

FCC Denies Petition for Declaratory Ruling on Fax Advertisements

December 22, 2016

On December 21, 2016, the FCC's Consumer and Governmental Affairs Bureau (CGB) released an [order](#) denying a request by Kohl's Pharmacy & Homecare, Inc. (Kohl's) for a declaratory ruling that facsimiles sent on its behalf did not violate the Telephone Consumer Protection Act (TCPA) "where the facsimiles simply informed businesses of the health benefits of corporate flu vaccines." Kohl's claimed that such transmissions do not fit within the definition of an "unsolicited advertisement" because "the purpose of the facsimile transmission was to 'promote wellness ... so that people would get vaccinated and not get ill.'" Alternatively, Kohl's asked the FCC to issue an exemption from the TCPA for its faxes based on the Commission's exemption for healthcare-related calls subject to the Health Insurance Portability and Accountability Act (HIPAA), or for a retroactive waiver of the fax advertisement rules. The Bureau ruled against Kohl's on each request.

First, the Bureau denied Kohl's contention that the faxes were not advertisements. The order finds that because "the primary purpose of the faxes is to sell flu vaccines rather than any informational purpose," the Kohl's faxes were advertisements. In particular, the order explained that the faxes listed a price range for the flu vaccines, finding that "the primary purpose of including price will almost always be to convince the fax recipient that the price for the product or service is reasonable and that a purchase should be considered." CGB also considered the amount of space on the faxes that was used for advertising content rather than non-advertising information. The order concluded that the "amount of space devoted to the commercial availability of Kohl's flu vaccination service and instructions for getting a free price quotation show that the faxes are not *bona fide* informational communications."

Next, the order rejected Kohl's argument that the FCC should find that its faxes are exempt from the TCPA as healthcare-related messages that are subject to HIPAA. CGB stated that the Commission's previous healthcare exemptions were narrow and expressly permitted under the TCPA, but that "Kohl's has not offered any basis for extending the previously granted exemptions for healthcare-related messages to its unsolicited advertisement faxes." The order also refuted Kohl's claim that the application of the healthcare exemption to phone calls and text messages but not faxes violates the First Amendment, noting that the previous exemptions "were limited to calls that did not constitute unsolicited advertisements," and therefore the Commission "afford[ed] identical treatment to the various types of communication."

Finally, the Order denies Kohl's request for a retroactive waiver of the FCC's fax advertisement rules, finding that "Kohl's does not state any special circumstance that would warrant deviation for the rule, nor does it put forth any reason the public interest would be better served by waiver of the rule."

It is important to note that this ruling is a decision by a Bureau of the Commission. As such, it is

subject to review by the Commissioners upon petition by an interested party. With the upcoming transition to the new administration, it is not clear whether Kohl's will pursue additional administrative remedies relating to its petition. We are certain that we'll keep watching for any further proceedings and will cover them here as they occur.