitutes prior express invitation or permission to send a facsimile advertisement.⁴ Mere distribution or publication of a fax number, however, does not establish consent to receive advertisements by fax.⁵

Materials attached to this Citation and Letter of Inquiry show that you or your business apparently sent advertisements to telephone facsimile machines. Further, as shown in the attachments, the individuals, businesses, or other entities that received these advertisements have all indicated that they did not (1) have an established business relationship with either your business or Fax.com, or (2) otherwise expressly agree to receive the fax advertisements. Accordingly, it appears that your business has violated section 227(b)(3) of the Communications Act and section 64.1200(a)(3) of the Commission's rules by sending unsolicited advertisements to telephone facsimile machines.

You should be aware that such subsequent violations of the Communications Act or of the Commission's rules may result in the imposition of monetary forfeitures not to exceed \$11,000 for each such violation or each day of a continuing violation. See 47 C.F.R. § 1.80(b)(3).

Pursuant to section 503(b)(5) of the Communications Act, you may request a personal interview to discuss this citation at the Commission's Field Office nearest to your place of business. You should be prepared to address the steps your business is taking to ensure compliance with the federal prohibition on faxing unsolicited advertisements. You may contact Senetta Lancaster at slancaster@fcc.gov or at (202) 418-2875 to locate the appropriate field

² 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3).

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

⁴ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8779 n. 87 (1992) (*TCPA Report and Order*); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12408 (1995) (*TCPA Memorandum Opinion and Order*).

⁵ *TCPA Memorandum Opinion and Order*, 10 FCC Rcd 12391, 12408.

office. As indicated above, you must schedule such an interview to occur within 21 days of the date of this citation. Alternatively, you may submit a written statement responding to the citation within 21 days of the date of this citation. If you choose not to respond to this citation and a Notice of Forfeiture is issued, your unresponsiveness will be considered in our assessment of a forfeiture amount.

II. INQUIRY REGARDING FAX.COM AND ADVERTISING PRACTICES SUBJECT TO 47 U.S.C. § 227

A. Instructions

If you request that any information or documents responsive to this letter be treated in a confidential manner, you shall submit, along with all responsive documents, a statement of the reasons why the documents should be afforded confidential treatment and the facts upon which this claim is based, in accordance with the FCC's rules. *See* 47 C.F.R. § 0.459.

If you withhold any documents under claims of privilege, you shall submit, together with any claim of privilege, a schedule of the items withheld that states individually as to each such item the numbered request (below) 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 grounds for claiming that the item is privileged.

Each requested document not subject to a claim of privilege or request for confidential treatment shall be submitted in its entirety even if only a portion of that document is responsive to a request. 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 manuals, instructions, and any other written materials necessary to understand any documents responsive to these requests must also be submitted.

In addition, you should immediately modify your document retention policies, if necessary, to ensure that no arguably relevant documents are destroyed. This includes not only the information requested, but also any other documents relating to these matters, including, without limitation, files, computer disks and tapes, audio or visual tapes or recordings, manuals, instructions, training materials, memoranda, documents, forms, letters, or other writings used in connection with your advertising, promotion, marketing, offering for sale, sale, and billing.

For purposes of this letter, the word "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."

For each document or statement submitted in response to the requests below, indicate, by number, to which request it is responsive. If any document is undated, 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 of the author(s) or recipient(s). If such information is unknown to you, identify the person(s) from whose files the document was retrieved.

For purposes of this letter, unless otherwise specified, the documents that are the subject of the numbered paragraphs below are all documents dated or created, in either final or draft form, from January 1, 1998 until the present.

Identify with reasonable specificity all documents provided in response to these requests. Any written statement in response to a request should be certified by an authorized officer of the company.

B. Definitions

For purposes of this letter, the following definitions apply:

"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 written, typed, printed, transcribed, taped, recorded, 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, 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).

"You" or "your business" shall mean the business entity captioned above and any affiliate, d/b/a, parent companies, any wholly or partially owned subsidiary, or other affiliated companies or businesses, 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.

"Fax broadcaster" shall mean any individual or entity that transmits messages to telephone facsimile machines on behalf of other entities for a fee.

"Fax.com" shall mean Fax.com, Inc., and to the extent they are known to you, any affiliate, d/b/a, parent companies, any wholly or partially owned subsidiary, or other affiliated companies or businesses, 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.

"Advertisement" shall mean any material advertising the commercial availability or quality of any property, goods, or services."

"Unsolicited advertisement" shall mean any advertisement that is transmitted to any person without that person's prior express invitation or permission, unless that person has an established business relationship with the sender."

“Established business relationship” shall mean a prior or existing relationship formed by a voluntary two-way communication between persons or entities, with or without an exchange of consideration, on the basis of an inquiry, application, purchase, or transaction made by a person or entity regarding products or services offered by another person or entity, which relationship has not been previously terminated by either party.”

C. Documents and Information to be Provided

1. Describe in detail any arrangements whereby any fax broadcaster, including Fax.com, has transmitted advertisements on behalf of your business to telephone facsimile machines. Provide a copy of each advertisement that was so transmitted on behalf of your business and provide the following information with respect to each advertisement:
 - a. The timeframe during which you employed any fax broadcaster, including Fax.com, to transmit the advertisement to telephone facsimile machines;
 - b. The total number of transmissions of the advertisement to telephone facsimile machines that you employed any fax broadcaster, including Fax.com, to make, broken down by month;
 - c. Any charges levied by any fax broadcaster, including Fax.com, for transmitting the advertisement on behalf of your business to telephone facsimile machines, broken down by total number of faxes transmitted, by individual fax, and by month;
 - d. Any payments made by or on behalf of your business to any fax broadcaster, including Fax.com, for transmitting the advertisement on behalf of your business to telephone facsimile machines, broken down by total number of faxes transmitted, by individual fax, and by month;
 - e. Whether you employed any fax broadcaster, including Fax.com, to assist with the design or content of the advertisement. Describe in detail any input from the fax broadcaster regarding the content of the advertisement;
 - f. Whether you provided any fax broadcaster, including Fax.com, with a list of telephone facsimile machine numbers to be used in transmitting the advertisement on your behalf. If so, provide such list.
 - g. Whether you employed any fax broadcaster, including Fax.com, to transmit the advertisement on behalf of your business to telephone facsimile machines whose numbers are contained in the fax broadcaster’s database. If so, describe the range of destination numbers (*e.g.*, nationwide, statewide, regional) that you employed the fax broadcaster to use.
 - h. Any arrangements whereby any fax broadcaster, including Fax.com, handles or handled complaints, lawsuits, or other enforcement actions related to transmission of the advertisement to telephone facsimile machines, including any

complaints, lawsuits, or actions initiated by the FCC, any state regulatory or law enforcement entities, or individual consumers or business entities. Does the arrangement provide for the fax broadcaster(s) to represent you in such actions and/or pay or reimburse you for any monetary forfeitures, court judgments, settlement payments or expenditures of any type related to such complaints or enforcement actions?

Answer each question separately for each advertisement. If you employed more than one fax broadcaster to transmit a particular advertisement, answer each question separately for each fax broadcaster. Provide a copy of any contracts or agreements whereby your business employed any fax broadcaster, including Fax.com, to transmit your business's advertisements to telephone facsimile machines. Provide any other relevant documents related to your arrangements with any fax broadcaster.

2. Describe any steps you have taken to ensure that advertisements transmitted by any fax broadcaster, including Fax.com, on behalf of your business were delivered only to telephone facsimile machines belonging to individuals or other entities that (a) have an established business relationship with either your business or the fax broadcaster, or (b) have otherwise provided prior express consent for the advertisement to be faxed. Provide any relevant documents.

3. Describe any information conveyed to you by any fax broadcaster that you employed to transmit advertisements to telephone facsimile machines, including Fax.com, regarding the lawfulness of transmitting unsolicited advertisements to telephone facsimile machines. You should address whether any such fax broadcaster, including Fax.com,

a. Ever informed you that the transmission of unsolicited advertisements to telephone facsimile machines violates federal law; or

b. Ever stated or suggested to you that an advertisement sent to a telephone facsimile machine is made lawful by inclusion of a toll-free opt-out number on the face of an advertisement.

If you employed more than one fax broadcaster to transmit advertisements to telephone facsimile machines, answer each question separately for each fax broadcaster. Provide any relevant documents.

4. Describe any complaints, lawsuits, or enforcement actions initiated against you for the transmission of advertisements to telephone facsimile machines by or on behalf of your business. For each such complaint, lawsuit or enforcement action, include the following information:

a. The date the action was initiated;

b. The identity of the initiating party;

c. The forum in which the complaint or enforcement action was initiated;

- d. Whether the action involves advertisements transmitted by any fax broadcaster, including Fax.com;
- e. Any response to the action by or on behalf of your company or any fax broadcaster, including Fax.com;
- f. Any monetary payments made in response to or in settlement of the action;
- g. Any ruling or agreement resolving the action.

Provide any relevant documents.

5. Describe in detail any legal action you have initiated against any fax broadcaster, including Fax.com, related to
- a. The fax broadcaster's transmission of advertisements to telephone facsimile machines on your business's behalf; or
 - b. The fax broadcaster's marketing of its fax broadcasting service.

Provide any relevant documents.

We encourage you to furnish any additional documents or provide a statement of any other facts that you believe may be relevant to this inquiry.

Finally, you are directed to provide an affidavit or declaration pursuant to 28 U.S.C. § 1746 and 47 C.F.R. § 1.16, signed by an authorized officer of your business, which states that all of the documents and information requested by this letter which are in your possession, custody, control, or knowledge have been produced, and which certifies that the information produced is true and correct. You should be aware that 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.

Your response to this inquiry and any written response to the citation should be submitted no later than 21 days from the date of this letter to:

Kurt Schroeder
Deputy Chief
Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission
445 - 12th Street, S.W.
Washington, D.C. 20554

Please reference EB-02-TC-208 when corresponding with the Commission regarding these matters.

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.

Thank you for your prompt cooperation and assistance in this matter. You may contact Mary Romano at (202) 418-0975 or Mr. Schroeder at (202) 418-0966 if you have any questions about this inquiry.

Colleen Heitkamp
Chief, Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission

Enclosures