

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
iHire, LLC)
Petition for Declaratory Ruling)
)
Rules and Regulations Implementing the) CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)

DECLARATORY RULING

Adopted: August 28, 2015

Released: August 28, 2015

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. In this order, the Consumer and Governmental Affairs Bureau ("Bureau" or "we") deny to the extent described herein and otherwise dismiss a Petition for Declaratory Ruling filed by iHire, LLC. We clarify that faxes promoting a business's job placement services are "advertisements" under the Telephone Consumer Protection Act (TCPA) and Commission rules, even when they respond to a job posting requesting faxed resumes and contain summary information about job candidates. Based upon iHire's practices and other facts described in the record, rather than iHire's characterization of the issue in its Petition, we find that its faxes are unsolicited advertisements and violate the TCPA.

II. BACKGROUND

A. The Telephone Consumer Protection Act

2. In 1991, Congress enacted the TCPA to address a growing number of telephone marketing calls and other calling practices thought to be an invasion of consumer privacy. In relevant part, the TCPA prohibits the use of any telephone facsimile (fax) machine, computer, or other device to

1 iHire, LLC (iHire) states that it is an employment service. iHire, Petition for Declaratory Ruling, CG Docket No. 02-278, filed June 20, 2011, at 3 (Petition). Under the Commission's rules, the Commission or its delegate may issue a declaratory ruling "terminating a controversy or removing uncertainty." 47 C.F.R. § 1.2.

2 The TCPA is codified at section 227 of the Communications Act of 1934, as amended. See 47 U.S.C. § 227. The TCPA defines "unsolicited advertisement" 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, in writing or otherwise." 47 U.S.C. § 227(a)(5).

3 See infra para. 6.

4 Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227.

send an “unsolicited advertisement” to a telephone fax machine.⁵ An unsolicited advertisement is defined 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, in writing or otherwise.”⁶

B. The iHire Petition and Service

3. On June 20, 2011, iHire filed a Petition for Declaratory Ruling seeking clarification that resumes faxed by a third party on a job seeker’s behalf in response to online job postings are not advertisements under the TCPA and Commission rules, and therefore do not require the recipients’ consent or need to include opt-out notices.⁷ In its Petition, iHire states that Baltimore Podiatry Group (BPG) posted a request for a medical assistant on Craigslist.⁸ In response, iHire faxed “summary resumes” of job seekers to BPG on six occasions.⁹ iHire states that each fax encouraged BPG to contact the applicant directly, contained information on how to view a full resume for the applicant at iHire’s website, and included a notice with a telephone number and email address explaining how BPG could contact iHire if it no longer wished to receive summary resumes from iHire.¹⁰

4. On October 23, 2012, the Bureau sought comment on iHire’s Petition.¹¹ Four individuals filed comments and reply comments.¹² Two commenters state that iHire’s faxes are prohibited unsolicited advertisements;¹³ one cautions the Commission against taking action that would overturn or create inconsistency with a Maryland court decision finding iHire liable for TCPA violations;¹⁴ and one

⁵ 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(4). The exceptions listed at 47 U.S.C. § 227(b)(1)(C)(i)-(iii) are not relevant here because the sender of the fax advertisement and the recipient of the fax did not have an established business relationship. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, 3791, para. 8 (2006) (*2006 Order*); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, CG Docket Nos. 05-338, 08-239, Order on Reconsideration, 23 FCC Rcd 15059, 15064 para. 11 (2008).

⁶ 47 U.S.C. § 227(a)(5); 47 C.F.R. § 64.1200(f)(15).

⁷ Petition at 2. The opt-out provisions are set forth at 47 U.S.C. § 227(b)(2)(D), 47 C.F.R. § 64.1200(a)(4)(iii). They require, in part, that the notice appear on the first page of the unsolicited advertisement and include a domestic contact telephone number and fax machine number for the recipient to transmit an opt-out request to the sender. 47 U.S.C. § 227(b)(2)(D). The included numbers must permit the recipient a cost-free mechanism to transmit an opt-out request any time on any day of the week. *Id.*

⁸ Petition at 2.

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3.

¹¹ *See Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Declaratory Rulemaking from iHire, LLC*, CG Docket No. 02-278, Public Notice, 27 FCC Rcd 13305 (CGB 2012).

¹² *See* Appendix.

¹³ *See* Alembik Comments at 4; Shields Comments at 2.

¹⁴ *See* Worsham Comments at 1. BPG successfully sued iHire for the same alleged TCPA violations in Maryland. On February 23, 2011, the Circuit Court for Baltimore County entered judgment against iHire and awarded \$1500 plus interest and costs to BPG. *Baltimore Podiatry Group Drs. Scheffler & Sheitel P.A. v. iHire LLC*, Case No. 03C10010644 (District Case No. 080400006642010), Circuit Court for Baltimore County-Civil System (Circuit Court of Maryland). In a separate complaint filed by BPG against iHire, the Circuit Court for Baltimore County determined the three faxes at issue were advertisements under the TCPA and that iHire did not have BPG’s invitation or permission to send the faxes. April 29, 2013, filing by Michael C. Worsham, CG Docket No. 02-278, at 4-5. The parties later settled and the court dismissed with prejudice. *See* Docket for the Circuit Court for

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states that the Petition does not contain sufficient detail for the Commission to decide the question posed in the Petition.¹⁵

5. After the Bureau reviewed the Petition, we asked iHire to file additional information about its practices. On April 16, 2013, iHire filed BPG's Craigslist job posting, the six "summary resumes" iHire faxed to BPG, the job candidates' full resumes, and the Maryland docket.¹⁶ According to iHire's website, potential employers must register with iHire and pay \$450 for the ability to view up to 600 full resumes for 30 days.¹⁷ iHire does not allow potential employers to view just one full resume.¹⁸

III. DISCUSSION

6. We deny to the extent described herein iHire's request for a declaratory ruling and otherwise dismiss it. We find that iHire's faxes to BPG are unsolicited advertisements for iHire's services that are prohibited by the TCPA. We need not and do not reach the broader question stated in iHire's Petition: whether resumes faxed by a third party on a job seeker's behalf in response to an online job posting are advertisements under the TCPA and Commission rules.¹⁹ Instead, we limit our analysis to iHire's actual practice of faxing "summary resumes" and directing potential employers to iHire's website where they can only access full resumes by paying a fee.²⁰ Our action "terminate[s] the apparent controversy."²¹

7. We begin by reviewing the Commission's guidance for determining when a fax is an advertisement. An "advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services."²² Faxes "that contain only information . . . [are] not [] prohibited by the TCPA rules."²³ Faxes containing *de minimis* advertising do not trigger the TCPA's prohibitions. For example, a company logo or business slogan on an account statement—a "*de minimis* amount of advertising information"—does not convert a communication into an unsolicited advertisement if, for

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Baltimore County, Case No. 03-C-10-002526, available at <http://casesearch.courts.state.md.us/inquiry/inquiryDetail.jjs?caseId=03C10002526&loc=55&detailLoc=CC> (last visited on Aug. 25, 2015).

¹⁵ See Roylance Comments at 5.

¹⁶ April 16, 2013, filing by iHire, CG Docket No. 02-278 (April Filing).

¹⁷ iHireNursing's website includes a page of Frequently Asked Questions (FAQs). Under the heading "Employer FAQs," is the question "How do I get started?" The answer reads in part: "Simply register for free at our Website or call one of our account managers." The FAQ also states: "We do not offer the ability to purchase just one resume. You are required to purchase a resume search." <http://www.ihirenursing.com/faq/employers> (last visited Aug. 25, 2015). A 30-day resume search is \$450. *Id.*

¹⁸ *Id.* ("[Question:] You have a particular resume in your database that I would like to see, can I just pay for that one resume? [Answer:] We do not offer the ability to purchase just one resume. You are required to purchase a resume search.")

¹⁹ See Petition at 2.

²⁰ See <http://www.ihirenursing.com/faq/employers> (last visited Aug. 25, 2015).

²¹ Petition at 2. The Administrative Procedure Act and the Commission's rules allow the Commission or its delegate, in its discretion, to issue a declaratory ruling to terminate a controversy or remove uncertainty. See 5 U.S.C. § 554(e); 47 C.F.R. § 1.2. Consistent with that discretion, we decline to address the broader question because we would not be addressing the legality of iHire's actual practice by doing so.

²² 47 C.F.R. § 64.1200(f)(1).

²³ 2006 Order, 21 FCC Rcd at 3814, para. 53.

example, the primary purpose is to relay account information to the fax recipient.²⁴ In addition, “[a]n incidental advertisement contained in [an informational fax such as a] newsletter does not convert the entire communication into an advertisement.”²⁵ In determining whether an advertisement is incidental to an informational communication, the Commission has stated it will consider “whether the advertisement is to a *bona fide* ‘informational communication.’”²⁶ In this analysis, the Commission has stated it may consider, among other things, the amount of space devoted to advertising versus the amount of space used for information or transactional messages.²⁷ The Commission also has stated it considers the “primary purpose of the communication.”²⁸

8. Applying Commission precedent, we conclude that iHire’s faxes amount to “teaser” information aimed at generating enough interest in the candidate to induce a potential employer to visit iHire’s website and purchase access to full resumes, as well as to expose potential employers to advertising and offers for the other for-fee services iHire offers potential employers. We first “consider the amount of space devoted to advertising versus the amount of space used for information.”²⁹ Roughly two thirds of the printed lines on each of iHire’s one-page faxes encourage the recipient to visit iHire’s website and instruct the recipient on how to do so, while one third actually provides information about the job candidate.³⁰ Specifically, each fax’s first paragraph states that iHire is an employment website, not a recruiter or agency, and that potential employers may contact candidates directly.³¹ The second paragraph indicates that the document is a summary resume, states that a full resume is available at iHire’s website, and offers brief instructions for how to locate the full resume.³² Following these paragraphs is information pertaining to the job candidate: a sentence describing the type of position sought, a sentence describing past experience, a statement of the job titles the candidate is qualified to fill, the candidate’s name and phone number, and the candidate’s ID number at iHire’s website.³³ Below this information are step-by-step instructions for the recipient to review the full resume at iHire’s website.³⁴ These instructions indicate that a potential employer must register on iHire’s website.³⁵ The fax concludes with iHire’s contact information, which a potential employer may use if it wishes to stop receiving faxes from iHire.³⁶ Even assuming that the information about the candidate in each fax is purely informational, we find that the amount of space devoted to iHire’s services and the instructions on how to access its website indicate that the faxes are not *bona fide* informational communications.³⁷

²⁴ *Id.* at 3814, para. 51.

²⁵ *Id.* at 3814, para. 53

²⁶ *Id.* at 3814, para. 53 n.187.

²⁷ *Id.*

²⁸ *Id.* at 3814, para. 51.

²⁹ *Id.* at 3814, para. 53 n.187.

³⁰ April Filing at 3, 7, 10, 14, 18, 22.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ The 2006 *Order* identifies several factors that the Commission will consider in determining whether an advertisement is to a *bona fide* “informational communication.” See 2006 *Order*, 21 FCC Rcd at 3814, para. 53

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9. Second, separate from the relative amount of space devoted to iHire's service and how to access it, we find that the primary purpose of the faxes is to sell iHire's services rather than to inform the recipient about the job candidate, and the advertisement is thus not merely a *de minimis* or incidental portion of these faxes.³⁸ BPG asked for candidate resumes but iHire instead gave summary resumes containing scant and general information, lacking present and past employment, education, and reference information that are standard in resumes.³⁹ This lack of candidate information, promotion of iHire, and provision of instructions on how to access iHire's website to view full resumes for a fee persuades us that the faxes' primary purpose is to act as a "teaser" to induce potential employers to pay to see a full resume and to expose them to advertising and offers for iHire's other for-fee services. Thus, we find that the faxes advertise the commercial availability of goods or services.⁴⁰ The advertising on iHire's faxes is clearly not *de minimis*; it is a type of "pretext to advertise commercial products and services" and "marketing campaign to sell property, goods, or services" that the Commission previously cautioned would violate the TCPA.⁴¹ While the faxes include the job candidates' telephone numbers and state that the potential employer may contact the job candidates directly,⁴² we believe a potential employer would more likely seek additional information about a candidate before contacting the candidate directly and is therefore more likely to go to iHire's website.

10. iHire nonetheless would not have violated the TCPA and Commission rules if its faxes were solicited from iHire by the recipient,⁴³ but it is clear from the record they were unsolicited. BPG's Craigslist posting instructs job "candidates" to "[f]ax a brief, hand written (by you), history of your previous health care positions" to a specified number.⁴⁴ The posting also specifies "[p]rincipals only," clarifies "[r]ecruiters, please don't contact this job poster," and indicates "[p]lease do not contact job poster about other services, products or commercial interests."⁴⁵ This job posting specifically states that third parties such as iHire should not fax resumes on behalf of a job candidate, and expressly precludes any other commercial fax communication. Moreover, BPG's job posting did not provide the "prior express invitation or permission, in writing or otherwise"⁴⁶ required for the faxes to be considered solicited.⁴⁷ While the job posting solicited faxes from candidates themselves, the faxes sent by iHire to BPG were clearly unsolicited. Businesses such as iHire may provide a valuable service to job seekers and potential employers who wish to use it, but the company cannot lawfully, under the TCPA, send fax advertisements that are clearly unsolicited.

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n.187. Other than "the amount of space devoted to advertising versus the amount of space used for information," none of those factors are germane to an analysis of the faxes iHire sent to BPG. *Id.*

³⁸ See 2006 Order, 21 FCC Rcd at 3814, para. 51.

³⁹ See April Filing at 2-29.

⁴⁰ See 47 U.S.C. § 227(a)(5).

⁴¹ 2006 Order, 21 FCC Rcd at 3814, para. 52; 47 U.S.C. § 227(a)(5); 47 C.F.R. § 64.1200(f)(15).

⁴² April Filing at 3, 7, 10, 14, 18, 22.

⁴³ 2006 Order, 21 FCC Rcd at 3811, para. 45 ("In the absence of an [established business relationship], the sender must obtain the prior express invitation or permission from the consumer before sending the facsimile advertisement.").

⁴⁴ April Filing at 2.

⁴⁵ *Id.*

⁴⁶ 47 U.S.C. § 227(a)(5); 47 C.F.R. § 64.1200(f)(15).

⁴⁷ See 47 C.F.R. § 64.1200(f)(15) ("[U]nsolicited advertisement" is defined, in part, as material having been sent without "prior express invitation or permission, in writing or otherwise.").

IV. CONCLUSION AND ORDERING CLAUSES

11. For the reasons discussed above, we deny iHire's Petition to the extent described herein and find that iHire's faxes to BPG are prohibited by the TCPA because they are unsolicited advertisements for iHire's services.

12. Accordingly, IT IS ORDERED, pursuant to sections 1-4 and 227 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 227, sections 1.2 and 64.1200 of the Commission's rules, 47 C.F.R. §§ 1.2, 64.1200, and pursuant to the authority delegated in sections 0.141 and 0.361 of the Commission's rules, 47 C.F.R. §§ 0.141, 0.361, that the Petition for Declaratory Ruling filed by iHire in CG Docket No. 02-278 on June 20, 2011, IS DENIED TO THE EXTENT DESCRIBED HEREIN AND IS OTHERWISE DISMISSED.

13. IT IS FURTHER ORDERED that this Declaratory Ruling shall be effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Alison Kutler
Acting Chief
Consumer and Governmental Affairs Bureau

Appendix**List of Commenters**

The following parties filed comments in response to the October 23, 2012 Public Notice (CG Docket 02-278):

<u>Commenter</u>	<u>Abbreviation</u>
Richard S. Alembik	Alembik
Gerald Roylance*	Roylance
Joe Shields	Shields
Michael C. Worsham*	Worsham

* filing both comments and reply comment (bold - reply comments only)