



Congress of the United States  
House of Representatives  
Washington, DC 20515

59

Federal Communications Commission  
45 L Street NE  
Washington, DC 20554

Dear Acting Chairman,

I write to you today regarding interpretations of the Junk Fax Prevention Act, (“JFPA”) of the Telephone Consumer Protection Act, (“TCPA”). Constituents from Pennsylvania’s 1<sup>st</sup> Congressional District expressed their concern to my office regarding the Third Circuit Court of Appeals’ interpretation of the JFPA’s definition of “unsolicited advertisement”. This group alleges that the overly broad interpretation will encourage frivolous, nuisance, class action litigation. The constituents alleged this interpretation is out of step with the majority of District and Appeals Courts that have addressed the issue.

Therefore, in accordance to the letter drafted by Mr. Petrille, we request that the FCC issue formal guidance and/or promulgate appropriate regulations that continue the precedence of exempt faxes sent by, or on behalf of, market research companies seeking participation in bona fide market research surveys from the definition of “unsolicited advertisement” under the TCPA.”

I am also aware of a market research business in my district which has relied on guidance it previously sought from the FCC, which it is now fighting a lawsuit brought against it within days after the Third Circuit rendered *Fischbein*.

Therefore, in accordance to the letter drafted by Mr. Petrille, we request that the FCC issue formal guidance and/or promulgate appropriate regulations that continue the precedence of exempt faxes sent by, or on behalf of, market research companies seeking participation in bona fide market research surveys from the definition of “unsolicited advertisement” under the TCPA.

I respectfully request full and fair consideration of the consequences alleged by Mr. Petrille because of this new interpretation and see that their observations deserve thoughtful consideration from your office.

Please do not hesitate to reach out to my office at 215-579-8102 if my office can be of any further assistance in this matter.

Respectfully,

A handwritten signature in blue ink that reads "Brian Fitzpatrick".

Brian Fitzpatrick  
Member of Congress (PA-01)



**HIGH SWARTZ**

ATTORNEYS AT LAW

EST. 1914

Donald Pettrille, Jr., Esquire  
267-880-4289  
dpetrille@highswartz.com

January 25, 2021

***Via Regular Mail***

Acting Chairman  
Federal Communications Commission  
45 L Street NE  
Washington, DC 20554

***Re: In re: M3 USA Corporation's  
Petition for Expedited Declaratory Ruling,  
CG Docket No. 02-278, CG Docket No. 05-338***

To the Chair:

I write to you regarding confusion in the interpretation of the Junk Fax Prevention Act, (“JFPA”) of the Telephone Consumer Protection Act, (“TCPA”), (47 U.S.C. § 227b). The Third Circuit Court of Appeals has interpreted the JFPA’s definition of “unsolicited advertisement” in an overly broad manner that will encourage frivolous, nuisance, class action litigation, and is out of step with the majority of District and Appeals Courts that have addressed the issue. We ask for the FCC to issue agency guidance on this issue that could help resolve divergent interpretations of its own act.

The JFPA prohibits businesses from sending “unsolicited advertisements” to a telephone facsimile machine when there is no pre-existing business relationship between the parties. An “unsolicited advertisement” is “any material advertising the commercial availability or quality of any property, goods, or services.” Clearly, companies wishing to sell their product or service by sending unsolicited faxes are prohibited from doing so. The TCPA provides statutory penalties against the sender of a non-compliant fax for each unsolicited advertisement sent to a telephone facsimile machine.

Until recently, the federal courts have differentiated faxes sent on behalf of market research companies seeking applicants to participate in market research studies in exchange for a fee. The courts have generally, distinguished these faxes from “unsolicited advertisements,” because these faxes offer compensation for the recipient’s services, and no “product or service” of the sender is not being offered to the end user recipient. In one recent case, the United States District Court for the Eastern District of Michigan found, “the FCC purposefully chose not to

---

Doylestown

**High Swartz LLP**

Norristown

116 East Court Street, Doylestown, PA 18901 | P: 215-345-8888 | F: 215-345-5358 | highswartz.com

**High Swartz LLP**  
Acting Chairman  
Federal Communications Commission  
January 25, 2021  
Page 2

state that all surveys are advertisements under the TCPA and explicitly narrowed its analysis to surveys sitting in for commercial offers. Implicit in the FCC's analysis is the assumption that surveys generally are not advertisements under the TCPA." See *Exclusively Cats Veterinary Hospital, P.C. v. M/A/R/C Research, L.L.C.*, 2020 U.S. Dist. LEXIS 45181, Case No. 19-11228, E.D. Mich, March 16, 2020). The case is in line with other decisional law affecting the market research industry, and written guidance the FCC has given to specific businesses on a case by case basis.

Recently the United States Court of Appeals for the Third Circuit rendered a decision that is out of step with the developed body of law. In *Fischbein v. Olson Research Group, Inc.*, Slip Opinion No. 19-3222, (May 15, 2020), it found, contrary to the developing body of law, that surveys and survey invitations were, in fact, unsolicited advertisements under the TCPA. Not only does *Fischbein* cloud the decisional law upon which the market research industry had been relying, it opens up the flood gates for professional litigants to initiate class action law suits against small and medium size businesses who have diligently tried to comply with federal law and FCC regulations. In fact, I am aware of a market research business in my district which has relied on guidance it sought from the FCC itself, which is now fighting a law suit brought against it within days after the Third Circuit rendered *Fischbein*.

I understand that there is a request for Declaratory Ruling before the Commission in the case of *In re: M3 USA Corporation's Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, CG Docket No. 05-338. A decision in this matter, will clarify an issue that the courts have muddled. We would also request that the FCC issue formal guidance and/or promulgate appropriate regulations that unequivocally exempt faxes sent by or on behalf of market research companies seeking participation in bona fide market research surveys from the definition of "unsolicited advertisement" under the TCPA.

I look forward to hearing from you regarding the Commission's view of this matter, and for your input on any legislative solutions we may consider in Congress.

Very Truly Yours



Donald Pettrille, Jr.

cc: Brian K. Fitzpatrick (*via email only*)