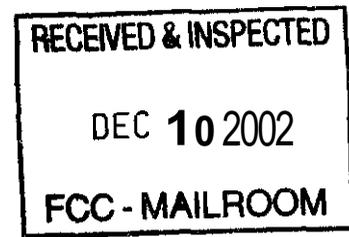




NATIONAL AUTOMOBILE DEALERS ASSOCIATION  
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703/821-7040 • 703/821-7041



Legal & Regulatory Group

December 6, 2002

**Via Federal Express**

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, Room TW-A325  
Washington, D.C. 20554

02-278  
92-90

Re: Notice of Proposed Rulemaking - Telephone Consumer Protection Act

Dear Ms. Dortch

The National Automobile Dealers Association (“NADA”) submits the following in response to the request of the Federal Communications Commission (“FCC” or “Commission”) for comment on whether to revise, clarify or adopt additional **rules** to more effectively carry out Congress’s directives in the Telephone Consumer Protection Act (“TCPA”).

NADA represents over 19,000 franchised automobile and truck dealers who sell new and used vehicles and engage in service, repair and parts sales. Our members employ more than 1,000,000 people nationwide. A significant number of our members are small businesses as defined by the Small Business Administration.

NADA members utilize a number of methods to solicit potential and existing customers. Due to their small size and resource limitations, NADA members necessarily seek to offer their products and services in the most cost effective manner possible. This may include advertising by facsimile or through automatic dialing devices. NADA therefore is very interested in changes that may occur to the current statutory and regulatory scheme governing **this** area.

The FCC’s Notice of Proposed Rulemaking raises a number of issues that require careful consideration. **Our** immediate concern pertains to the FCC’s request for comment on the TCPA’s “established business relationship” exemption, the application of the statute’s “prior express permission” language to trade association solicitations and the extent to which the TCPA imposes liability on fax broadcast providers.

**Established Business Relationship Exemption**

1. The Scope of the Exemption

The Notice of Proposed Rulemaking seeks comment on whether any circumstances have developed that would justify revisiting the Commission’s definition of “established business relationship” and whether revisiting the exemption would “interfere with ongoing business

relationships or impede communications between businesses and their customers, particularly for small businesses.” It further **asks** whether it should “clarify the type of consumer inquiry that would create an established business relationship.”

For the reasons stated below, we do not believe there has been a change in circumstances that warrants substantive revisions to the “established business relationship” exemption. Contrarily, we believe narrowing the exemption would unnecessarily deprive small businesses of a cost-effective marketing opportunity. We urge the Commission, however, if it engages in **further** rulemaking, to provide non-exclusive examples of circumstances that establish the requisite business relationship.

The profitability of a small business largely depends on the efficiency with which it can market its products and services. Lacking the resources to conduct extensive marketing surveys, the business must direct its marketing efforts to consumers and businesses that have a specific interest in the products and services that the business offers. Among the consumers and businesses that comprise this group are those that have either entered into a transaction with the business or shown some interest in doing **so**. Efforts to restrict marketing opportunities to this valued group would deprive small businesses of a cost-effective means of reaching persons with whom they have a greater likelihood of entering into future transactions.

It similarly would assist our members if the Commission provides non-exclusive examples of circumstances that establish the requisite business relationship. Although the present definition describes some circumstances, the Commission should address other circumstances, such **as** those contained in paragraph 24 of the Notice of Proposed Rulemaking. This would better define the scope of the exemption and remove ambiguity that may result in costly and unnecessary litigation.

## **2. Application of the Established Business Relationship Exemption to Faxes**

The Commission also seeks comment on whether it should preserve its determination that a prior business relationship between a fax sender and recipient establishes the requisite consent to **receive** fax advertisements. It also **asks** whether it should amend the rules to expressly provide for such an exemption and whether the scope of the exemption should be narrowed to apply, for instance, only to those products or services on which it is based.

The rule should expressly state that the established business relationship exemption applies to fax advertisements and should not be limited solely to the type of product that gave rise **to** the relationship. There is no policy rationale for changing the Commission’s previous determination of this issue. Nor is there anything unique or more intrusive about fax advertisements that warrants treating them more restrictively than prerecorded voice message advertisements (for which the exemption is recognized). Changing the rules in this **regard** would deprive small businesses of an important means of advertising their products and services in a manner that they have come to rely upon. It also would preclude consumers and businesses from **obtaining** product information that may be useful to them. The same applies to any effort to limit the scope

of the exemption by prohibiting fax advertisements about “different” products and services. In addition, such an exercise would only invite litigation over whether a product was the “same” or “different.” The difficulty of drawing a line that separates the two and applying the distinction to the variety of products and services that are offered in the market place would likely manifest itself in costly litigation over a business’s alleged failure to abide by the new distinction.

#### Scope of Prior Express Permission Language

The FCC **seeks** comment on whether membership in a trade association constitutes an invitation to receive an unsolicited facsimile advertisement. The TCPA rules should expressly provide that membership in a trade association constitutes prior express permission to receive unsolicited facsimile advertisements from the organization.

The nature of the trade association-member relationship requires this approach. In deciding to become a member of a trade association, the member voluntarily seeks the benefit of the association’s services. This includes such items **as** obtaining information on current legislative, regulatory and judicial developments **as well as** information **on** critical industry and operational developments. It also includes obtaining information on new products and services that increase the member’s ability to sustain its business and compete in the marketplace. Because businesses have **this** expectation when joining the association, the FCC should clearly state that becoming a member of an association constitutes prior express permission to receive fax advertisements. Alternatively, the Commission should identify membership in a trade association **as an** example of **an** established business relationship.

The impact of a different construction should not be overlooked. It is essential that trade associations have the ability to rapidly disseminate product and service information to their members. The association and its members would be adversely affected if faxes could not be used for this purpose. Restricting this means **of** marketing would be particularly harmful to trade associations of small businesses, **as** those businesses rely on their association to provide information which they do not have the resources to independently access and analyze.

#### **Fax** Broadcast Providers

The FCC **seeks** comment on whether the Commission should amend the rules to state explicitly that certain fax broadcasting practices expose the fax broadcaster to liability under the TCPA.

We believe some form of accountability is necessary where the fax broadcaster was aware, or reasonably should have been aware, that its broadcast fax advertisements violated the TCPA. Fax broadcasters often will be unfamiliar with the accuracy of **an** advertisement presented to them. They also may be unaware of whether one of the exceptions to the general prohibition **on** unsolicited fax advertisements (e.g., prior express consent, established business relationship) applies to the designated recipients of the advertisement. The same does not (or should not) apply, however, **to** their knowledge of the underlying TCPA prohibitions and restrictions. In

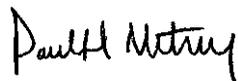
contrast to many small businesses whose business they solicit, fax broadcasters should know the limitations the statute imposes and when the list of recipients (**as** opposed to the content of the advertisement) will clearly result in a violation of the statute. Consider, for example, a situation in which a fax broadcaster contacts a small business and offers to send fax advertisements to everyone with the same area code **as** the business. It should be clear to a fax broadcaster that the exceptions to the prohibition that are contained in the statute cannot possibly apply to **this** broad category of fax recipients. Nonetheless, the small business, which may not even be aware of the existence of the statute (let alone its specific provisions), would be solely responsible for resulting violations. Such a result is neither equitable nor sound public policy and should be addressed in any subsequent rulemaking. In addition, fax broadcasters should be required to provide written disclosures of the restrictions and exceptions that apply to fax advertisements before entering into a contract with a company to provide **this** service.

### **Conclusion**

It is critical that the FCC use **this** rulemaking to clarify these issues. Any ambiguity that remains will only generate an increasing number of lawsuits over technical violations that may produce damages far in excess of any alleged harm caused to the consumer. This particularly applies to lawsuits being brought under the TCPA that seek certification **as** a class action. Class actions **are** totally inappropriate under the TCPA **as** they create the potential for bankrupting damage recoveries even though the plain intent of the statute is to afford recipients of unsolicited faxes the opportunity to seek damages in small claims court. In addition to the issues outlined above, we encourage the FCC to remove the specter of class action lawsuits under the TCPA and their disproportionate threat of damages.

We thank you for the opportunity to comment.

Sincerely,



Paul D. Metrey  
Director, Regulatory Affairs