Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

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July 11, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

ACCEPTED/FILED

JUL 11 2014

Federal Communications Commission
Office of the Secretary

Re: Petition for Declaratory Ruling and/or Waiver
CG Docket Nos. 02-278, 05-338

Dear Ms. Dortch:

On behalf of United HealthGroup Incorporated and its affiliates and subsidiaries ("UHG"), please find enclosed the original and four copies of UHG's Petition for Declaratory Ruling and/or Waiver.

Should you have any questions regarding this filing, please do not hesitate to contact me.

Respectfully submitted,

Mark W. Brennan

Partner
mark.brennan@hoganlovells.com
D 202-637-6409

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ACCEPTED/FILED

JUL 11 2014

Federal Communications Commission
Office of the Secretary

In the Matter of	)	
	)	CG Docket No. 02-278
Petition of UnitedHealth Group Incorporated	)	
for Declaratory Ruling and/or Waiver of	)	CG Docket No 05-338
Section 64.1200(a)(4)(iv) of the	)	
Commission's Rules	)	

PETITION OF UNITEDHEALTH GROUP INCORPORATED FOR DECLARATORY RULING AND/OR WAIVER

Pursuant to Sections 1.2 and 1.3 of the Federal Communications Commission's ("Commission") rules,[1] UnitedHealth Group Incorporated and its affiliates and subsidiaries (collectively, "UHG") respectfully requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of its rules, 47 C.F.R. § 64.1200(a)(4)(iv), does not apply to facsimile advertisements sent with the recipient's "prior express invitation or permission" ("solicited faxes"). Such an interpretation is consistent with the plain language of the Telephone Consumer Protection Act ("TCPA"), as codified in 47 U.S.C. § 227 and amended by the Junk Fax Prevention Act of 2005 ("JFPA"),[2] and avoids an interpretation that would render the rule unlawful under administrative law principles. Alternatively, the Commission should issue a declaratory ruling clarifying that the statutory basis for implementing Section 64.1200(a)(4)(iv) is not Section 227(b) of the Communications Act, 47 U.S.C. § 227(b). These clarifications would help prevent lawsuits that unfairly target organizations that have sent

[1] 47 C.F.R. §§ 1.2, 1.3.

[2] *See* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991); Junk Fax Prevention Act of 2005, Pub. L. No. 109-21, 119 Stat. 359 (2005). The TCPA and the JFPA are codified at 47 U.S.C. § 227.

solicited faxes in good faith. Such lawsuits also waste judicial resources on resolving claims that Congress never intended to create.

If the Commission declines to issue either of the requested declaratory rulings, UHG respectfully requests that the Commission grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by UHG (or on its behalf) after the effective date of the regulation. No real purpose is served by enforcing Section 64.1200(a)(4)(iv) with respect to recipients who have already provided "prior express invitation or permission." In contrast, the public interest would be harmed by requiring parties like UHG to divert substantial resources and staff away from productive health care efforts to resolve unnecessary litigation efforts stemming from confusion over the Commission's regulations.

As a final matter, to the extent that the Commission determines that any declaratory ruling, waiver, or other relief[3] may be warranted for fax advertisements that are sent without the "prior express invitation or permission" of the recipient but are sent to a recipient with whom the sender has an "established business relationship," UHG respectfully requests that it be granted such relief on the bases described in this petition.

I. BACKGROUND

The TCPA, as codified in 47 U.S.C. § 227 and amended by the JFPA, prohibits, under certain circumstances, the use of a fax machine to send an "unsolicited advertisement."[4] An "unsolicited advertisement" is "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."[5] The JFPA expressly applies only to unsolicited faxes, and not

[3] *See infra* note 18 (referencing the FCC public notices associated other similar filings).
[4] 47 U.S.C. §§ 227(a)(5) and (b)(1)(C).
[5] *Id.* at § 227(a)(5) (emphasis added).

to all faxes.[6] Accordingly, the TCPA's general prohibition against faxes does not apply to solicited faxes, *i.e.* faxes sent with the recipient's "prior express invitation or permission."

The Commission adopted rules implementing the JFPA.[7] Even though the JFPA expressly applies only to unsolicited faxes, the Commission adopted a rule, Section 64.1200(a)(4)(iv), purporting to impose opt-out notice requirements on solicited faxes.[8]

Since the adoption of Section 64.1200(a)(4)(iv), various plaintiffs have seized on the ambiguity of this rule to bring numerous class action lawsuits under Section 227(b) of the TCPA.[9] Such lawsuits have been brought against companies acting in good faith for engaging in communications for which the fax recipients had provided "prior express invitation or permission," had an established business relationship, or both. Many of these class action lawsuits seek millions of dollars in damages.

UHG is currently subject to a class-action lawsuit based on alleged violations of the TCPA's fax provisions.[10] That case arose after UHG sent a one-page solicited fax advertisement to the plaintiff. Although it was a solicited fax and the parties had a contractual relationship,[11] the plaintiff argues that UHG should have provided an opt-out notice.[12]

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[6] *See generally* the JFPA.

[7] *See generally Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 (2006) ("*JFPA Order*").

[8] *See* 47 C.F.R. § 64.1200(a)(4)(iv). Originally, the rule was codified at 47 C.F.R. § 64.1200(a)(3)(iv) but was subsequently renumbered. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830 (2012).

[9] 47 U.S.C. § 227(b)(3)(A)-(C).

[10] *See Meinders v. UnitedHealthcare, Inc., et al.*, No. 3:14-cv-00548-DRH-DGW (N.D. Ill.).

[11] The parties to the litigation dispute, *inter alia*, whether the fax was solicited. However, it is not necessary for the Commission to resolve that dispute in acting on this petition. The disputed factual issues in the case will be resolved by the court and do not impact the issues raised in this petition.

[12] *See* Class Action Complaint, *Meinders v. UnitedHealthcare, Inc., et al.*, No. 3:14-cv-00548-DRH-DGW ¶ 2 (N.D. Ill.).

The issue of whether Section 64.1200(a)(4)(iv) applies to solicited faxes was the subject of a recent Eighth Circuit Court of Appeals decision, *Nack v. Walburg*.[13] In *Nack*, the Eighth Circuit recognized that "it is questionable whether the regulation at issue (thus interpreted) properly could have been promulgated under the statutory section that authorizes a private cause of action," but the court found that the Administrative Orders Review Act (*i.e.* the Hobbs Act)[14] precluded it from holding the regulation invalid outside of the statutory procedure mandated by Congress.[15] The court, however, indicated that the defendants in *Nack* might obtain relief from the Commission.[16] Subsequently, the defendants in that case moved to stay the litigation and filed a Petition for Declaratory Ruling and/or Waiver with the Commission.[17] Other parties have followed suit.[18] Consistent with the concerns raised in those petitions, UHG similarly requests that the Commission issue a declaratory ruling clarifying Section 64.1200(a)(4)(iv) or, in the alternative, grant UHG a retroactive waiver of Section 64.1200(a)(4)(iv), as explained herein.

II. DISCUSSION

A. The Commission Should Clarify That Section 64.1200(a)(4)(iv) Does Not Apply to Faxes Sent With the "Prior Express Invitation or Permission" of the Recipient.

The Commission should issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) does not apply to solicited faxes for the following reasons: (i) the plain language of Section 64.1200(a)(4)(iv) and the Commission order implementing the rule is unclear with respect to the rule's scope and applicability, but the TCPA is clear that the

[13] 715 F.3d 680 (8th Cir. 2013).

[14] 28 U.S.C. § 2342 *et seq*.

[15] 715 F.3d at 682.

[16] *Id*. at 687.

[17] Petition of Douglas Paul Walburg and Richie Enterprises, LLC for Declaratory Ruling and/or Waiver, CG Docket Nos. 02-278 and 05-338 (filed Aug. 19, 2013).

[18] *See, e.g., Consumer and Governmental Affairs Bureau Seeks Comment on Petition Concerning the Commission's Rule on Opt-Out Notices on Fax Advertisements*, Public Notice, CG Docket Nos. 02-278 and 05-338, DA 14-923 (rel. June 27, 2014); Public Notice, DA 14-734 (rel. May 30, 2014); Public Notice, DA 14-556 (rel. Apr. 25, 2014); Public Notice, DA 14-416 (rel. Mar. 28, 2014); Public Notice, DA 14-120 (rel. Jan. 31, 2014).

prohibitions specified in the statute apply only to unsolicited faxes; (ii) applying Section 64.1200(4)(iv) to faxes sent with the "prior express invitation and permission" of the recipient exceeds the Commission's authority; and (iii) interpreting Section 64.1200(a)(4)(iv) to apply to solicited faxes raises significant First Amendment concerns.

1. The plain language of Section 64.1200(a)(4)(iv) and the Commission's implementing order is unclear in its scope and applicability; excluding solicited faxes is consistent with the express statutory language of the TCPA.

Section 64.1220(a)(4)(iv) is unclear and cannot be interpreted in an internally consistent manner. In relevant part, the rule states:[19]

> No person or entity may: ... [u]se a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless – (i) The unsolicited advertisement is from a sender with an established business relationship .... (iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

Thus, on its face, the rule creates uncertainty by its own lack of clarity, confusing sentence structure, and conflicting language.

The Commission's implementing order itself is also confusing. On the one hand, the *JFPA Order* states the "opt-out notice requirement only applies to communications that constitute unsolicited advertisements."[20] On the other hand, the *JFPA Order* states that "entities that send facsimile advertisements to consumers from whom they obtained permission must include on the advertisements their opt-out notice."[21] Accordingly, it is impossible to discern definitively whether Section 64.1200(a)(4)(iv) is intended to reach solicited faxes.

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[19] 47 C.F.R. § 64.1200(a)(4).

[20] *JFPA Order* ¶ 42 n. 154 (emphasis added).

[21] *Id.* ¶ 48 (emphasis added).

In contrast, the language of the TCPA is clear that the statute applies only to unsolicited advertisements.[22] Further, nothing in the legislative history of the TCPA indicates that Congress intended to apply such requirements to faxes sent with the recipient's "prior express invitation or permission."[23] Similarly, the Commission did not indicate in its Notice of Proposed Rulemaking that it was considering adopting opt-out notice requirements with respect to solicited faxes.[24] Accordingly, the Commission should clarify that Section 64.1200(a)(4)(iv) does not apply to solicited faxes.

2. The Commission lacks the statutory authority to apply Section 64.1200(a)(4)(iv) to solicited faxes.

Congress has spoken directly to the question of whether a solicited fax must contain an opt-out notice by limiting Section 227(b) of the TCPA to unsolicited advertisements.[25] By doing so, Congress restricted the Commission's jurisdiction to that particular type of communication. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[26] Indeed, the Commission itself recognized that the TCPA's scope is limited to unsolicited fax

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[22] *See, e.g.*, 47 U.S.C. § 227(a)(5) (defining "unsolicited advertisement"); *id.* § 227(b)(1)(C) (prohibiting the use of a device to send an "unsolicited advertisement"); *id.* § 227(b)(1)(C)(iii) (creating an exception for "unsolicited advertisements" containing an appropriate notice requirement).

[23] *See, e.g.*, S. Rep. No. 102-178 at 3 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970; S. Rep. No. 109-76 at 1 (2005), reprinted in 2005 U.S.C.C.A.N. 319.

[24] *See generally Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Notice of Proposed Rulemaking and Order, 20 FCC Rcd 19758 (2005).

[25] *See supra* note 22.

[26] *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also, e.g., Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S. Ct. 2427 (2014) ("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 705 (D.C. Cir. 2005) ("[T]he Commission can only issue regulations on subjects over which it has been delegated authority by Congress."); *ACLU v. FCC*, 823 F.2d 1554, 1571 (D.C. Cir. 1987) (where Congress has addressed a question with a "specific statutory provision," the Commission lacks the authority to establish a contrary regulation on the same subject).

advertisements.[27] Accordingly, the Commission should issue a declaratory ruling clarifying that it lacks the statutory authority to apply Section 64.1200(a)(4)(iv) to solicited faxes.

3. Applying Section 64.1200(a)(4)(iv) to solicited faxes raises significant First Amendment concerns.

The Supreme Court has made clear that truthful commercial speech may be burdened only where the government can show that the proposed restriction directly advances a substantial government interest and that the regulation "is not more extensive than is necessary to serve that interest."[28] Application of Section 64.1200(a)(4)(iv) to solicited faxes fails to meet this standard.

Courts applying that test to unsolicited faxes under Section 227(b) have upheld the Commission's requirements by recognizing "a substantial interest in restricting unsolicited fax advertisements in order to prevent the cost shifting and interference such unwanted advertising places on the recipient."[29] But, as the Eighth Circuit acknowledged in *Nack*, that interest is simply not present in the context of solicited faxes.[30] Indeed, in the *JFPA Order*, the Commission identified no governmental interest for adoption of a rule requiring an opt-out notice for solicited fax advertisements, demonstrated no advancement of any government interest, and provided no reasons why a less restrictive rule would not suffice. For these reasons, the Commission should clarify that the scope of Section 64.1220(a)(4(iv) does not apply to solicited fax advertisements.

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[27] *See, e.g., JFPA Order* ¶ 1 ("[W]e amend the Commission's rules on unsolicited facsimile advertisements as required by the" JFPA); *id.* ¶ 2 ("[T]he TCPA prohibits the use of any telephone facsimile machine ... to send an 'unsolicited advertisement.'"); *id.* ¶ 7 ("On December 9, 2005, the Commission released a Notice of Proposed Rulemaking proposing modifications to the Commission's rules on unsolicited facsimile advertisements to implement the amendments required by the" JFPA.).

[28] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

[29] *Missouri v. Am. Blast Fax, Inc.*, 323 F.3d 649, 655 (8th Cir. 2003).

[30] *See Nack*, 715 F.3d at 687 ("[T]he analysis and conclusion as set forth in *American Blast Fax* would not necessarily be the same if applied to the agency's extension of authority over solicited advertisements."); *see also* H.R. Rep. No. 102-317, 1991 WL 245201, at *10 (1991) (recognizing concerns regarding restrictions on commercial speech).

B. Alternatively, the Commission Should Clarify that the Statutory Basis of Section 64.1200(a)(4)(iv) Is Not 47 U.S.C. § 227(b).

If the Commission declines to issue the declaratory ruling requested in Part I.A. above, the Commission should issue a declaratory ruling clarifying that Section 227(b) of the Communications Act is not the statutory basis for Section 64.1200(a)(4)(iv). Such a declaration would provide clarity on the basis for this rule section and the Commission's authority to apply it. Moreover, the declaratory ruling would clarify for courts and potential litigants that fax advertisements sent with the recipient's "prior express invitation or permission" do not provide a basis for a private action under the TCPA. This clarity would be particularly helpful given that the Commission cited eleven statutory provisions in the *JFPA Order* as the basis for the numerous amendments made to Section 64.1200, but failed to specify the statutory basis for Section 64.1200(a)(4)(iv).[31]

By clarifying that Section 64.1200(a)(4)(iv) is not grounded in the Commission's authority under Section 227(b), the Commission has the opportunity to ensure fair treatment for businesses acting in good faith that would otherwise be subject to potentially devastating class action lawsuits based merely on sending faxes to willing recipients who already have provided "prior express invitation or permission."[32] Without the requested clarification, courts will be left to guess at the Commission's jurisdictional authority, injecting greater uncertainty into the many pending lawsuits that have arisen as a result of the ambiguity of Section 64.1200(a)(4)(iv) and potentially depriving defendants of a valid defense.

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[31] *See JFPA Order* ¶ 64 (adopting order "pursuant to the authority contained in sections 1-4, 201, 202, 217, 227, 258, 303(r), and 332 of the Communications Act of 1934, as amended").

[32] *Cf. Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977) (requiring agencies to articulate the basis for their rules can "assist judicial review" and help to ensure "fair treatment for persons affected by rule.").

C. Alternatively, the Commission Should Grant a Retroactive Waiver of Section 64.1220(a)(4)(iv) for Any Solicited Fax Sent by UHG or on its Behalf.

If the Commission declines to issue either of the declaratory rulings requested in this petition, UHG respectfully requests that the Commission nonetheless grant a retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by UHG (or on its behalf) after the effective date of the regulation. Section 1.3 of the Commission's rules permits the Commission to grant a waiver if good cause is shown.[33] Generally, the Commission may grant a waiver of its rules in a particular case if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.[34] Furthermore, waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.[35]

A grant of the requested waiver is in the public interest. The TCPA and the Commission's TCPA rules are intended "to allow consumers to stop unwanted faxes."[36] That purpose is not served where, as here, the recipient of the fax already had given permission to UHG to send a fax advertisement, and importantly, was fully capable of contacting UHG for purposes of opting out of future fax communications. Additionally, as discussed above, in light of the lack of clarity regarding the scope and applicability of Section 64.1200(a)(4)(iv) and its questionable legal foundation, grant of the waiver would better serve the public interest than strict adherence to the rule.

Moreover, denial of the waiver would be inequitable and could impose unfair liability on UHG based on claims that Congress never intended to create. Furthermore, the public interest would be harmed by requiring parties like UHG to divert substantial resources and staff away

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[33] 47 C.F.R. § 1.3.

[34] *See WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

[35] *See Ne. Cellular Tel. Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990).

[36] *JFPA Order* ¶ 48.

from productive health care efforts to resolve unnecessary litigation efforts stemming from confusion over the Commission's regulations. Similarly, the Commission should seek to disincentivize parties from abusing the Commission's rules for private gain. For these reasons, UHG submits that the public interest would be served by the Commission's grant of the requested waiver.

As a final matter, to the extent that the Commission determines that a similar declaratory ruling, waiver, or other relief may be warranted for fax advertisements that are sent without the "prior express invitation or permission" of the recipient but are sent to a recipient with whom the sender has an established business relationship, UHG respectfully requests that it be granted such relief on the bases described in this petition.

III. CONCLUSION

For the reasons stated above, UHG respectfully requests that the Commission issue a declaratory ruling clarifying that Section 64.1200(a)(4)(iv) of the Commission's rules does not apply to solicited faxes. In the alternative, UHG respectfully requests that the Commission clarify that the statutory basis for Section 64.1200(a)(4)(iv) is not 47 U.S.C. § 227(b). In the event the Commission declines to issue either declaratory ruling sought in this petition, UHG respectfully requests that the Commission nonetheless grant UHG a retroactive waiver of Section 64.1200(a)(4)(iv) for any solicited fax sent by UHG (or on its behalf) after the effective date of the regulation.

Respectfully submitted,

Mark W. Brennan
Tony Lin
Hogan Lovells US LLP
555 Thirteenth Street, NW
Washington, DC 20004
Counsel to UnitedHealth Group Incorporated

July 11, 2014