

**Before the
Federal Communications Commission
Washington, D.C. 20554**

_____)	
In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	CC Docket No. 92-90
)	
_____)	

REPLY COMMENTS OF XPEDITE SYSTEMS, INC.

Xpedite Systems, Inc. ("Xpedite") hereby respectfully submits its Reply Comments in response to the *Notice of Proposed Rulemaking and Memorandum Opinion and Order* in the above-referenced dockets, released by the Federal Communications Commission (the "Commission" or "FCC") on September 18, 2002, FCC 02-250, 67 Fed. Reg. 62667 (Oct. 8, 2002) (the "NPRM"). The NPRM solicits comments on topics relating to the Commission's rules that were promulgated pursuant to the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (the "TCPA"). The focus of Xpedite's Reply Comments are the Commission's rules that generally prohibit the sending of unsolicited commercial advertisements to fax machines.

I. FAX BROADCASTERS

A number of "fax broadcasters," including Xpedite, transmit their customers' facsimile messages without exercising any control over the content of the messages and without providing the facsimile numbers to which the messages are

delivered. In fact, many fax broadcasters do not even view their customers' messages because they are transmitted to the fax broadcaster through an automated computer process, and then sent automatically to a list of numbers provided by the fax broadcaster's customer.

The Commission, following Congressional intent, has stated that “[i]n the absence of a ‘high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions,’ common carriers will not be held liable for the transmission of a prohibited facsimile message.”¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8780 (1992).

However, this exemption is not expressly stated in the Commission's rules. Accordingly, the NPRM solicits comments on whether the rules should be amended to specify the activities of a fax broadcaster that could expose it to liability under the TCPA and the Commission's rules (*e.g.*, providing customers with a list of facsimile numbers for use in directing advertisements, which “indicates a fax broadcaster's close involvement in sending unlawful fax advertisements”²) NPRM, ¶ 40.

¹ To further clarify that legitimate fax broadcasters should not be subject to liability for the transmission of their customers' messages, the Commission has stated that “the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements, and that fax broadcasters are not liable for compliance with the rule.” *Rules and Regulations Implementing the Telephone and Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12407 (1995).

² NPRM ¶ 40, *citing Fax.com Notice of Apparent Liability*, FCC 02-226 (rel. Aug. 7, 2002).

Many commenters in this proceeding, even state attorneys general, agree that only fax broadcasters who are closely involved in the transmission of their clients' messages (*e.g.*, by providing lists of fax numbers) should be subject to liability if the faxes are unsolicited advertisements. *See, e.g.*, Comments of the Attorneys General of Alabama, et al. ("State AGs Comments") at 42 (stating that fax broadcasters who determine the content or destination of advertisements should be considered senders and not merely disinterested fax broadcasters and asking the Commission to amend the rules to "note this distinction" between uninvolved fax broadcasters and other "involved" entities); Comments of National Consumers League at 6 (arguing that fax broadcasters who supply lists should be held liable for rule violations); and Comments of Nextel Communications, Inc. at 40 (urging the Commission to "specify by rule that it is the party (or parties) determining the destination of the facsimile advertisement that is liable for any violation of the TCPA."). Thus, the record in this proceeding supports the retention of the exemption from TCPA liability for those fax broadcasters who merely transmit messages for their customers, as distinguished from those entities that are more involved in their clients' marketing activities.

Xpedite urges the Commission to amend its rules to expressly provide that fax broadcasters are not subject to liability under the rules prohibiting the transmission of unsolicited facsimiles, and to specify the activities which could remove fax broadcasters from this exemption. Congress itself would support this outcome. As clearly expressed in the TCPA's legislative history, "[t]he regulations concerning the use of [fax] machines apply to the persons initiating the telephone call or sending the message and do not apply

to the common carrier or *other entity that transmits the call or message and that is not the originator or controller of the content on the call or message.*” S. Rep. No. 102-178, at 9 (emphasis added). Moreover, such clarification in the rules would provide much needed guidance to the industry, and is advocated by commenters in this proceeding. Further, as the above legislative history directs, the exemption from liability is not limited to entities formally classified as telecommunications “common carriers” (e.g., licensed telephone companies), but covers – and is intended to encompass – entities such as Xpedite that transmit messages of various types for hire by the public.

The State AGs Comments suggest that a fax broadcaster that transmits to a database provided by someone else should seek documented assurances from that provider that the recipients have consented to receiving the faxes, or face liability (State AGs Comments at 43). Congress, by creating an exemption for third party transmitters of others’ faxes, did not intend to put this type of burden on fax broadcasters, and the Commission has never acknowledged a need for it. As a federal court stated in interpreting the fax provision of the TCPA, “[t]he transmission service provider should not be a censor; it should only be liable if it is knowingly involved in the illegal conduct or has *actual notice* that the communication is illegal and fails to prevent the transmission.” *Illinois v. Discovery Marketing, Inc., et al.*, Order, Civ. No. 99-3243 (C. D. Ill. Feb. 14, 2000, Scott, J.) (pertinent sections attached as Exhibit A to Xpedite’s Comments in this docket) (emphasis added). Moreover, the State AGs would actually be expanding the scope of the TCPA, by failing to distinguish between advertisements and other messages that are transmitted. In addition, from a technological perspective, this

requirement simply does not make sense, since customers of fax broadcasters generally send their lists of numbers and messages remotely to the fax broadcasters' automated system, and the fax broadcaster generally does not have an opportunity to review in advance the content or the distribution list. Finally, requiring fax broadcasters to inquire into consent issues is incongruous with the requirement that the fax broadcaster remain uninvolved and simply act as a transmitter. In short, Congress exempted from TCPA liability entities that merely transmit messages on behalf of others; such entities should not be burdened with ascertaining if consent has been obtained. The TCPA squarely places the responsibility on the advertiser to comply with the consent requirement.

II. ESTABLISHED BUSINESS RELATIONSHIP EXEMPTION

At the outset, it is important to recognize, as Congress did when it enacted the TCPA, that not all forms of fax advertising are illegal or intrusive. *See House Report, 102-317, 102d Cong., 1st Session (1991), p. 9-10* (clarifying that the goal of the TCPA is not to make all facsimile advertising illegal because, when conducted properly, transmitting advertisements via fax machines is “an established lawful marketing practice”). Further, a central goal of the TCPA is to protect business relationships without compromising the privacy of individuals. *See Id.* at 18 (noting that the established business relationship exemption reflects a balance between “a desire to not unduly interfere with ongoing business relationships” and a consumer’s privacy interests). In keeping with such Congressional intent, the Commission has determined that “a prior business relationship between a fax sender and recipient establishes the

requisite consent to receive telephone facsimile advertisement transmissions.” NRPM, ¶

39. However, this exemption currently is not expressly provided for in the rules.

Many commenters rightly urge the Commission to amend the rules to make such an exemption clear. *See, e.g.*, Comments of the New York State Consumer Protection Board – Responses to the Proposed Rules Other Than Issues Relating to a National Do-Not-Call List at 18 (explaining that the business relationship exemption should be kept because “consumers have voluntarily entered into the business relationship, and always have the option to terminate it.”); Comments of the Magazine Publishers of America at 22 (stating that the Commission’s determination that a business relationship establishes the requisite consent to receive facsimile advertisements “has protected ongoing business relationships without any adverse impact on consumer privacy”); Comments of American Business Media at 4-5 (explaining that the absence of such an exemption expressly stated in the rules has forced its members to curtail their fax communications with their subscribers); Comments of Nextel Communications, Inc. at 25 (urging the Commission to preserve the business relationship exemption for faxes “to preserve the sanctity of the customer relationship and avoid unduly burdening the right of companies to communicate with their customers”); Comments of DIRECTV, Inc. at 9-10 (explaining that consumers may welcome such communications from companies with whom they have relationships, and can terminate such relationships for purposes of this exemption if they do not); and Comments of the Newsletter & Electronic Publishers Association (“NEPA Comments”) at 3-5 (urging FCC to formalize the “established

business relationship exception” which would “have little, if any, adverse impact on consumer privacy.”).

In light of the fact that the TCPA sought to balance a consumer’s right to privacy with the desire to avoid interfering with existing business relationships and legitimate marketing practices, it is reasonable to provide expressly for an existing business relationship exemption from the general prohibition on transmitting unsolicited facsimiles. As with telemarketing calls, the consumer is in the driver’s seat and can terminate the relationship for such purposes at any time. *See e.g.*, NEPA Comments at 4 (“current and former subscribers who nevertheless object to such facsimile advertising would still be able to prevent it by requesting that they be placed on the publisher’s internal do-not-call list.”).

III. IDENTIFICATION REQUIREMENTS

Currently, the Commission’s rules require that all facsimile messages contain “an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity or individual.” 47 C.F.R. § 68.318(c)(3). The Commission has clarified that when a message is transmitted by a fax broadcaster on behalf of a client, it is the client’s identifying information that must be contained on the fax. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 12 FCC Rcd 4609, 4613 (1997) (finding that the TCPA “mandates that a facsimile include the identification of the business, other entity, or individual creating or originating a facsimile message and not the entity that transmits the message.”). The NPRM seeks comment on whether such

identification requirements have been effective in protecting consumers' rights to enforce the TCPA. NPRM, ¶ 40.

The Commission should continue to require the identifying information of the entity responsible for creating the facsimile message. Requiring a fax broadcaster's identifying information, in addition to the sender's information, could confuse consumers as to who created the message and directed that the message be sent to the consumer. As stated above, fax broadcasters who do not have a high degree of involvement in the creation or transmission of the fax message (*e.g.*, who do not exercise control over the content of the message and who do not provide the fax numbers to which the message is sent) should not be liable for the transmission of an unsolicited facsimile advertisement. However, if such a fax broadcaster's identifying information were on the fax, the consumer may not be able to identify the party it should contact to ensure that future faxes are not sent, or against whom to pursue legal remedies. Accordingly, such a requirement could cause considerable consumer frustration and may force legitimate fax broadcasters to incur legal fees to rectify any misunderstandings. Even the State AGs Comments only go as far to suggest that fax broadcasters who *determine the destination of the fax advertisement* should be required to include their identifying information on the fax. Thus, for "uninvolved" fax broadcasters such as Xpedite, requiring that their identifying information also appear on facsimiles would be counterproductive, by potentially involving them in customer complaints and disputes when they have only acted in the manner that Congress sanctioned – as a carrier of another's message.

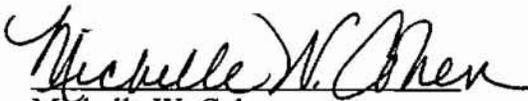
Moreover, as explained above, the established business relationship exemption for unsolicited faxes protects the privacy of the consumer by enabling the consumer to terminate an existing business relationship for the purposes of receiving such faxes. This can only be accomplished if the consumer is able to determine the actual sender of the fax. Confusion encountered by consumers due to multiple telephone numbers and company names on the fax message would delay the termination of the consumer's existing business relationship request, as fax broadcasters are not required to maintain "do not send" lists for their customers.

III. CONCLUSION

In enacting the TCPA, Congress sought to protect the privacy of consumers against unwanted telemarketing while preserving legitimate marketing practices. Xpedite respectfully requests that the Commission amend its rules consistent with its Comments and these Reply Comments, which would further such Congressional goals.

Respectfully submitted,

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