

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Rules and Regulations Implementing the |) | CG Docket No. 02-278 |
| Telephone Consumer Protection Act of |) | |
| 1991 |) | |
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**REQUEST FOR STAY
OF FACSIMILE ADVERTISEMENT RULES
SUBMITTED BY
NATIONAL ASSOCIATION OF BUSINESS POLITICAL ACTION COMMITTEES**

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The National Association of Business Political Action Committees (“NABPAC”) hereby petitions the Federal Communications Commission (“FCC” or “Commission”) to stay certain rules the agency recently adopted in the above-captioned proceeding.¹ Specifically, NABPAC seeks an immediate stay of the application to political action committees all rules that pertain to unsolicited facsimile advertisements (“unsolicited fax rules”). The rules are set forth in the Commission’s June 26, 2003 Report and Order in the above-captioned proceeding.

A stay will permit the Commission to fully reconsider the imposition of these rules according to a planned forthcoming request from NABPAC, as well as similar requests from other affected parties. After full reconsideration and likely revisions, the FCC then can develop a new effective date to enable all parties time to review and comply with the Commission’s new decision. Grant of the stay is warranted and in the public interest because immediate enforcement of the unsolicited fax rules would interfere with the operations of NABPAC and its members during the current election cycle. Indeed, although we understand that the most important fax provision will not be effective until after further consideration of the mandates of

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 68 Fed Reg 44144 (2003).

the Paperwork Reduction Act, **any effective compliance date in this election cycle** would be inappropriate.

BACKGROUND

NABPAC is a trade organization dedicated to promoting and defending political action committees (“PACs”) and political action professionals. For more than 25 years, NABPAC has helped American businesses understand campaign finance laws and enhance political effectiveness. The membership of NABPAC includes 300 PAC and government affairs professionals from 132 corporations and associations throughout the country who represent some of the smallest and largest PACs. Further information is posted on NABPAC’s website at www.nabpac.org.

The Commission’s new unsolicited fax rules require that prior express, written permission must be obtained before sending any unsolicited facsimile transmission to any person. Federal Communications Commission staff has stated publicly that the fax rule applies to PACs, including fax invitations to virtually all fundraising events. The newly announced fax rule requires new, explicit consent in writing and this consent must include the fax number(s) to which faxes may be sent. Further, an “established business relationship” is no longer sufficient to demonstrate express permission.

THIS REQUEST MEETS THE FCC STANDARDS FOR GRANTING A STAY

NABPAC respectfully requests the Commission to grant an immediate stay of the unsolicited fax rules at least until the FCC has an opportunity to review and formally rule on petitions for reconsideration by NABPAC and other interested parties. The Commission has established that, in ruling on requests for stays, it will generally consider the same factors used

by courts in ruling on preliminary injunction motions.² Those factors include (1) the likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary injunctive relief; (3) the degree of injury to other parties if relief is not granted; and (4) that the issuance of the order will further the public interest.³ Ultimately, however, the Commission reaches its decision on a case-by-case basis and no single factor is dispositive.⁴

Here, all four factors support the grant of a stay of the unsolicited fax rules to political action committees. First, NABPAC can demonstrate likelihood of success on the merits and will do so in a forthcoming Petition for Reconsideration. Indeed, NABPAC assumes that the FCC was not fully cognizant of the broad scope and application of the rules to PACs at the time of their adoption. The FCC fully understands that political action committee activity is central to the political process, and that restrictions on political speech may be subject to strict or “exacting scrutiny” under the First Amendment.⁵ Given the absence of clear analysis of these rules under those fundamentals of constitutional law, NABPAC assumes that application to political action committees was inadvertent and unintended.

Second, the stay is merited because NABPAC and its members will suffer irreparable harm if they are required to comply with the new unsolicited fax rules during this election cycle. As the Supreme Court has stated, “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”⁶ Although the FCC fully appreciates the important role of PACs in the election process, the Commission may not fully

² *In re AT&T Corp.*, 13 FCC Rcd. 14,508 (1998).

³ *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921 (D.C. Cir. 1958).

⁴ *In re AT&T Corp.*, 13 FCC Rcd 14,508 (1998).

⁵ *Buckley v. Valeo*, 442 U.S. 1, 44-45 (1976).

⁶ *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality).

appreciate the extent to which faxes are used in routine communication with PAC donors. Immediate enforcement of the new unsolicited fax rules would require NABPAC and its members to either quickly obtain written consent for such faxes or cease sending important faxes. This will force NABPAC and its members to curtail important political communications and thereby cause irreparable harm.

Third, a stay in the application of the rules to PACs will not significantly harm other parties. NABPAC directs most of its faxes to its members, who are PAC and government affairs professionals. NABPAC maintains an established business relationship with these members, and these members are accustomed to receiving faxes from NABPAC as a value and result of their NABPAC membership. Similarly, PACs use faxes to communicate with former and known donors and members who fully appreciate the efficiency of the medium. Moreover, prior to the adoption of the new unsolicited commercial fax rules, there was no evidence that these types of faxes caused any serious harm to the parties who received them. Staying the effective date of these new rules will merely maintain the *status quo* until the Commission has a chance to fully reconsider the matter. Doing so will not cause any harm to other parties and will avoid the irreparable harm, described above, to NABPAC.

Finally, the public interest supports granting a stay of the unsolicited fax rules to PACs. Immediate enforcement of the unsolicited fax rules will interfere with communications by NABPAC with its members as well as the communication by all PACs with their donors. Indeed, NABPAC believes that the FCC can and should decide as a matter of law and enforcement discretion that any unsolicited fax rule would unnecessarily interfere with existing PAC law.

PACs are regulated by the Federal Election Campaign Act (“FECA”), and the implementing regulations promulgated by the Federal Election Commission (“FEC”). The

FECA and FEC regulations govern virtually all aspects of PAC conduct, including much communication.

Recent legislation evidences Congress's intent that the FEC and the FCC maintain complementary, not conflicting, regulatory authority over political communications. The Bipartisan Campaign Reform Act of 2002 ("BCRA") defined a new category of speech, the "electioneering communication," that hinges upon the medium used.⁷ PACs are subject to various reporting requirements in connection with making "electioneering communications."⁸ BCRA also regulates public communications such as "mass mailings" which include facsimile.⁹ Importantly, when Congress empowered the executive branch to promulgate regulations in this area, it explicitly commanded the FEC to do so.¹⁰ The FEC thus issued regulations that, among other things, addressed the medium by which PACs and other entities make electioneering and public communications.¹¹ By vesting the FEC with the authority to regulate the mode by which PACs engage in political speech, Congress expressed no desire to empower the FCC to regulate the manner in which PACs could use facsimile in effecting political communications.

⁷ 2 U.S.C. § 434(f)(3) ("electioneering communication" is defined as, *inter alia*, a "broadcast, cable, or satellite communication.").

⁸ *Id.* § 434(f)(1); 11 C.F.R. § 104.20(b).

⁹ 2 U.S.C. § 431(23).

¹⁰ BCRA § 402(c)(1).

¹¹ 11 C.F.R. § 100.29(c)(1); *see also* 11 C.F.R. §§ 100.26 and 100.27 (definitions of "public communication" and "mass mailing.").

CONCLUSION

For the foregoing reasons, NABPAC requests the Commission to grant a stay of the unsolicited fax rules.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jan Baran", is written over a horizontal line.

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