

August 17, 2017

Via ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Request for Comment on Petition for Expedited Declaratory Ruling Filed by
Amerifactors Financial Group, LLC, CG Docket Nos. 02-278 and 05-338

Dear Ms. Dortch:

The American Bankers Association¹ (ABA) writes in support of the Petition for Expedited Declaratory Ruling (Petition) filed by Amerifactors Financial Group, LLC (Amerifactors).² In the Petition, Amerifactors seeks a declaratory ruling that the Telephone Consumer Protection Act³ (TCPA) does not apply to fax transmissions (faxes) received via online fax services or on a device other than a telephone facsimile machine.

Enacted in 1991, the TCPA sought to address, in part, problems posed by the mass sending of faxes that (1) must be printed and (2) tie up the recipient's fax line such that the recipient cannot receive faxes sent by others.⁴ In the 26 years since, fax technology has improved exponentially. Today, businesses rarely receive faxes on machines that automatically print incoming faxes and require ink refills and paper rolls. Instead, businesses send and receive faxes in the same manner in which they receive e-mail and other electronic communications. With current technology,

¹ The American Bankers Association is the voice of the nation's \$17 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$13 trillion in deposits and extend more than \$9 trillion in loans.

² Petition for Expedited Declaratory Ruling of Amerifactors Financial Group, LLC, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket Nos. 02-278 and 05-338 (filed July 13, 2017), available at <https://ecfsapi.fcc.gov/file/107132729420021/AmeriFactors%20Petition%20For%20Expedited%20Declaratory%20Ruling%2007132017.pdf>.

³ Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 et seq.

⁴ The report of the House Committee on Energy and Commerce accompanying enactment of the TCPA described the fax transmissions targeted by the TCPA as follows: "Facsimile machines are designed to accept, process, and **print** all messages which arrive over their dedicated lines. The fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that it will be received and **printed** by the recipient's machine. This type of telemarketing is problematic for two reasons. First, it shifts some of the costs of advertising from the sender to the recipient. Second, it **occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages** while processing and printing the junk fax." H.R. Rep. No. 102-317, at 10 (1991) (emphasis added).

recipients can choose whether to print a particular fax, and incoming faxes do not prevent the recipient from receiving other faxes or communications at the same time.

Thus, the problem of harm that Congress sought to address in establishing restrictions on unsolicited faxes is no longer present when faxes are sent to an online fax service. Moreover, as Chairman Pai has noted, “if the FCC wishes to take action against newer technologies beyond the TCPA’s bailiwick, it must get express authorization from Congress”⁵ We agree with Amerifactors that the sending of faxes to an online fax service or to a device other than a telephone facsimile machine is one such “newer technolog[y]” that is beyond the TCPA’s scope.

Because of the uncertainty over the TCPA’s applicability to newer technologies, there has been a significant increase in the filing of class action lawsuits, which has harmed consumers and businesses alike.⁶ The TCPA was designed to provide consumers with a right to pursue an individual claim against an unlawful caller (or fax sender) in small claims court and without the need for an attorney.⁷ However, with statutory damages of up to \$1,500 per call made or fax sent,⁸ any company that seeks to use an advanced technology not contemplated by the TCPA’s drafters may be subjected to a class action lawsuit with a damage claim in the millions, if not billions, of dollars, with a high settlement value unrelated to actual culpability.⁹ The risk of draconian litigation costs has led financial institutions to limit—and, in certain instances, to eliminate—many pro-consumer communications.

⁵ Declaratory Ruling and Order, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, 30 FCC Rcd 7961, 8076 (2015) (Comm’r Pai, dissenting).

⁶ A white paper published in May 2017 found that “TCPA litigation has consistently increased year-after-year. Between 2010 and 2016 there was a **1,273% increase in litigants**; between 2015 and 2016 alone the total number of litigants increased 32%.” Josh Adams, Dir. of Research, ACA Int’l, *Unintended Consequences of an Outdated Statute: How the TCPA Fails to Keep Pace with Shifting Consumer Trends 2* (May 2017), available at <http://www.acainternational.org/assets/research-statistics/p4-aca-wp-tcpaconsequences.pdf> (emphasis in original).

⁷ See 137 Cong. Rec. 30821-30822 (1991) (statement of Sen. Hollings) (“The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. **Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court** Small claims court or a similar court would allow the consumer to appear before the court without an attorney. **The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer.**”) (emphasis added).

⁸ 47 U.S.C. § 227(b)(3).

⁹ As Chairman Pai has observed, the “TCPA’s private right of action and \$500 statutory penalty could incentivize plaintiffs to go after the illegal telemarketers, the over-the-phone scam artists, and the foreign fraudsters. But trial lawyers have found legitimate, domestic businesses a much more profitable target.” Declaratory Ruling and Order, 30 FCC Rcd at 8072-73 (Comm’r Pai, dissenting).

For these reasons, the Commission should grant Amerifactors' request for a declaratory ruling that the TCPA does not apply to fax transmissions received via online fax services or on a device other than a telephone facsimile machine.

Sincerely,

A handwritten signature in black ink that reads "Jonathan Thessin". The signature is written in a cursive style with a large initial 'J'.

Jonathan Thessin
Senior Counsel, Center for Regulatory Compliance