

Written Statement

of

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on

H.R. _____, the Junk Fax Prevention Act of 2004

Before the

**Energy and Commerce Subcommittee on
Telecommunications and the Internet
United States House of Representatives**

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I. INTRODUCTION

Good morning Chairman Upton, Ranking Member Markey, and members of the Subcommittee. My name is K. Dane Snowden, and I am Chief of the [Consumer & Governmental Affairs Bureau](#) of the Federal Communications Commission ("FCC" or "Commission"). I appreciate this opportunity to appear before you to discuss the history of the rules on the transmission of unsolicited facsimile advertisements under the Telephone [Consumer Protection Act of 1991 \(TCPA\)](#), as well as the FCC's role in implementing and enforcing these rules.

In 2002, the FCC initiated a rulemaking proceeding to update its rules under the TCPA, which culminated in the establishment of the popular and successful national "[do-not-call](#)" registry. While the do-not-call registry certainly garnered a great deal of media attention with over 60 million telephone numbers now registered on the list, the Commission undertook at the same time a comprehensive review of the unsolicited fax rules under the TCPA. The Commission asked for public comment on the effectiveness of those rules and on any developing technologies that might warrant revisiting the restrictions on fax advertising. Based on the FCC's own extensive enforcement experience and on the record before us, the Commission revised the rules implementing the TCPA to require any entity transmitting a fax advertisement to first obtain the recipient's express permission in writing. We concluded that an established business relationship would no longer be sufficient to constitute the necessary permission under the TCPA to allow the lawful transmission of an advertisement to a person's fax machine. I appreciate this opportunity to explain the Commission's action in 2003 and how these revised rules differ from our prior ruling in 1992 on sending fax advertisements.

II. BACKGROUND

A. The TCPA and 1992 Commission Rules

On December 20, 1991, Congress passed the TCPA to address a growing number of telephone marketing calls and certain telemarketing practices Congress found to be an invasion of consumer privacy and even a risk to public safety. The statute also restricts the use of telephone facsimile machines to send unsolicited advertisements, making it unlawful “to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.” In addition, the TCPA requires all fax messages to identify the sender on the first page or on each page of a transmission.

It is important to emphasize that the TCPA treats fax advertising differently than it does telemarketing calls. In defining a “telephone solicitation,” the TCPA excludes calls to consumers with whom a company has either their “prior express invitation or permission” or an “established business relationship.” Thus, a company may make a telemarketing call to an existing customer. If that customer asks not to be called again, the company must place the consumer on its company-specific do-not-call list and honor the consumer’s request not to be called. The TCPA does not, however, expressly exempt from its fax provision those faxes that are sent to “established business relationship” customers. Instead, the TCPA’s fax provision acts as a ban on fax advertisements unless the recipient has given “prior express invitation or permission” to receive the fax. Neither the statute nor the legislative history contemplates a mechanism for consumers to “opt out” of unwanted fax transmissions, as is the case with telemarketing calls.

In adopting rules in 1992 to implement the TCPA, the Commission stated in its Report and Order that the TCPA leaves the Commission without discretion to create exemptions from or limit the effects of the fax prohibition. The Commission noted, however, that fax transmissions from persons or entities that have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient. The Commission subsequently made clear in 1995 that the existence of an established business relationship between a fax sender and recipient establishes consent to receive telephone facsimile advertisement transmissions.

B. Enforcement

Since the FCC adopted rules to implement the TCPA, the Commission has aggressively enforced the rules on sending fax advertisements, despite the fact that identifying and tracking down the senders of junk fax messages can be a difficult task. Complaints filed with the Commission often contain insufficient information for the FCC to pursue alleged violations—primarily because fax senders do not include adequate identification information or a working telephone number on their faxes. Instead, senders of junk faxes often disguise their identities with aliases, acronyms, or simply provide no identifying information whatsoever.

It is also worth noting that the obstacles that senders of junk faxes use to avoid identification create a significant challenge for enforcement action within the one-year statute of limitations period for proposing forfeiture penalties. This is because before the Commission can consider a forfeiture penalty against most senders of junk faxes, it is required under section 503 of the Communications Act to issue a warning citation to any violator that does not hold a Commission authorization (which would include most fax senders). Only if the non-licensee violator subsequently engages in conduct described in the citation may the Commission propose a forfeiture, and the forfeiture may only be issued as to the subsequent violations. Nevertheless,

the Commission has issued forfeiture orders totaling over \$6.9 million in penalties for junk faxing. The Commission has also issued 233 citations for faxes sent in violation of the TCPA. Most recently, the Commission issued a forfeiture of nearly \$5.4 million against Fax.com for violating the TCPA and the Commission's junk fax rules. This enforcement action marked the largest forfeiture the Commission had ever issued with respect to the sending of unlawful faxes.

Despite a general ban on unsolicited facsimile advertisements, and aggressive enforcement by the Commission, unwanted faxed advertisements have proliferated, particularly as facsimile service providers (or fax broadcasters) enable sellers to send advertisements to multiple destinations at relatively little cost.

III. RECENT COMMISSION ACTION

Against this backdrop, the Commission decided to review the fax rules under the TCPA when it took up the telemarketing rules in September of 2002. In a Notice of Proposed Rulemaking, the Commission sought comment on both telemarketing and fax practices and asked whether any of the rules should be revised to ensure the TCPA's mandate was being carried out. Specifically, we sought comment on the continued effectiveness of the fax rules, including whether an established business relationship establishes the requisite express permission to receive faxed advertisements, and on any developing technologies that might warrant revisiting the rules.

With regard to the effectiveness of the rules under the existing regime, the record we compiled indicated that many individuals and businesses are, in fact, inundated with unsolicited faxes. Some commenters explained that advertisers continue to send them faxes despite efforts to be removed from senders' fax lists. The record revealed that, in addition to the cost of paper and toner associated with receiving faxes, consumers and businesses—both small and large—are

burdened by the time spent reading and disposing of faxes. In addition, the record demonstrated that when fax machines must print unsolicited advertisements and are not operational for other purposes, there is a loss in productivity for those businesses.

In reviewing whether an established business relationship between a fax sender and recipient establishes the requisite express permission to receive facsimile advertisements, the Commission received comments from a small number of businesses that opposed the elimination of the established business relationship “exemption” for faxing. These businesses argued that doing so would interfere with ongoing business relationships and raise business costs. Consumer advocates, however, maintained that the TCPA requires companies to obtain express permission from consumers—even their existing customers—before transmitting a fax to a consumer. They argued that consumers should not have to assume the cost of the paper used, the cost associated with the use of the facsimile machine, and the costs associated with the time spent receiving a facsimile advertisement during which the machine cannot be used by its owner to send or receive other facsimile transmissions, without their permission. Some businesses indicated that facsimile advertisements interfere with receipt of faxes connected to their own business, and that the time spent collecting and sorting such faxes increases their own labor costs.

In addition, the Commission reviewed closely the express language of the TCPA and its legislative history. One of Congress’s primary concerns behind the TCPA was to protect the public from bearing the costs of unwanted advertising. It restricts certain practices found to impose unacceptable costs on consumers, such as autodialed calls to wireless numbers and unsolicited advertisements sent to fax machines. Although the TCPA expressly excludes calls to persons with whom a company has an “established business relationship” from the restrictions on “telephone solicitations,” it does not contain a similar exception from the fax prohibition.

Similarly, the legislative history describes the need to protect ongoing business relationships in terms of companies being able to make telemarketing calls to their customers. It contains no similar references to an established business relationship for fax senders. As some commenters pointed out, Congress initially included in the TCPA an EBR exemption for sending faxes, but removed it from the final version of the statute. Instead, the legislative history focuses exclusively on the concern that, in the words former Representative Matthew Rinaldo (R-NJ), “unsolicited and unwanted faxes can tie up a machine for hours and thwart the receipt of legitimate and important messages.”

Although the Commission in 1992 noted that “prior express invitation or permission” could be interpreted broadly enough to allow an “established business relationship” to suffice, a more extensive consideration of the statutory language in our 2003 rulemaking informed by our enforcement experience, led us to a different outcome. The record in our proceeding revealed that inclusion of an established business relationship within the meaning of prior express permission had resulted in consumers and businesses assuming the unwanted advertising costs of faxing, of any entity with which they conduct business. Therefore, we reversed our prior conclusion that an established business relationship provides companies with the necessary express permission to send faxes to their customers. We instead determined that companies that wish to fax unsolicited advertisements to customers must obtain their express permission before transmitting faxes to them. Under the revised rules (which will not become effective until January 1, 2005), such permission must be provided in writing, including through electronic mail, and include the recipient’s signature and facsimile number. This written permission requirement was intended to ensure that consumers and businesses have a means to control the messages sent to their fax machines.

III. CURRENT STATUS OF FAX RULES

Following the release of the [Commission's 2003 Report and Order](#), businesses, associations, and other entities that advertise via fax filed comments indicating that obtaining written permission from persons to whom they fax will be burdensome—both time consuming and costly. In light of these additional claims, the Commission immediately stayed the effective date of the written consent requirement until January 1, 2005. In the interim, we also concluded that businesses could continue to rely on an established business relationship for permission to send fax advertisements. And, we clarified that the time limitations on the duration of an established business relationship for telephone solicitations—18 months from any purchase or transaction and 3 months from an inquiry or application—would not apply to the sending of unsolicited advertisements.

The stay has provided the Commission with an opportunity to review industry and consumer concerns. As part of our normal rulemaking process, numerous petitions have been filed with the Commission, seeking review of the fax rules. Many such petitions are from entities not involved in our 2003 proceeding. These petitioners have asked the Commission to reinstate the established business relationship “exemption” for faxing and to allow businesses to secure permission orally or via fax. They argue that elimination of the established business relationship exemption, on which businesses have come to rely, will cause serious disruption to routine business operations. They point out that businesses and membership and trade associations use the fax machine to send customers a variety of communications, such as invitations to conferences and event, pricing sheets, announcements of weekly specials and real estate listings. According to these businesses, the fax machine continues to be a valuable tool for communicating with customers and conducting normal business. Because these petitions for

reconsideration are currently before the Commission, I am extremely limited as to what I can say about the Commission's deliberations regarding these matters.

IV. CONCLUSION

The goal of the TCPA is to protect consumers from certain marketing practices that can be intrusive and costly to the consumer. As companies continue to advertise via facsimile, we must ensure that consumers and businesses have a means to control the messages they receive on their fax machines.

I look forward to answering any questions you have.