

**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	)	
	)	

**REQUEST FOR STAY**

**PROXIMITY MARKETING**

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## SUMMARY

Proximity Marketing requests the Commission to stay the effective date of its *Report and Order* and the amended rules adopted therein to implement the Telephone Consumer Protection Act of 1991 (“TCPA”), concerning unsolicited facsimile advertising, as they apply to the publishers of Requester Publications and related businesses. Requester Publications generally are specialized trade or business publications provided at no charge to subscribers that have demographic characteristics indicating they have an interest in the publication’s subject matter. Proximity Marketing’s request for stay is limited solely to faxed communications from the publisher of a Requester Publication to a subscriber that has (1) previously requested to receive the publication, and (2) pays nothing for the subscription, with “no strings attached.” The Commission’s reversal of its prior determination, that companies having an established business relationship have consent to send faxes to their customers or clients, and the amended rules requiring a recipient’s express signed written consent to receive facsimile advertising, will, absent immediate clarification or a stay, result in significant disruption and economic harm to hundreds, if not thousands, of publishers of Requester Publications, as well as related companies in the Requester Publication industry.

This request for stay satisfies the four factors considered by the Commission: (1) Proximity Marketing is likely to prevail on the merits; (2) absent the stay (or clarification that Proximity Marketing is concurrently seeking), the new rules will result in irreparable harm; (3) no other interested parties will be substantially harmed; and (4) the public interest favors relief.

As shown in Proximity Marketing’s concurrently filed Request for Clarification, faxed communications from a publisher to the subscriber of a Requester Publication (who receives a free subscription), asking the subscriber to confirm his or her desire to continue receiving the

publication, free of charge, does not constitute an unsolicited facsimile advertisement under the TCPA. Facsimile renewal reminders are limited to notifying the subscriber that his or her subscription is about to expire, and requesting the subscriber to provide responsive information to continue receiving the free subscription. Publishers are required to obtain this information in written form to comply with U.S. Postal regulations governing the eligibility standards for lower Periodical postage rates, and for independent industry audits. The renewal reminders contain no offer or request that the subscriber buy any product or service, and there is no purchase involved in renewing the subscription.

There are about 4,000 Requester Publications, each having anywhere from 15,000 to 250,000 subscribers, meaning there are tens or hundreds of millions of individual subscriptions potentially affected. Compliance with the new requirements adopted in the *Report and Order*, prior to the August 25, 2003, effective date, is a virtually impossible task. Creating lists of the millions of subscribers who need to be contacted, deploying those communications by facsimile or otherwise, and collecting and collating responses, simply cannot be done in such a short time. Assuming the new requirements are applicable to Requester Publication renewal notices, and absent written consent from subscribers, after August 25 publishers will have to use alternate means to communicate with their subscribers to renew their subscriptions. Each of the alternatives is more expensive and less productive than faxed communications. This will mean a significant increase in costs to publishers, a likely reduction in the number of subscription renewals and therefore fewer subscribers, and lower advertising revenues attributable to reduced subscribership. In the case of Proximity Marketing, it would likely mean a drastic reduction in its business from the reduced use of facsimiles in circulation renewal programs.

A delay in the effective date of the *Report and Order* and amended facsimile advertising rules, as they pertain to faxed communications for subscription renewals of Requester Publications, will not harm any other interested parties. Such communications are sent infrequently (no more than a few times in a year depending on whether a subscriber responds to the initial communication). Indeed, a stay likely will reduce the burden that otherwise may occur from a flood of facsimile and other efforts to get subscribers to provide written consent to continue receiving faxed communications.

Finally, a stay will further the public interest. There is much confusion about the scope of the *Report and Order* and amended rules. In the face of such ambiguities concerning the applicability of the Commission's new regulatory approach, granting the requested stay will afford the Commission an opportunity to resolve these issues without the adverse impact that immediate implementation of the new rules will cause.

## TABLE OF CONTENTS

INTRODUCTION	3
STAY REQUEST	9
I. LIKELIHOOD OF SUCCESS ON THE MERITS	9
II. PETITION AND OTHER PARTIES IN THE REQUESTER PUBLICATION INDUSTRY WILL SUFFER IRREPARABLE HARM	11
III. OTHER INTERESTED PARTIES WILL NOT BE HARMED	14
IV. GRANTING THE STAY REQUEST IS IN THE PUBLIC INTEREST	15
CONCLUSION	16

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**REQUEST FOR STAY**

Proximity Marketing hereby requests the Commission to stay the effective date of its *Report and Order* in this proceeding, and the amended rules adopted therein, concerning unsolicited facsimile advertising, as they apply to the publishers of Requester Publications.<sup>1</sup> The new rules and policies implement the Telephone Consumer Protection Act of 1991 (“TCPA”).<sup>2</sup> The Commission’s reversal of its prior determination, that companies having an established business relationship have consent to send faxes to their customers or clients, and its amended rules requiring a recipient’s express signed written consent to receive facsimile advertising, will, absent immediate clarification or a stay, result in significant disruption and economic harm to hundreds, if not thousands, of publishers of Requester Publications that are circulated at no charge (free) to subscribers, as well as related companies in the Requester Publication industry.<sup>3</sup>

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<sup>1</sup> See *Report and Order, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 03-153, released July 3, 2003. A summary of the *Report and Order* was published in the Federal Register on July 25, 2003, 68 FR 44144. Requester Publications are identified and defined *infra*.

<sup>2</sup> Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified at* 47 U.S.C. Section 227.

<sup>3</sup> Proximity Marketing is concurrently filing a separate Request for Clarification of the *Report and Order* as described *infra*.

Absent immediate Commission action, the new rules will become effective August 25, 2003.<sup>4</sup> As discussed below, the question now arises whether the TCPA's prohibitions and the Commission's amended rules, concerning unsolicited facsimile advertising, apply to certain communications between publishers and subscribers of Requester Publications. If they do apply, the Commission has radically altered the regulatory landscape for this industry while providing only 30 days in which to adjust – a virtually impossible task.

This Request for Stay is filed in the event the Commission fails to grant Proximity Marketing's concurrently filed Request for Clarification.<sup>5</sup> A copy of the Request for Clarification is attached and incorporated herein by reference. If the Commission fails to grant Proximity Marketing's Request for Clarification (*i.e.*, that the TCPA does not apply to faxed communications used to verify subscriber information for Requester Publications) prior to August 25, the Commission should stay the effective date of the *Report and Order* and new rules until the later of six months from August 25, 2003, or Commission action on petitions for reconsideration of the *Report and Order*.

Such a stay would allow the Commission to address significant issues concerning the applicability of the Commission's new rules and the TCPA raised in Proximity Marketing's Request for Clarification and petitions for reconsideration of the *Report and Order* that are likely to be filed. Perhaps more importantly, the stay would provide a more reasonable time period for publishers and related businesses (such as Proximity Marketing) to modify their business

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<sup>4</sup> See 68 FR 44144, at 44176-77 (effective date of *Report and Order* is August 25, 2003, except for certain provisions, including those which contain information collection requirements subject to Office of Management and Budget ("OMB") approval and for which the Commission will subsequently announce the effective date.). Amended Section 64.1200(a)(3)(i), which contains the new requirement for a signed, written statement expressly inviting or permitting facsimile advertisements to the recipient, is one of the provisions subject to OMB approval.

operations and implement procedures consistent with the altered regulatory landscape. Absent a stay, publishers of Requester Publications, and the marketing companies that serve those publishers, will face significant adverse consequences and economic injury.

However, if the Commission grants Proximity Marketing's Request for Clarification prior to the August 25 effective date, such action would moot this Request for Stay.<sup>6</sup>

## INTRODUCTION

Requester Publications generally are specialized trade or business publications provided at no charge to subscribers that have demographic characteristics indicating they have an interest in the publication's subject matter.<sup>7</sup> There are approximately 4,000 such publications nationwide. They typically have anywhere from 15,000 to 250,000 subscribers per publication.<sup>8</sup> These publications generally rely solely on revenue from advertisers that desire to market their products and services to the highly specialized and qualified demographic group that receives each publication.

Subscribers to Requester Publications are obtained in several ways, including telemarketing, direct mail, and Internet web sites. With respect to telemarketing, publishers will

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<sup>5</sup> Section 1.44(e) of the Commission's Rules requires that a request to stay the effective date of any Commission decision or order be filed as a separate pleading.

<sup>6</sup> Proximity Marketing is aware that at least two other parties have already requested a stay of the new rules adopted in the *Report and Order*. See Petition for Stay filed July 25, 2003 by the American Society of Association Executives, and the Request for Expedited Stay filed July 25, 2003 by American Teleservices Association. Proximity Marketing takes no position on these requests.

<sup>7</sup> U.S. Postal Service regulations define a Requester Publication as a publication which is circulated free or mainly free of charge. See 39 C.F.R. Part 3001, Subpart C, Appendix A, Section 413.1. This Request for Clarification, and Proximity Marketing's concurrent Request for Stay, address only those publications which are provided free of charge to some or all of their subscribers.

<sup>8</sup> Assuming an average of only 25,000 subscribers to the 4,000 publications would mean there are 100 million separate subscriptions to Requester Publications.

contact potential subscribers, describe the magazine and the benefits or value derived from receiving the publication, and ask if the business professional would like to receive the publication at no charge. If a person indicates they would like to receive the publication, they are asked to verify their mailing address and usually asked to provide their e-mail address, fax number and other relevant demographic information. They also are asked to provide a personal “verifier” (*e.g.*, information unique to the individual). In addition to telemarketing, publishers will send direct mail offers to potential subscribers that can be filled out and returned to the publisher to initiate a subscription. Subscribers also sign up to receive these publications via the publisher’s web site, filling out the requisite information on-line.<sup>9</sup>

Requester Publications are a specific category of publication that is entitled to lower Periodical mailing rates under United States Postal Service regulations.<sup>10</sup> To qualify as a Requester Publication, the Postal Service requires that publishers have documentary evidence that 50% or more of the copies of the publication are distributed to subscribers requesting the publication.<sup>11</sup> Postal Service regulations require a written showing to be filed with the Postal Service annually.<sup>12</sup> In addition, there are independent, not-for-profit, self-regulating organizations that audit and verify circulation data of Requester Publications for advertisers and

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<sup>9</sup> Although a publisher may, as a last resort, purchase a directory that fits the publication’s subscriber profile and add those names to receive the publication, this is infrequently used. Advertisers do not want to see “invented” circulation numbers, and such subscribers would not, as discussed *infra*, help the publisher qualify for postal rate discounts. Further, publishers generally do not communicate with these people by facsimile because they know there is not an existing business relationship, unlike subscribers who have affirmatively indicated they want to receive the publication.

<sup>10</sup> *See generally* 39 C.F.R. Part 3001, Subpart C, Appendix A, Section 411.1. The Periodical mailing rate is substantially less than the First Class and Standard mail rates. *See e.g.*, <http://pe.usps.gov/text/dmm/r200.htm> (periodical postage rates).

<sup>11</sup> *See* 39 C.F.R. Part 3001, Subpart C, Appendix A, Section 413.41.

<sup>12</sup> *See* 39 U.S.C. Section 3685(a)(4).

other industry participants.<sup>13</sup> These audits are an important part of the industry as they allow advertisers to confirm that a specific publication is reaching the targeted demographic group.

Qualification for Requester Publication status and the lower Periodical postage rate is critical for publishers trying to minimize their operating costs. Thus, it is important that publishers have and maintain written documentation of a request for the publication from its subscribers. Publishers annually expend significant personnel and financial resources to obtain and maintain the required documentation that subscribers desire to continue receiving their publications.<sup>14</sup>

The methods used to confirm that subscribers want to continue receiving a publication include a combination of faxed communications, e-mail, telephone and direct mail. For many publishers, the most effective of these is faxed communications.<sup>15</sup> Faxed communications include a notice from the publisher to the subscriber explaining that his or her subscription is about to expire and requesting the subscriber to confirm that he or she wants to continue receiving the publication. These communications also request the subscriber's contact information (*e.g.*, telephone number, fax number and/or e-mail address), and updated business and demographic information. Subscribers complete the information and fax it back to the publisher. These faxed communications are delivered only to existing subscribers of the publication, and only to subscribers who have previously requested to receive the publication.

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<sup>13</sup> The largest auditor for Requester Publications is BPA International (home page at <http://www.bpai.com>). Another is the Audit Bureau of Circulations (ABC) (home page at <http://www.accessabc.com>).

<sup>14</sup> Although an individual subscriber's desire to continue to receive a publication must be reconfirmed at least every three years, the actual length of a subscription will vary from publication to publication. Publishers generally contact their subscribers on a staggered schedule so that not all subscribers are contacted at the same time.

The faxed responses provide the requisite documentation required by the Postal Service and satisfy independent audit requirements.

Other methods of contacting subscribers for their renewal information are likely less effective and more costly than faxed communications. These include telephone contact, e-mail and direct mail. The cost for faxed communications is usually a fraction of the cost associated with telemarketing or direct mail communications. For example, GIE Media, the publisher of several trade magazines reports that its cost is about \$.60 for each facsimile renewal response, whereas the average cost for each telephone verification is \$3.75.<sup>16</sup> Unlike a typical store-front business, publishers do not have personal contact with their subscribers.<sup>17</sup>

Many publishers retain the services of an independent marketing company to assist in coordinating their communications with subscribers. Proximity Marketing is such a company. Proximity Marketing is an electronic direct marketing company that specializes in developing and coordinating fax, e-mail and web-based communications campaigns for the magazine publishing market. Its services to clients include circulation renewal programs, editorial survey programs, directories and buyer's guide updates, and marketing and promotion campaigns. Magazine circulation renewal programs for Requester Publications are a substantial percentage of Proximity Marketing's business. Proximity Marketing is a small business under SBA guidelines.

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<sup>15</sup> The exact percentage of subscriber responses to faxed communications will vary from publisher to publisher. In some instances as many as 50% of a publication's renewal authorizations come from faxed communications.

<sup>16</sup> See letter dated August 1, 2003, from Heidi Spangler, Director, Circulation and Database Operations, BIE Media, Inc., to Chairman Michael K. Powell, a copy of which is contained in Exhibit A hereto.

<sup>17</sup> *Compare Report and Order* at para. 191 (consent for faxed advertising can be obtained through interaction with customers in a store).

The Commission's *Report and Order* and new regulations governing unsolicited facsimile advertising, if applicable to faxed communications from Requester Publications seeking subscriber renewal information, would have a devastating impact on the Requester Publication industry. They would adversely affect the publishers and marketing companies that assist publishers. These concerns did not exist before the Commission's *Report and Order* pursuant to the Commission's prior conclusion that faxed transmissions "from persons or entities that have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient."<sup>18</sup> Because existing subscribers, who have requested to receive a publication, have an established business relationship with the publisher, the publisher could send faxed communications to those subscribers under the Commission's prior interpretation of the TCPA.

However, the Commission's reversal in the *Report and Order*, and new conclusion that an established business relationship does not provide the requisite consent to send faxed advertising to clients or customers, now raises the question: Does a faxed communication from a publisher to the subscriber of a Requester Publication (who receives a free subscription), asking the subscriber to confirm his or her desire to continue receiving the publication, free of charge, constitute an unsolicited faxed advertisement under the TCPA? This is the question posed in Proximity Marketing's Request for Clarification, which also demonstrates that such communications are not subject to the TCPA. However, if the Commission fails to grant Proximity Marketing's request prior to August 25, then the Commission's amended rules

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<sup>18</sup> *Report and Order* at para. 185, citing *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (Report and Order), 7 FCC Rcd 8752, 8779, para. 54, n. 87 (1992) ("*1992 TCPA Order*"). That is not to say, however, that related issues did not arise, such as threats of class action law suits and frivolous law suits. See e.g., Comments of American Business Media, filed November 22, 2002, at pages 4-5.

requiring written consent to the transmission of facsimile advertising, will, overnight, radically alter the Requester Publication industry.

These changes will have an immediate and adverse impact on publishers and the marketing companies that assist publishers in communicating with their subscribers (such as Proximity Marketing). To continue sending faxed renewal notices to their subscribers, publishers may (or will) need to obtain, prior to August 25, the signed written permission of their subscribers.<sup>19</sup> Absent such consent, publishers will need to use far more resource intensive and less effective methods to contact their subscribers, and marketing companies that assist publishers will face a drastic reduction in their business.

There are tens or hundreds of millions of individual subscriptions to Requester Publications.<sup>20</sup> To have 4,000 or so publications all contacting their subscribers within the brief period before the *Report and Order* is effective is not only an impossible task, it will severely disrupt the publishers' and marketing companies' business operations and create significant economic hardship. Publishers and marketing companies will experience a severe adverse economic impact if publishers are no longer able to communicate by fax with subscribers concerning the status of their subscription.<sup>21</sup>

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<sup>19</sup> See 47 C.F.R. Section 64.1200(a)(3)(i), as amended (*Report and Order*, Appendix A). Although the effective date of this amended rule is pending OMB approval, for all practical purposes publishers will need to obtain the written consent from their subscribers given the elimination of the established business relationship exemption as of August 25. It also is unclear whether, after August 25, publishers may even use facsimile communications to obtain the written consent to send facsimile advertisements. See *Report and Order* at para. 193 (“facsimile requests for permission to transmit faxed ads, including toll-free opt-out numbers, impose unacceptable costs on the recipients. This kind of “negative option” is contrary to the statutory requirement for prior express permission or invitation”).

<sup>20</sup> See footnote 8, *supra*.

<sup>21</sup> See *e.g.*, attached letters in Exhibit A.

Thus, if the Commission fails to grant Proximity Marketing's Request for Clarification prior to August 25, the Commission should stay the effective date of the *Report and Order* and its amended rules until the later of six months from August 25, 2003, or Commission action on petitions for reconsideration of the *Report and Order*. Such a delay in the effective date would at least provide a more reasonable period for publishers to contact their subscribers, obtain written consent to continue communicating by fax, and implement procedures that comply with the Commission's amended rules.

### **STAY REQUEST:**

The Commission considers four factors in evaluating a stay request: (1) is the petitioner likely to prevail on the merits; (2) will the petitioner suffer irreparable harm if the relief is not granted; (3) will any other interested parties be substantially harmed if the relief is granted; and (4) does the public interest favor relief.<sup>22</sup> As shown below, each of these elements is met for the Commission to grant the limited stay requested herein.

#### **I. LIKELIHOOD OF SUCCESS ON THE MERITS**

Proximity Marketing demonstrates in its Request for Clarification that faxed renewal notices from the publisher of a Requester Publication to its subscribers, notifying the subscribers that their subscription is about to expire and asking if they want to continue the subscription, free of charge, are not a "facsimile advertisement" as that term applies to the TCPA and the Commission's Rules.<sup>23</sup> That showing is incorporated herein by reference. In summary:

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<sup>22</sup> See, e.g., *Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>23</sup> See Request for Clarification at pages 8-14.

The key phrase in the definition of “facsimile advertising” is “advertising the commercial availability or quality of any property, goods, or services.”<sup>24</sup> Based on common definitions of the terms “commercial” and “advertising,” the key elements of an advertisement are that it makes something known, generally with the intent or for the purpose of selling the item advertised. The focus is on activity that seeks to promote the purchase or sale of a good, product or service. A faxed communication from the publisher of a Requester Publication to a subscriber is not making known the publication, since the subscriber already requested and receives the publication. Nor is it promoting the purchase or sale of a good, product or service, since there is no charge for the subscription.<sup>25</sup>

The Commission’s interpretation of “unsolicited advertising” elsewhere in the *Report and Order* supports the conclusion that faxed renewal notices in the limited context of Requester Publications do not amount to advertising the commercial availability of a good, product or service. Thus, in the context of telemarketing calls inviting consumers to listen to or view a “free” radio or television broadcast, the Commission has held that such calls do “not include or introduce an unsolicited advertisement.”<sup>26</sup> However, if the message is part of an overall marketing campaign that encourages the purchase of goods or services, or that describes the commercial availability or quality of any goods or services, then it would be an “advertisement” under the TCPA.<sup>27</sup> The differentiating factor is the promotion of the “advertised” item for sale or purchase. Indeed, the Commission distinguished in the telemarketing context between calls inviting consumers to view or listen to a free broadcast (not advertising), versus programming

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<sup>24</sup> See 47 U.S.C. Section 227(a)(4) and 47 C.F.R. Section 64.1200(f)(10) as amended in the *Report and Order*.

<sup>25</sup> Request for Clarification at pages 9-11.

<sup>26</sup> *Report and Order* at para. 145.

<sup>27</sup> *Ibid.*

for which a consumer must pay, such as cable television or direct broadcast satellite (advertising).<sup>28</sup> Similarly, there are free subscriptions to Requester Publications for which a renewal notice contains no encouragement to purchase any good or service, versus paid subscriptions to general circulation or other publications.<sup>29</sup>

The faxed renewal reminder from the publisher of a Requester Publication to a subscriber is limited to notifying the subscriber that his or her subscription is about to expire, and requests the subscriber to provide responsive information to continue receiving the free subscription. Publishers are required to obtain this information in written form, to comply with U.S. Postal regulations governing the eligibility standards for lower Periodical postage rates, and for independent industry audits. There is no reasonable basis for characterizing such communications as “facsimile advertising” as that term is defined under the TCPA. Thus, Proximity Marketing is likely to prevail in its Request for Clarification.

## **II. PETITIONER AND OTHER PARTIES IN THE REQUESTER PUBLICATION INDUSTRY WILL SUFFER IRREPARABLE HARM**

Proximity Marketing, as noted, is an independent marketing company that assists publishers of Requester Publications with, among other things, their circulation renewal programs. Publishers retain the services of Proximity Marketing, and similar companies, to coordinate the delivery of faxed communications notifying subscribers that their subscription will expire and tabulating and reporting subscriber responses. If the provisions of the *Report and Order* governing faxed advertising become effective August 25, and apply to circulation renewal

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<sup>28</sup> *Ibid.*

<sup>29</sup> Although there also may be some paid subscriptions to a Requester Publication, the renewal of those subscriptions is outside the scope of Proximity Marketing’s Request for Clarification and this Request for Stay.

programs for Requester Publications, publishers and marketing companies like Proximity Marketing will suffer irreparable harm.<sup>30</sup>

The brief period from Federal Register publication to the effective date provides a wholly inadequate period for the Requester Publication industry to react to and modify its business operations in accordance with the new requirements without suffering significant damage. With about 4,000 publications, each having anywhere from 15,000 to 250,000 subscribers, there are tens or hundreds of millions of individual subscriptions that are affected. Compliance with the new requirements within such a brief period is a virtually impossible task.

Creating lists of the millions of subscribers who need to be contacted, deploying those communications by facsimile or otherwise,<sup>31</sup> and then collecting and collating responses, simply cannot be done in such a short time. Assuming the new facsimile advertising requirements are applicable to Requester Publication renewal notices, and absent signed written consent from subscribers, after August 25, publishers will have to use alternate means to communicate with their subscribers to renew their subscriptions.<sup>32</sup> Each of the alternatives is more expensive and

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<sup>30</sup> The Commission recognizes that such harm will occur, but fails to undertake any analysis concerning the extent of the harm or its impact on those affected, particularly small businesses. *See Report and Order*, Appendix B (Final Regulatory Flexibility Analysis) at para. 37. Indeed, the Commission does not even address whether it considered any possible alternatives that would minimize the significant impact on small entities, contrary to the requirements of the Regulatory Flexibility Act. *Compare Report and Order*, Appendix B at para. 27 (“the RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for such small entities . . . .”)

<sup>31</sup> Faxed communications between parties with an established business relationship prior to the effective date of the new rules are in compliance with the Commission’s existing rules. *Report and Order*, para. 189, n. 699.

<sup>32</sup> As noted, previously, it is unclear whether, after August 25, publishers may use facsimile communications simply to request signed written consent after the new rules are effective. *See* footnote 19, *supra*.

less productive than faxed communications.<sup>33</sup> This would mean a significant increase in costs to publishers, a likely reduction in the number of subscription renewals and therefore fewer subscribers, and lower advertising revenues attributable to reduced subscribership. In the case of Proximity Marketing, it would likely mean a drastic reduction in its business from the reduced use of facsimiles in circulation renewal programs.

Exacerbating these problems further is the fact that many publishers have already contacted their subscribers for this year. A significant number of publishers re-qualify their subscribers using a June-to-June subscription calendar year. Thus, many publishing organizations have recently completed the process of renewing annual subscriptions and depleted their annual budget for contacting subscribers. They do not, therefore, have additional funds that would be needed prior to August 25 to seek and obtain written consent to continue to contact their subscribers by facsimile. Other publishers, that use a calendar year for contacting their subscribers, are halfway (or more) through this process, and those subscribers already contacted this year would not normally be contacted again until next year.<sup>34</sup>

The adverse impact would be particularly harmful to small business publishers and marketing companies (such as Proximity). Attached as Exhibit A are letters that Proximity Marketing has received from publishers and other entities involved in the Requester Publication industry discussing the economic and business injury the new rules will inflict. The Midwest Circulation Association, a group of Midwestern magazine circulation professional, notes that the

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<sup>33</sup> See e.g., letter dated July 31, 2003, from Sylvia Sierra, Corporate Circulation Director, PBI Media, to Chairman Michael K. Powell, noting that the cost of contacting each of PBI Media's subscribers to get written consent to send facsimile communications could exceed \$408,000 in the first year, and that if PBI Media cannot communicate with its subscribers by facsimile and has to substitute mail or telemarketing, it will increase its operating budget by an estimated \$514,000 per year. A copy of the letter is contained in Exhibit A hereto.

<sup>34</sup> See e.g., letter from GIE Media, Inc. in Exhibit A.

new rules “will ruin many small to mid-sized business publishers.”<sup>35</sup> GIE Media notes that the new rules may increase its costs more than \$90,000 in a single calendar year.<sup>36</sup> PBI Media notes that its costs may increase by an estimated \$514,000 per year.<sup>37</sup>

The Commission acknowledges that it expects the new rules to harm small businesses.<sup>38</sup> In the face of such anticipated injury, it is unconscionable that the Commission has provided such a short and inappropriate transition period.

### **III. OTHER INTERESTED PARTIES WILL NOT BE HARMED**

A delay in the effective date of the *Report and Order* and amended facsimile advertising rules, as they pertain to faxed communications for the renewal of Requester Publications, will not harm any other interested parties. Such communications are sent infrequently, usually no more than a few times per year.<sup>39</sup> Publishers of Requester Publications do not continually send out facsimile communications. They contact their subscribers concerning the status of their subscription only when necessary. Granting a stay while the Commission reviews petitions for reconsideration or for an additional six months as requested herein, will not result in any significant burdens on those receiving the faxed communications. Indeed, it likely will reduce the burden that otherwise may occur from by a flood of facsimile and other efforts prior to August 25 to get subscribers to provide written consent to continue receiving faxed communications.

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<sup>35</sup> Letter dated July 30, 2003, from the Midwest Circulation Association to Chairman Michael K. Powell.

<sup>36</sup> See Exhibit A, letter from GIE Media, Inc.

<sup>37</sup> See Exhibit A, letter from PBI Media.

<sup>38</sup> *Report and Order*, Appendix B (Final Regulatory Flexibility Analysis) at para. 37.

<sup>39</sup> If a publisher does not receive a response to its initial renewal notice, it usually will re-contact the subscriber before the subscription is cancelled.

Not all of the amended rules and procedures adopted in the *Report and Order* have such a short implementation window. For example, the national do-not-call and call abandonment rules do not become effective until October 1, 2003. The caller ID requirements will not go into effect until January 29, 2004. In each of these other circumstances, the Commission determined that an extended implementation period was appropriate and would not impose an undue burden or cause undue injury. The *Report and Order* contains no discussion whatsoever as to why a 30-day time period is necessary to implement the amended rules governing facsimile advertising. At least as applied to facsimile communications from publishers of Requester Publications to their subscribers, there is far less burden or harm to other parties as compared to the Commission's extended implementation period for other rule changes adopted in the *Report and Order*.

#### **IV. GRANTING THE STAY REQUEST IS IN THE PUBLIC INTEREST**

Granting the requested stay will serve the public interest. There is much confusion concerning the applicability of the sweeping changes the Commission has adopted. Proximity Marketing has received communications from numerous publishers of Requester Publications indicating a great deal of uncertainty as to what types of communications are included under the new regulations. This issue did not previously exist when business-to-business faxed communications were covered under the established business relationship presumption. Nor is the Requester Publication industry the only one where confusion exists. For example, the American Society of Association Executives (ASAE) has filed a Petition for Emergency Clarification and Petition for Stay that also is based on ambiguities in the Commission's *Report and Order* and how the new rules apply. Proximity Marketing expects that other parties also will raise concerns in the form of requests for clarification or petitions for reconsideration of the

*Report and Order*. In the face of such ambiguities concerning the applicability of the Commission's new regulatory approach, granting the requested stay will serve the public interest in affording the Commission the opportunity to resolve these issues.

## CONCLUSION

Proximity Marketing's request for stay is limited solely to faxed communications from the publisher of a Requester Publication to a subscriber that has (1) previously requested to receive the publication, and (2) pays nothing for the subscription, with "no strings attached." Such facsimile communications are limited to notifying the subscriber that his or her subscription is about to expire, and requesting the subscriber to provide responsive information to the publisher to continue receiving the free subscription.<sup>40</sup> Proximity Marketing is not requesting a stay of the new rules in their entirety (*e.g.*, as they apply to all unsolicited facsimile advertising).

Granting the requested stay would minimize the significant harm that will result from the Commission's rapid implementation of a radical change in the regulatory landscape affecting thousands of publications and millions of subscribers. Proximity Marketing has shown that it will likely prevail in requesting clarification that notices to Requester Publication subscribers concerning their subscriptions do not constitute facsimile advertising under the TCPA. Granting the stay will not harm other parties, and it will further the public interest by giving the

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<sup>40</sup> Proximity Marketing recognizes that if such a faxed communication also includes a promotion or offer for the subscriber to purchase some other product or service, in addition to continuing the free subscription, then it would change the character of the communication and it would fall within the purview of the TCPA's prohibitions as interpreted by the Commission in the *Report and Order*. Although Proximity Marketing believes there are other flaws concerning the *Report and Order* in this regard, they are beyond the scope of this Request for Stay. They may be addressed in a separate petition for reconsideration.

Commission an opportunity to resolve the many ambiguities that exist in the *Report and Order* and amended rules.

For the foregoing reasons, Proximity Marketing requests the Commission to stay the effective date of the *Report and Order* and the amended rules adopted therein, as they pertain to faxed communications from the publisher of a Requester Publication to its subscribers concerning subscription renewals which are free of charge to the subscriber, until the later of six months from August 25, 2003, or Commission action on petitions for reconsideration of the *Report and Order*.

Respectfully submitted,

By: /s/ \_\_\_\_\_  
Mark Van Bergh

2538C South Arlington Mill Drive<sup>41</sup>  
Arlington, VA 22206  
(703) 671-7335

Its Attorney

Dated: August 6, 2003

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<sup>41</sup> Note that counsel for Proximity Marketing is in the process of relocating his Washington, D.C. law office. Therefore, the address and telephone number provided are temporary for this transition period.

**EXHIBIT A – LETTERS**



incorporated

4012 Bridge Avenue  
Cleveland, Ohio 44113-3399

216-961-4130 • Phone  
800-456-0707 • Toll Free  
216-961-0364 • Fax

August 1, 2003

Chairman Michael K. Powell  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Chairman Powell:

I am writing to express my concerns about the severe financial impact the new fax regulations will have on the business-to-business publishing industry, particularly circulation subscription maintenance. As someone who has received irritating, relentless faxes in the past, I completely agree that legislation is necessary to regulate the abuse of this method of communication. However, the new regulations are not only ambiguous in nature but will require significantly more than the 30 day allotted time period to be implemented correctly.

I am the Director of Circulation and Database Operations at GIE Media, a publisher of several trade magazines in the lawn care, pest control, and recycling markets. We have over 100,000 subscribers to our magazines that receive their monthly issues on a complimentary basis. Like the majority of trade magazines, we do not charge for the subscriptions but we are required to contact subscribers once a year to confirm that they want to continue receiving the publication. When subscribers initially request their free subscriptions, they are only required to provide a valid mailing address so that we can mail the publication to them. We do give them the option of providing a phone number, fax number, and email address for correspondence purposes. However, they are not required to provide this information in order to receive the magazine. Once they have received the publication for a continuous period, we need to contact them to verify that they wish to continue receiving the magazine as well as update their business information. Again, we do not charge a fee for the subscriptions; we simply verify that they want to continue receiving our publication. This is done through a series of efforts including direct mail, faxing, and telemarketing. Faxing has proven to be the most efficient, cost-effective, and least intrusive method of contacting our subscribers and is an essential tool for communicating with them.

GIE Media has great respect for our subscribers and the existing fax regulations. These types of faxes are only sent to people already active recipients of our magazines. If at any time a subscriber requests that we do not contact him by fax, that number is added to a suppression file and removed from all future fax projects. In addition, GIE Media does not release subscriber fax numbers to 3<sup>rd</sup> parties.

**PRINT COMMUNICATIONS**

- C&D Recycler
- Lawn & Landscape
- Pest Control Technology
- Recycling Today
- Service Technician

**INTERNET COMMUNICATIONS**

- [lawnandlandscape.com](http://lawnandlandscape.com)
- [pctonline.com](http://pctonline.com)
- [recyclingtoday.com](http://recyclingtoday.com)
- [fibremarketnews.com](http://fibremarketnews.com)

**CONFERENCES**

- C&D Management Forum
- Lawn & Landscape Business Strategies
- Lawn & Landscape School of Management
- Paper Recycling Forum
- PCT Dialogue

The costs required to comply with these new regulations by August 24<sup>th</sup> will put a severe financial strain on our company. Since we are already halfway through our calendar year, many of our customers have already been contacted and we will not need to contact them again until next year. However, in order to get permission to fax them by August 24<sup>th</sup>, we will need to contact all of them again immediately. If we have to contact 100,000 people at roughly \$.13 fax, the cost to simply request permission to fax them in the future will be over \$10,000. However, if we are given a year to obtain permission from all of our subscribers, we can request this permission during the annual update and not irritate them with unnecessary faxes that are not relevant to their subscription status.

In addition, this new regulation will increase our costs significantly in the future. On average, we update about 30,000 subscriptions each year through fax communication. The average cost to our company for each faxed response is about \$.60 for a total of \$18,000/year spent on faxing. The alternative to faxing is telephone verification. The average cost for each telephone verification is \$3.75. If we are forced to contact our subscribers by phone instead of fax, this has the potential to increase our costs by over \$90,000 in a single calendar year. Further, most new subscriptions are qualified over the telephone. Since the new regulations require that we receive permission to fax our subscribers in writing, we will not be able to obtain permission during the phone call and will be pushed into a cycle of calling subscribers each year instead of communicating with them in a more efficient, less expensive manner.

My request at this time is that you extend the deadline for compliance to August 24<sup>th</sup>, 2004 so that we have time to obtain permission from our subscribers during the standard verification process. I also ask that you examine these regulations for practicality. In this day and age, businesses rarely see their customers and it is difficult to obtain a written signature on a piece of paper. Please consider a verbal agreement obtained over the telephone along with a personal identifier for verification to be an acceptable source of authorized permission.

In closing, I realize this is a complicated issue and I trust that the FCC will take the time to examine the financial impact this legislation will have on the publishing industry. Thank you for your time.

Regards,

A handwritten signature in cursive script that reads "Heidi Spangler".

Heidi Spangler  
Director, Circulation and Database Operations  
GIE Media, Inc.



## CANON COMMUNICATIONS LLC

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Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

July 25, 2003

To Whom It May Concern:

Dear Sirs,

The new telemarketing rules, especially the new rules on faxing, as posted today in the Federal Register, are of grave concern to Canon Communications LLC.

Canon Communications LLC publishes 13 B-to-B magazines and organizes 16 tradeshow. We also publish an annual directory of medical device manufacturers. Much of our correspondence to existing clients is done by means of faxing:

- Alert of subscription expiration
- Instructions to pre-registered tradeshow attendees for badge pick-up, parking and other last minute notifications
- Requirement of information updates for company listings in the Medical Device Register
- Exhibitor and advertiser alerts for upcoming tradeshow or publications

As most publishers in the B-to-B world, we are very sensitive to the privacy concerns of our clients. We maintain strict privacy procedures and invest heavily in the updating and maintenance of our subscriber and attendee databases. Each subscriber record has separate fields for phone, fax and e-mail privacy preferences.

However, your new rules are making it impossible for us to continue to communicate important subscriber and attendee information by means of faxing. Here are some of the challenges and obstacles your new rules present:

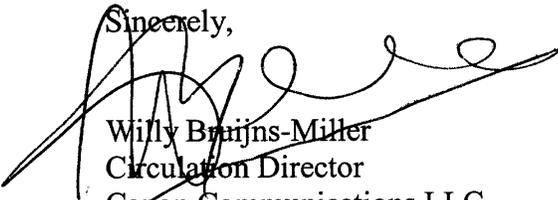
1. Due to the ambiguity of your description of what is considered an advertisement, all our business communications with our clients are at risk of being found in violation: renewals, upcoming advertising opportunities to our advertisers, show communications to our show attendees and or exhibitors.



2. B-to-B fax numbers are shared by many subscribers. One subscriber may object to being faxed a renewal notice, whereas his colleague may welcome the notification. With the continuous movement of personnel in these recessionary times, publishers may leave themselves wide open for lawsuits if the person who gave permission left the company, but the person who objected stayed. The risk of lawsuits will increase with your new rules and as a result we will incur more cost and less income.
3. By enforcement of the rules within the next 30 days, we are not given sufficient time to alter our plans and update our files. This results immediately in a loss of business requiring us to alter our plans in favor of more expensive and less responsive renewal efforts and other client communications.
4. Obtaining written and signed permission from each customer will require us to continuously solicit this kind of response from every new subscriber. Not only does this increase our cost but the annoyance factor for our clients will increase dramatically as well. That, in turn, will reduce response overall, which in turn will mean a loss of business for us.
5. By losing yet another method of communication with our clients, we will be required more and more to turn to e-mail. This will not help the already overwhelming volume due to the current spam environment.

Although I support the FCC in their effort to protect the public from unsolicited faxing, I hope you will take another look at the new rule and make amendments that allow businesses like ours to continue regular communications with our client base.

Sincerely,



Willy Bruijns-Miller  
Circulation Director  
Canon Communications LLC



PBI Media, LLC • 1201 Seven Locks Road, Suite 300 • Potomac, MD 20854 • +1-301-354-2000 •

[www.pbimedia.com](http://www.pbimedia.com)

July 31, 2003

Chairman Michael K. Powell  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554  
Dear Chairman Powell:

Dear Mr. Powell:

I am writing regarding the new regulations on faxing that will take effect on August 24, 2003. I am the corporate circulation director of PBI Media, LLC. PBI Media is a full-service business to business information and marketing solutions provider in four major areas: Magazines, newsletters, events and websites.

PBI Media specializes its services for clients in eight targeted global marketplaces: Aviation, Broadband, Defense, Dynamic Media, Electronic Commerce, Marketing and PR, Satellite and Telecommunications.

At PBI Media we take our subscribers privacy very seriously. We offer them the opportunity to not be promoted to if they choose so.

We currently use fax to contact our subscribers for subscription renewals. We do not use fax for new name acquisition, as we only communicate via fax with those subscribers with whom we have a prior business relationship. The new policy requires that we obtain permission from each subscriber to communicate with him or her via fax. The permission has to be done in writing with a signature, or electronic signature if using email. The cost of contacting each one of these subscribers to get their written permission to send their renewals could exceed \$408,000 in the first year. This is not a budgeted expense. If we can't communicate with our subscribers via fax, we need to communicate with them via mail or telemarketing which will increase the operating budget by an estimated \$514,000 per year.

The new rules are overly broad in their definition and will seriously hinder our ability to communicate with our subscribers who count on the information of our business publications month after month. I believe that the FCC should look at exceptions for the business publications.

Sincerely,

Sylvia Sierra  
Corporate Circulation Director



August 5, 2003

Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Dear Commissioners:

We write this letter to you on behalf of Babcox Publications and with respect to the FCC's recent updating of the rules and regulations of the Telephone Consumer Protection Act of 1991 and its effect on fax communications. We are an Akron, Ohio based publisher of business periodicals for the automotive industry. This ruling will have a severe negative impact on our efforts, and on the efforts of other business periodical publishers, to:

- 1.) renew existing magazine subscribers, and
- 2.) to conduct routine surveys among our existing readers.

The business periodicals industry relies solely on advertising revenue to support its operations. Our publications are free to subscribers who fit certain predetermined business demographic profiles. Business magazine publishers provide value to advertisers (in our case automotive parts and equipment manufacturers) by "gathering" and "pre-qualifying" subscribers with certain business demographic characteristics and by creating and publishing a compelling and necessary business magazine for that group of subscribers.

A very common and effective manner of communicating with existing subscribers is via fax "re-qualification" forms. These forms simply allow existing subscribers the opportunity to renew their existing subscription, at no charge, by re-addressing a brief set of business demographic-oriented questions. In all cases, these faxes are delivered only to existing subscribers where a bona fide existing business relationship already exists with the publishing company. This method of communication by business periodicals publishers is standard and customary in the industry, is our basic means of communication with our readers, and is a significant cornerstone in terms of ensuring our subscriber databases are appropriate. In fact, to qualify our publications for beneficial Periodicals Class (formerly 2<sup>nd</sup> Class) U.S. postal rates, the USPS requires that we communicate with and seek a minimum 50% direct request from subscribers. Favorable responses by fax qualify toward the attainment of this benchmark. These faxes are truly not advertisements and they are not intended to sell anything.



Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Page 2

Another core function of a business periodical publisher is the surveying of its readers to provide a basis for editorial content in its magazines. In these instances, readers respond to specified survey questions, and results are then published in future issues of the very publications produced and delivered for them. Fax surveying is the most economical and effective way for publishers to communicate "out" to readers and for readers to respond "back" to publishers. Again, these fax surveys truly are not advertising and are not intended to sell anything. They enhance the educational editorial product provided for readers.

Although we agree with the intent of the FCC ruling, essentially to limit "junk" faxes, we disagree with the likely classification of re-qualification fax forms and reader surveys, within the context of the business publication industry, as "fax advertisements". Our position is that such methods of communication are in the context of a bona fide business transaction.

Our hope is that a stay on the effective date of the order and/or an expedited clarification of what is unsolicited fax advertising can occur swiftly and appropriately. It would be devastating to our business to lose this critical means of communicating with our subscribers with such short notice and lack of consideration for the existing business relationship developed with our readers over the years.

Thank you for your consideration.

Sincerely,  
Babcox Publications, Inc.

A handwritten signature in black ink, appearing to read "Bill Babcox".

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Bill Babcox, President

A handwritten signature in black ink, appearing to read "Brad Mitchell".

---

Brad Mitchell, Director of Circulation

# McCloskey Communications, Inc.

1 August 2003

To Whom It May Concern:

I am writing in support of Proximity Marketing's petition for a Stay of the Rules seeking to delay the effective compliance date for regulations governing faxes sent to established clients. This new rule will have a serious and regrettable effect on the way our company and its magazines maintain contact with clients – all of whom have voluntarily provided us with fax numbers for the express purpose of maintaining steady contact.

Our company, McCloskey Communications, Inc., is a small operation that publishes small-circulation, business-to-business magazines for sharply focused markets. We have a small in-house staff of six, and keeping in touch with our clients via fax has proved an efficient and effective way of maintaining basic contact.

As a rule, we send faxes to our clients each month, informing them of issue contents and special programs. Without the faxes, many of our clients would have no way of knowing what options they have available to them.

We maintain the fax list scrupulously, updating it weekly. It has not nor will it ever be made available to any organization or person beyond our company for any reason. It is, after all, our client/contact list – perhaps the most precious of any magazine's commercial possessions. Further, whenever a client has indicated that he or she wishes to have a name removed, we do so immediately and without question or hesitation.

For us, there is no option to faxing: It has proved reliable and cost effective, and we quite simply cannot afford the alternatives of reverting to direct mail or beefing up our staff to maintain pertinent contact.

Further, we know we will strain good relations with clients by asking them to sign a document basically asking them to declare their intention of doing long-term business with us. I am certain some will misinterpret our intentions in seeking that authorization, and I fear some will decline to authorize simply as a matter of reflex in these security-conscious times.

In short, I see the rules as overly broad in their definition and also know for a fact that they will seriously hinder our ability to communicate with our clients.

Sincerely,

*Jim McCloskey*

Jim McCloskey  
President/CEO/Publisher  
JMc:btc

6119 Lockhurst Drive Woodland Hills, CA 91367 818.715.9776 Fax: 818.715.9059

# Midwest Circulation Association

July 30, 2003

Chairman Michael K. Powell  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Dear Chairman Powell:

On behalf of the Midwest Circulation Association (MCA), we are compelled to speak out for trade magazine publishers concerning their ability to renew free trade magazine requesters by fax under the Telephone Consumer Protection Act final rule.

The MCA is a group of Midwestern magazine circulation professionals who meet throughout the year to share trends in magazine subscription promotion, computer fulfillment, circulation audit requirements, and postal affairs.

Trade magazines are the communication backbone of commerce. Every industry has one or more publication devoted to news, trends, and best practices, while advertising new products and services. Many trade publishers offer magazines free to qualifying business people (by title or trade), re-verifying at least 50% of readers periodically to qualify for postal discounts (granted by Congress to encourage the dissemination of information). They spend significant time, effort and money to minimize both promotion expense and reader annoyance. Fax renewals are behind up to 30% to 40% of the mailing list in some cases.

It is not clear if these "free" requalification fax efforts are considered "advertising" under the recent FTC interpretation of the TCPA. The MCA believes they should not be considered advertising.

Adding consumer-oriented fax permission requirements to an already complex and expensive business-to-business communication will ruin many small to mid-sized business publishers and hasten the failure of American commerce.

The *reversal* of the decision that a *prior business relationship constitutes an express invitation or permission to receive unsolicited faxes*, goes too far to be useful for both consumer and business-to-business communications. The final rule must discriminate between business-to-consumer and business-to-business faxing, considering the problem presented here by the trade publishing industry.

Please refine this ruling. The final outcome should allow business to be conducted, while preventing abuse in a fair and balanced way.

For the Midwest Circulation Association, thank you for considering our views,

*Linda Lambdin* (pc)

Linda Lambdin, MCA Co-President  
Circulation Director, Scranton Gillette  
Communications

*Sue Ravenscraft* (pc)

Sue Ravenscraft, MCA Co-President  
VP Circulation, Stagnito Communications

*William Coffman* (pc)

William Coffman, MCA Secretary  
President, PMG Group, Inc.

*Phil Claiborne*

Phil Claiborne, MCA Govt Affairs Advisor  
Circulation Director, The Elks Magazine

c: Leslie Smith, FCC, via email

**Midwest Circulation Association, c/o B.P.O.E., 425 W Diversey Pkwy, Chicago, IL 60614-6196  
Phone: (773) 755-4910, fax: (773) 755-4911, email: philc@elks.org**

# moose river publishing

374 Emerson Falls Road, St. Johnsbury, VT 05819  
ph802-748-8908 fax802-748-1866 e/www.mrp LLC.com

August 6, 2003

To: Federal Communications Commission  
Cc: Sen. Patrick Leahy, Sen. James Jeffords

From: James Kendrick, president, Moose River Publishing  
RE: New FCC regulations relating to the TCPA law

To whom it may concern,

I am writing this hoping that these new controls over faxed material will be amended as proposed by Proximity Marketing and other American business leaders who will be adversely affected.

My company is small – 46 employees – located in an economically depressed area of Northern Vermont. These new regulations will cost the company more than \$7,000 per month – easily enough to create the need for layoffs. And this area cannot sustain loss of good paying jobs.

We publish four business-to-business magazines in the golf course industry, the landscaping industry, agriculture and the forest products industry. Subscriptions are free to qualified individuals. We use faxing to notify readers that their free subscriptions are expiring. These readers – more than 300,000 – rely on this notification and have often thanks us for the service.

We do not rent or sell our readers' fax numbers – as this is very proprietary information.

The broad brush interpretations of these guidelines by the FCC are very dangerous to my business and certainly to others in the publishing industry. Technology is a key to competitive business practices. Imagine if you will the time and expense of contacting more than 300,000 individuals to let them know that they will no longer be offered the reminder service unless they send me written permission due to a new interpretation of the law by FCC bureaucrats?

Please reconsider.

Meantime, I will reluctantly begin to inform our readers – via the magazines – that due to over rigorous regulation by the FCC, we will soon have to curtail services to them.

Sincerely,

James Kendrick  
President/Publisher  
Moose River Publishing LLC  
TURF Magazine  
FARMING Magazine  
SUPERINTENDENT Magazine  
FOREST PRODUCTS EQUIPMENT Magazine