



# PUBLIC NOTICE

Federal Communications Commission  
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## CONSUMER AND GOVERNMENTAL AFFAIRS BUREAU SEEKS COMMENT ON PETITIONS CONCERNING THE COMMISSION'S RULE ON OPT-OUT NOTICES ON FAX ADVERTISEMENTS

CG Docket No. 02-278  
CG Docket No. 05-338

**Comment Date: August 8, 2014**  
**Reply Comment Date: August 15, 2014**

Five petitions have been filed seeking a declaratory ruling and/or waiver concerning section 64.1200(a)(4)(iv) of the Commission's rules, which requires fax ads sent to a consumer who has provided prior express invitation or permission to include an opt-out notice.<sup>1</sup> With this Public Notice, we seek comment on these petitions as described below.

The Petitioners seek a declaratory ruling clarifying that section 64.1200(a)(4)(iv) does not apply to faxes sent with the "prior express invitation or permission" of the recipient because they contend the Commission lacks authority to regulate "solicited" faxes.<sup>2</sup> The Petitioners also allege confusion was created regarding the applicability of the rule by language contained in a footnote to the 2006 order in which the Commission adopted this rule.<sup>3</sup> In addition, four Petitioners argue that regulation of solicited faxes raises First Amendment concerns.<sup>4</sup> Alternatively, the Petitioners request that the Commission

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<sup>1</sup> See *Petition of American Caresource Holdings, Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed June 30, 2014) (ACH Petition); *Petition of CARFAX, Inc. for Declaratory Ruling and/or Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (filed July 11, 2014) (CARFAX Petition); *Petition of Merck and Company, Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed July 11, 2014) (Merck Petition); *Petition of UnitedHealth Group, Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed July 11, 2014) (UnitedHealth Petition); *Petition of MedLearning, Inc. and Medica, Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed July 16, 2014) (Medica Petition) (collectively "Petitioners"); see also 47 C.F.R. § 64.1200 (a)(4)(iv).

<sup>2</sup> See ACH Petition at 5-6; CARFAX Petition at 6-8; Medica Petition at 6-9; Merck Petition at 5-9; UnitedHealth Petition at 5-7.

<sup>3</sup> ACH Petition at 5-6; CARFAX Petition at 6; Medica Petition at 7; Merck Petition at 5; UnitedHealth Petition at 5.

clarify that the statutory basis for this rule is not section 227(b) of the Communications Act, as amended.<sup>5</sup> Should the Commission decline these requests for declaratory ruling, the Petitioners seek a retroactive waiver of the opt-out notice requirement for fax ads sent where prior express invitation or permission has been obtained from the recipient.<sup>6</sup>

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 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 St., 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.

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<sup>4</sup> CARFAX Petition at 9 (“The FCC has not established that its rule requiring solicited faxes to include opt-out notices satisfies the test established by the Supreme Court not to be ‘more extensive than is necessary’ to advance a substantial governmental interest”); Medica Petition at 9; Merck Petition at 10-12; UnitedHealth Petition at 7.

<sup>5</sup> ACH Petition at 7; CARFAX Petition at 11; Medica Petition at 9-11; Merck Petition at 12-13; UnitedHealth Petition at 9.

<sup>6</sup> *See* ACH Petition at 8 (“[r]equiring strict compliance with the Regulation ... is inequitable, unduly burdensome and contrary to the public interest”); CARFAX Petition at 11-12 (“in light of ambiguity and confusion regarding the scope and applicability of Section 64.1200(a)(4)(iv), denial of a waiver could also impose substantial harm on CARFAX and other organizations”); Medica Petition at 13 (“[a] waiver would serve the public interest by avoiding an abuse of the private right of action”); Merck Petition at 16-17 (“[t]here is no public interest in subjecting Merck to a lawsuit seeking massive damages on the basis of faxes sent pursuant to the recipients’ prior express invitation or permission that included demonstrably effective opt-out notice on the first page describing a cost-free opt-out mechanism”); UnitedHealth Petition at 9 (“no real purpose is served by enforcing Section 64.1200(a)(4)(iv) with respect to recipients who have already provided express invitation or permission”).

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 and 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>7</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 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:** Richard D. Smith, Consumer and Governmental Affairs Bureau, Federal Communications Commission, (717) 338-2797; or [Richard.Smith@fcc.gov](mailto:Richard.Smith@fcc.gov).

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<sup>7</sup> 47 C.F.R. §§ 1.1200 *et seq.*