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November 12, 2002

VIA FEDERAL EXPRESS

Ms. Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, Maryland 20743

Re: Docket No. 02-278; Notice of Proposed Rulemaking re 1991 TCPA
(the "Rulemaking Notice")

Dear Ms. Dortch and FCC Commissioners:

I am the owner and president of Autoflex Leasing ("Autoflex") which is in the auto leasing business in Dallas and Fort Worth, Texas. I write, in part, to provide you the perspective of a businessman. Autoflex employs roughly 80 people, spends over $800,000 a year on legitimate advertising and has 13 operating business fax machines.

My comments are limited to unsolicited fax transmissions and two topics. The FCC's invitation for comments regarding whether "a rule [to explicitly state what conduct of fax broadcasters exposes them to TCPA liability - would] better inform the business community about the general prohibition on unsolicited fax advertising?" Rulemaking Notice at 26, ¶ 40. Secondly, to provide comment on "what conflicts between state telemarketing laws and federal law might warrant preemption?" Rulemaking Notice at 29, ¶ 48.

While I provide four copies of this letter as required, to save paper, I provide only one copy of the over 1,800 unsolicited fax ads received by Autoflex since September 1, 1999. Those are my initials, "AA" on the vast majority of these fax ads. I am certain that Autoflex has received hundreds more than this as the vast majority of these junk faxes came in on 4 of Autoflex' 13 fax machines. In fact, over 1,475 of these were received in the 11 months starting in September, 1999 and ending in July, 2000. As I have become enlightened about the ineffectiveness of litigation to either compel TCPA compliance or as being cost justified, I have become far less diligent at asking employees to collect fax ads (and keeping ones I see) in the past 2 years.

Despite the commendable actions of the FCC through enforcement actions (including the recent one against Fax.Com), a number of actions by state AG's (Texas, Illinois, Washington and Minnesota), a number of private TCPA class actions (including those where Autoflex and I have

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served as class representative), Autoflex continues to receive hundreds of unsolicited fax ads a month. Of course, while I oppose paper and toner costs being imposed on my business by unlawful advertisers, far and away the two bigger problems are a) lost labor time; and b) unfair competition.

Lost labor time results in the necessity of literally dozens of daily trips that my employees have to make to our 13 fax machines solely to determine that another unwanted junk fax has been received. The speed sensitive nature of my business – like most businesses – requires that whenever a fax machine "rings" that the nature of the fax be checked – as it is hopefully a customer, a bank, or one of scores of other speed sensitive business faxes. The real dollar losses and inefficiencies imposed on my business annually by such unlawful advertising are both substantial and incalculable.

Unfair competition results from the fact that it remains highly cost effective to violate the TCPA's unsolicited fax ad ban. In fact, because only a few TCPA class actions have met with any success to date and thousands of businesses fax advertise – the more you violate the TCPA the more cost effective it is. Hence, advertisers who abide by the TCPA are at a grave business disadvantage to trying to compete with the advertisers who make the illegal but otherwise prudent business choice of extremely cheap and extremely cost effective unsolicited fax advertising.

These fax advertisers are being advised that they need not worry about class actions being certified because the TCPA does not prohibit unsolicited fax ads that are received by computers or fax modems, just "traditional" fax machines with a built in printer. Therefore, they claim if a person, like me, is naive enough to actually serve as a class representative to attempt to accomplishment enforcement of the TCPA through a class action – that because some percentage of every 100 illegal fax ads might have been received by a computer – as long as the plaintiffs' can not prove which ones – they will lose.

Therefore, in answer to your question posed, the rule that the business community needs to be informed of and the clarification to the FCC regulations that I submit should be made is that 100% of the time you send or cause to be sent an unsolicited fax ad, the advertiser and transmitter will both be liable (assuming the transmitter failed to investigate the lack of prior solicitation) even if those unsolicited fax ads are received by computers, fax modems, palm pilots, etc., as long as said "equipment ... has the capacity ... to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper". 47 U.S.C. § 227(a)(4) & (a)(4)(B).

As a corollary thereto, I submit it should be clarified and held that the word "capacity" in this quoted section of the TCPA encompasses all equipment which can be attached to a printer. Said clarification is in accord with the TCPA's mandate that the FCC "shall prescribe regulations to implement the requirements of this subsection [which includes the fax ad prohibition in subsection (b)(1)(C)]". 47 U.S.C. § 227(b)(2). Not so clarifying would result in the opposite of what Congress intended – instead of a ban on unsolicited fax advertising with a deterrent sizeable

enough to compel compliance – the result is, the ability to have thousands of unlawful fax ads sent on your behalf with a virtual assurance that you will never be forced to respond to 100% of your illegal fax ads because some were undoubtedly received by computers.

While I believe said clarification stems from a construction of the plain words of the TCPA, if the FCC disagrees, said clarification is clearly justified by Congress' clear intent to impose a complete, not partial, ban on unsolicited fax ads and the fact that "remedial legislation ... must be construed broadly, not technically and restrictively." *Paul F. Newton & Co. v. Texas Comm. Bank*, 630 F.2d 1111, 1118-19 (5th Cir. 1980), citing, *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 151 (1972); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963).

Secondly, I provide comments on when should the TCPA preempt conflicting state laws. As the FCC has stated that the TCPA applies to intrastate fax ads, *In re Fax.Com, Notice of Apparent Liability for Forfeiture*, FCC 02-226 at 15, n. 59 (Aug. 7, 2002), I submit it should do so whenever there is a conflict between the complete prohibition on fax ads and any state law. The savings clause of the TCPA that "nothing in [the TCPA] or in the regulations prescribed under [the TCPA] shall preempt any State law that imposes more restrictive intrastate requirements", 47 U.S.C. § 227(e)(1), by negative inference clearly supports the proposition that less restrictive intrastate requirements will be preempted.

Therefore, to further effectuate congressional intent to impose a complete, not partial, ban on unsolicited fax ads the FCC should clarify or reaffirm that fax advertisers will be liable even if there state purports to pass legislation allowing unsolicited fax ads because said laws will be preempted by the federal TCPA.

Sincerely,

Andrew L. Adams

cc: Ms. Kelli Farmer Via Fed Ex (w/4 copies of this letter)
Federal Communications Commission
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