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December 13, 2002

Hon. Michael Powell, Chairman
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

RE: RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT (TCPA) OF 1991, 47 CFR PART 64, (DKT NO 02-278).

Dear Chairman Powell:

On behalf of the 600,000 small-business owners represented by the National Federation of Independent Business (NFIB), I am writing to offer comments on the Federal Communications Commission's Notice of Proposed Rulemaking on rules and regulations implementing the Telephone Consumer Protection Act of 1991, listed in the Federal Register on October 8, 2002 (67 Fed. Reg. 62667). NFIB and its members have had firsthand experience with the implementation of the regulations underlying TCPA, and have several recommendations for the improvement of those regulations. Our comments focus on the rules governing pre-existing business relationships, unsolicited facsimile messages, and the regulations governing the filing of claims for damages for violations of the TCPA. We submit these comments both as a trade association representing its members, and as a regulated entity having to contend with the intricacies and consequences of the TCPA.

While we recognize that the TCPA and its regulations were implemented in order to protect the privacy rights and lifestyles of consumers, NFIB believes that significant burdens are being placed upon businesses of all sizes in order to comply with the regulations involved, but that small businesses bear the brunt of those burdens. Regulatory costs rise as the size of businesses

shrink, with firms of fewer than 20 employees having regulatory costs roughly 33% higher than those firms with greater than 20 employees.

Pre-Existing Business Relationships

NFIB believes that the rules regarding "pre-existing business relationships" must be clarified. Specifically, the TCPA order calls for businesses to cease contacting customers who have affirmatively requested such a cessation, and that this request constitutes a severing of the business relationship. In the experience of many of our members, not only has this been an unwieldy and difficult rule to translate as a business practice (given, at times, the number of customers those businesses service, and the diverse locations in which they might be served), but it also prevents those businesses from utilizing essential tools in serving their customers.

In NFIB's own experience as a membership organization, in no small way our members are customers, who actually have contracted with NFIB to provide them with timely and relevant information on a regular basis. Strict enforcement of this rule would prevent us from providing members (both current and former) with information helpful to either their retention or renewal after a lapsed membership—and, with regards to current members, NFIB has been the subject of a number of unwarranted complaints from individuals who have failed to realize that their membership entitles them to the receipt of such information via fax.

Furthermore, for our small business members, an individual who continues to interact with a these small businesses following a "do not contact" request does not sever the business relationship *de facto*, and it should be the right of the business to continue to inform that customer. If that customer no longer wants to be directly informed of new products, services, or (in our case) important issues of the day, then it is incumbent upon that customer to affirmatively sever the relationship.

Finally, we do not believe that having the regulations reflect these sentiments would have an adverse impact on consumer privacy. Because the choice of patronizing a business (or membership association) already opens the customer to having certain discrete pieces of information made available to that business (for example, the opinions of what that customer

might be interested in purchasing based upon previous purchases, or, in our case, their opinions on public policy issues), the customer is, in fact, inviting the business to provide that customer with information regarding additional goods and services. In our opinion, the responsibility for protection of consumer privacy merely shifts from the business (in whose best interest it is to cultivate a solid relationship with the customer) to the consumer himself. The consumer is the only person really able to make the decision as to what level of privacy he wishes to have in his interactions with a business.

We suggest that the rules be amended to reflect this. Either the consumer must make an affirmative step clearly severing the relationship with the business, or, absent that requirement, some sort of grace period ought to apply to first time complaints from a former customer of a business who believes they have received a communication which is unwarranted.

Unsolicited Facsimile Messages

Our concerns over the pre-existing business relationship regulations further come also apply in the area of unwanted or unsolicited faxes, as those regulations apply both to groups like NFIB, and to our members. Currently, the TCPA prohibits the transmission of "unsolicited" advertisements by fax—i.e., read strictly, a business must first ask for permission before faxing advertisements. Further, it also requires that any advertising messages sent via fax must be preceded by some sort of identification by the sender for the recipient.

For many small businesses, the ability to fax information to their established customers is an essential commercial tool. In our opinion, a customer who provides his contact information (including fax number) when patronizing a business is offering an express invitation or permission to be contacted by that business. This is certainly true when that customer is in the market for, among other things, information, as is the case with NFIB and the products it provides to its members.

Considering the number of small businesses who do not have e-mail, and compare that number to those who have fax machines, in our case it is much more effective for NFIB to provide information to its members via fax. By using the simple guideline of assuming that contact

details given to us by members constitute permission by those members to so use those details, it enables us to provide the goods and services our members have requested us to give them. When required to secure explicit permission through identification with each fax, it causes us (and our members) a tremendous and unncecessary burden.

It is incumbent upon customers to state that they do not wish to receive faxes from businesses they patronize, and it should not be the responsibility of the business to have to identify itself with each and every fax it sends to a customer. The regulations should be changed to reflect that.

Enforcement—Costs of Private Rights of Action

Most important, however, is our belief that the rules implementing the TCPA have created a needless litigation burden on small businesses accused of sending unsolicited faxes, regardless of the merit of a consumer's claim. A small industry itself has been created dedicated almost solely to the prosecution of these claims, and a simple search on the internet shows that there are a number of organizations advocating for litigation, and others who will pursue them on behalf of litigants (for a fee). For example, junkfax.org, a website which advertises itself as being "dedicated to helping stop junk faxes" has a section on its initial page entitled "How to sue—How to get up to $1,500 for every junk fax you receive."[1]

While there might be merit to some claims, all claims, regardless of their merit, must be investigated. In the case of NFIB, we have had a number of meritless claims filed against us (meritless due to our pre-existing business relationship with the claimants, who were dues-paying members of the organization). Each claim threatened a lawsuit, and each claim offered a settlement for a certain monetary sum (usually upwards of $1,000). Regardless of the outcome, like any other business, NFIB is forced to either choose to remit substantial payments, or forced to expend considerable sums of money to defend itself against these meritless claims.

Even an organization as established as NFIB can ill-afford to fritter away its money on defending itself in this manner—the same is much more true for our average member, who has less than ten employees, nets $350,000 per year, and already contends with an annual regulatory cost

approaching $7,000 per employee[2]. That business, if hit with even a handful of claims (regardless of merit), faces substantial expenses in either settling those claims, or in hiring a lawyer to defend itself.

Clearly, TCPA's rules need to be changed to address this problem, either by changing the standards whereby a claim can be filed, allowing for exemptions for first-time violations, or by even allowing a defending party to seek attorneys' fees should a claim found to be without merit. These changes can protect the rights of innocent businesses, while still allowing for egregious violators to be punished.

Conclusion

NFIB appreciates the opportunity to comment on these rules. The regulations underlying the TCPA have had consequences that were unforeseen and unintended a decade ago. The clarifications recommended can be beneficial to those small businesses needlessly impacted by those consequences.

Thank you once again.

Sincerely,

Andrew M. Langer
Manager, Regulatory Policy

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[1] http://www.junkfax.org
[2] Crain and Hopkins, The Impact of Regulatory Costs on Small Firms, 2001, http://www.sba.gov/advo/research/rs207tot.pdf