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Federal Communications Commission
Office of the Secretary

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VIA E-MAIL (via <http://www.fcc.gov/e-file/ecfs.html>)

Commission's Secretary
Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 - 12th Street, S.W.; Room TW-A325
Washington, D.C. 20554

Re: Comments Respecting the "Telephone Consumer Protection Act of 1991" (CG Docket No. 02-278; CC Docket No. 92-90; FCC 02-250)

This responds to the Federal Communications Commission's ("FCC") invitation for comments regarding, in part, application of the Telephone Consumer Protection Act of 1991 (the "TCPA") to unsolicited facsimile advertisements. ***Notice of Proposed Rulemaking and Memorandum Opinion and Order,*** 67 Fed. Reg. 62667 (the "Notice of Proposed Rulemaking").

I. SUMMARY OF RECOMMENDATIONS

- Implement regulations insulating from lawsuit and liability under the TCPA third-parties whose name, trademark, or other indicia of identity is or are included in unsolicited facsimile advertisements without such third-party's specific authorization. That is, make clear that if the unsolicited facsimile advertisement is sent by a party other than the party whose goods or services are depicted in the fax, liability of the party whose goods and services are depicted or whose trademark or trade name is depicted can only be established upon a showing that that third-party specifically requested the sending party to send unsolicited facsimile advertisements to non-customers of the depicted party; and

- Implement regulations expressly applying the "established business relationship" exemption to unsolicited facsimile advertisements and clarify that such a relationship itself constitutes "prior express invitation or permission" to transmit unsolicited facsimiles advertisements; craft such regulations to allow a company with an established business relationship with a customer based on one type of product or service to send unsolicited facsimile advertisements about a different service or product, provided that such different services or products have some connection to the relationship between the fax sender and the recipient and/or its business activities.

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11. REQUIRE IDENTIFICATION OF FAX AUTHOR, NOT JUST "SENDER"

This section responds to the following FCC remark

> The TCPA prohibits the transmission of unsolicited advertisements by telephone facsimile machines and requires those sending any messages via telephone facsimile machines to identify themselves to message recipients. We seek comment on the continued effectiveness of these regulations and on any developing technologies, such as computerized fax servers, that might warrant revisiting the rules on unsolicited faxes.

Notice of Proposed Rulemaking ¶ 37.

The existent regulations are incomplete and expose to lawsuit and liability entities that Congress never intended to reach under the TCPA. The FCC noticed that under the TCPA, "the entity or entities ***on whose behalf*** facsimiles are transmitted are ultimately liable for compliance with the [TCPA's] rule banning unsolicited facsimile advertisements." Reconsideration Order, 10 FCC Rcd 12391, ¶¶ 34-35 (1995) (emphasis added). Yet, in their current form, the TCPA and related regulations do not include or explain the phrase "on whose behalf." Consequently, the regulations fail to account for the circumstance when the content of an unsolicited facsimile advertisement improperly suggests that it is sent on behalf of another when, in fact, it is not. The regulations should be amended such that if an unsolicited facsimile advertisement is sent by a party other than the party whose goods or services are depicted in the fax, a lawsuit or liability under the TCPA against the party whose goods and services are depicted or whose trademark or trade name is depicted can only be established upon a showing that that party specifically requested the sending party to send such unsolicited facsimile advertisements to non-customers of the depicted party. For that matter, the FCC should make clear that lawsuits are not envisioned or sustainable against entities which have not sent unsolicited facsimiles advertisements in violation of the TCPA and which have not specifically requested that unsolicited facsimile advertisements be transmitted to their non-customers.

As they are, the TCPA and related regulations would subject to a lawsuit under the TCPA an entity that is the victim of trademark and copyright infringement and commercial misappropriation. That is, some senders of unsolicited facsimile advertisements, for their own financial gain, overtly or impliedly associate third-parties with their transmissions, thereby confusing recipients as to the actual sender of the facsimile and exposing uninvolved third-parties to the legal devices of recipients of such "junk faxes." Three examples demonstrate the unintended and illogical consequences allowed by the current law:

- On November 8, 2002, at 6:39 a.m., undersigned counsel received at his home an unsolicited fax advertising a Disney vacation. The fax provided two telephone numbers to call (1-800-467-0776 and 1-800-822-9033). He called both numbers. Upon getting a return call, the entity described itself as having no affiliation with Disney, but representing hotels in the Disney area that offered Disney packages. Obviously, if the offer of the faxing party was accepted, Disney would benefit. But, the faxing party

would benefit by the making of a reservation at their facility during the Disney visit, also. Under these circumstances, even though the unsolicited fax dealt with and advertised the subject matter of **a** Disney vacation, Disney should not be sued or liable under the TCPA. Yet, under the current statutory and regulatory scheme, Disney could be sued under the TCPA in this actual scenario.

- Hypothetically, a seller of computer software may send an unsolicited facsimile advertisement that offers programs or goods manufactured and sold by "Company X." The imagined fax advertisement also may contain the seller's telephone number, which recipients would call to place a purchase order. Consumers might believe that the facsimile advertisement either was sent by Company X or was sent on Company X's behalf. Agitated recipients of this unsolicited facsimile advertisement may, on this erroneous belief, sue Company X under the TCPA. As enacted, the TCPA and related regulations potentially would support an illogical result. Company **X** may be sued under the TCPA in this hypothetical context even though it had not specifically authorized the faxing party to send unsolicited faxes on its behalf and even though it did not send, author, commission, or ratify the facsimile advertisement containing its identity and products. The fact that Company X might benefit tangentially is immaterial for the purpose of applying and enforcing the TCPA. **See** ***Worsham v. Nationwide Ins. Co.,*** 772 A.2d 868 (Md. Ct. Spec. App. 2001) ("[t]he mere existence of a mutual benefit resulting from such telephone solicitations is not sufficient to establish affiliation."). That is, even though Company X's products or services are ultimately bought, the impetus for the facsimile advertisement did not come from Company X, but from an entity that made money selling Company X's products or services. The regulations must be made clear to insulate entities like the hypothetical Company X from such a situation.

- Another example based in fact exists on the FCC's own Internet site **(http://www.fcc.gov/cgb/consumerfacts/telemarketscam.html).** There, in the context of unsolicited telephone calls prohibited by the TCPA, the FCC warns of scammers calling people claiming to be officials of a state Do-Not-Call registry or of an antifraud consumer group. Gaining the confidence of the listener, the scammer asks if the listener wants to be on a Do-Not-Call list and if so to provide important personal information, which the scammer invariably uses to steal money and identity, etc. Certainly, these calls are not made "on behalf of' the states with Do-Not-Call lists or various antifraud groups. Yet, these groups might be sued under the TCPA merely because they are mentioned in such unsolicited telephone calls. The absurdity of this example applies with equal force in the anti-"junk fax" context.

To date, in the absence of clearer regulations, consumers actually are bringing misguided lawsuits under the TCPA in situations similar to the above examples. Entities that have not given others specific authorization to send unsolicited faxes mentioning their identities and products are being sued under the TCPA. A regulatory scheme clarifying that the TCPA applies only to parties who specifically authorize the transmission of unsolicited facsimile advertisements promoting their goods and services and/or depicting their trademark or trade

name would effectuate the intent underlying the TCPA (*e.g.*, prohibiting telemarketers from invading consumer privacy) and prevent needless, costly litigation. That is, the FCC should implement regulations insulating from lawsuit or liability under the TCPA, alike, third-parties whose name, trademark, or other indicia of identity is or are included in unsolicited facsimile advertisements without such third-party's specific authorization.

III. EXCEPTIONS AND EXEMPTIONS: "PRIOR EXPRESS INVITATION OR PERMISSION" AND THE "ESTABLISHED BUSINESS RELATIONSHIP"

This section responds to the following FCC remarks:

> We seek comment on the need to clarify what constitutes prior express invitation or permission for purposes of sending an unsolicited fax. * * * We seek comment on the circumstances in which facsimile numbers are distributed or published by individuals and businesses. **We** invite comment specifically on the issue of membership in a trade association or similar group. For example, should the publication of one's fax number in an organization's directory constitute an invitation or permission to receive an unsolicited fax? The Commission also seeks comment on what effect its case-by-case analysis has had on the number of unsolicited faxes sent to consumers and on costs incurred by the recipients of such faxes.
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> We seek comment on the Commission's determination that a prior business relationship between a fax sender and recipient establishes the requisite consent to receive telephone facsimile advertisement transmissions. This determination has amounted to an effective exemption from the prohibition on sending unsolicited facsimile advertisements, although our rules do not expressly provide for such an exemption. We ask whether, in practice, the Commission's previous determination has served to protect ongoing business relationships and whether it has had any adverse impact on consumer privacy. If we were to preserve the "exemption," should we amend our rules to expressly provide for it? We also seek comment on the need to clarify the scope of the "exemption." For instance, should a company that has an established relationship with a customer based on one type of product or service also be allowed to send unsolicited faxes about a different service or product? **We** invite comment on a consumer's authority to stop faxes to his facsimile number from a business with which he has an established relationship. Is it necessary for the Commission to adopt rules to protect consumers from unsolicited faxes in such circumstances?

Notice of Proposed Rulemaking **¶¶ 38-39.**

The FCC's conclusion that a prior business relationship between a fax sender and recipient evidences the requisite consent to receive unsolicited facsimile advertisements is necessary and should be preserved by inclusion into the applicable law. The regulations should make express the application of the "established business relationship" exemption to facsimile advertisements.'

The FCC should make clear that this exemption applies to unsolicited facsimile advertisements to the same extent it applies to unsolicited telephone solicitations under the TCPA. The applicable regulations allow a party to avoid liability under the TCPA when and if an "established business relationship," as defined as follows, exists:

> The term ***established business relationship*** means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without the exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

47 C.F.R. § 64.1200(f)(4) (emphasis in original). Yet, a court may interpret these regulations as only applying with respect to impermissible telephone (as opposed to facsimile) solicitations. *Id.* § 64.1200(c)(3). ***But see Memorandum Opinion and Order, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,*** 10 FCC Rcd 12391, 12408-409 (1995) ("the existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions"); ***see also Report and Order, In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,*** 7 FCC 8752, 8779 (1992) ("fax transmissions from persons or entities with an established business relationship "can be deemed to be invited or permitted by the recipient.").

Additionally, the FCC should consider regulations clarifying that the existence of an "established business relationship" itself constitutes "prior express invitation or permission" to

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[1] The FCC should clarify if Congress refused to delegate authority to it to make exceptions to the TCPA:

> In banning telephone facsimile advertisements, the TCPA leaves the Commission without discretion to create exceptions from or limit the effects of the prohibition (see § 227(b)(1)(c)); thus such transmissions are banned in **our** rules as they **are** in the TCPA. § 64.1200(a)(3).

See In the Matter of Get-Awuys. Znc., Notice of Apparent Liability for Forfeiture, 15 FCC Rcd. 1805, 1813 n.23 (1999); ***see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,*** Report and Order, 7 FCC Rcd. 8752, 8779 n.87 (1992).

transmit unsolicited facsimile advertisements concerning matters that will facilitate or inform the recipient's business or business relationships. Such a regulation would be careful to preserve a prohibition against unsolicited facsimile advertisements that promote goods and services bearing no relationship to the type of business in which a recipient is engaged or the established relationship between the sender and the fax transmitter. For example, it might be permissible for a bank to fax unsolicited information to an established client about a new type of savings plan, but impermissible *to* fax unsolicited information about opportunities to buy cars (unless specifically requested). As discussed below, the test to determine whether an unsolicited facsimile advertisement transmitted between established business partners evidences or is consistent with the "prior express invitation or permission" of a recipient may be to examine the recipient's reasonable expectation of receiving such unsolicited facsimile advertisement.

Furthermore, as suggested above, the definition of the "established business relationship" should be constructed so as to allow a company that has a business relationship with a customer based on one type of product or service to send unsolicited facsimile advertisements about a different service or product, provided that such different services or products have some connection to the relationship between the fax sender and the recipient. For example, if a food wholesaler traditionally and permissibly sends facsimile advertisements concerning poultry or beef to a restaurant with which it has an established business relationship, the TCPA should not be implicated when and if the food wholesaler sends an unsolicited facsimile to the same entity concerning something different but related, like restaurant supplies. This is so because there exists a nexus or logical link between the different service or product offered (*i.e.*, supplies as opposed to food) and the relationship of the parties (*i.e.*, seller and buyer in the specific context of the restaurant business). The regulations, therefore should calibrate any ban against unsolicited facsimile advertisements and be designed to impose liability under the TCPA, if at all, only after a consideration of the reasonable expectation of the recipient.

Precedent exists for such a regulation. With respect to the House of Representative's version of what would become the finalized, negotiated version of the TCPA, one Congressman remarked:

> The bill appropriately singles out calls in which there is an existing business relationship between the caller and the consumer. Businesses need to be able to contact customers with whom they have a prior or existing business relationship. Generally, these calls are not objectionable ***to*** the recipient; ***they allow the customer*** *to take* ***advantage of special promotions and other offers from vendors with whom they are already familiar.*** At the same time, **I** want to emphasize that these vendors should be keeping track of customers' wishes regarding telephone calls and where and when he likes to receive them or not. Responsible telemarketers should respect certain basic privacy concerns irregardless of whether there is an existing business relationship.

137 Cong. Rec. H11307-01, at *H11314 (testimony of Representative Edward J. Markey (D-Mass.) (emphasis added). In other words:

> The existence of the relationship at the time of the solicitation, or within a reasonable time prior to it, would form the basis for the new solicitation, ***provided that it substantially relates to the products or services forming the basis of the relationship.***
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> In sum, the Committee believes the test to be applied must be grounded in the consumer's expectation of receiving the call. ***Consequently, the test shall consist of a determination of whether the new solicitation occurs within a reasonable period of time and the new product or service being promoted is related substantially to the prior relationship.*** The Committee intends this test to be one of substance and not one of form.

H.R. Rep. 102-317, 1991 WL 245201, at *13-14 (emphasis added). Applying this reasoning in the context considered here, the "established business relationship" would except from the TCPA transmission of unsolicited facsimile advertisements between established business partners arising in the line and in furtherance of the recipient's business or enterprise, *e.g.*, a travel provider updating a travel agent about fares and travel packages, a food wholesaler to a restaurant about food and supplies, a bondsman to a law firm specializing in criminal law about fees and filing requirements, etc. **A** regulation effectuating this reasoning would encourage the development and progress of existing business relationships without implicating the privacy concerns that are central to the TCPA, particularly where safeguards are in place to allow a recipient of an unsolicited facsimile advertisement - even a recipient with an established business relationship with the sender - to elect to stop receiving any further promotions.

Given the law of several states, the FCC should consider regulations under the TCPA that allow recipients of unsolicited facsimile advertisements to take affirmative steps to stop receiving such faxes. The TCPA expressly requires only that facsimile messages contain certain information such as the time of transmission (in the upper or lower margin of a fax). 47 U.S.C. § 227(d)(1)(B); 47 C.F.R. § 68.318(d)). Beyond these requirements, however, there is no case law or published commentary directing a recipient to a telephone number or person to contact in order to stop receiving unsolicited facsimile advertisements. To date, the FCC's observation and position is that "federal law does not address opt-out numbers in any way and even the effective use of such numbers in no way mitigates the fact that every unsolicited fax advertisement violates federal law." ***In the Matter of Fax.com, Inc., Notice of Apparent Liability for Forfeiture,*** 17 FCC Rcd. 15927, 15941 *(2002)*. The FCC should consider implementation of regulations that align the rigid federal prohibition against unsolicited facsimile advertisements with less-restrictive, but equally effective requirements enacted by several states relating to a recipient's ability to "opt-out'' of receiving unsolicited transmissions.