

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

REQUEST FOR CLARIFICATION

The Produce Marketing Association (“PMA”) hereby requests the Federal Communications Commission (“FCC” or “Commission”) to reconsider and clarify the new rules governing unsolicited facsimile advertisements that the Commission adopted in the above-captioned proceeding as they pertain to for-profit and non-profit organizations.¹ PMA requests that the Commission reinstate the “established business relationship” exception for unsolicited faxes, clarify the types of faxes that are “unsolicited advertisements,” and explicitly recognize that any commercially reasonable means of consent meets the “prior express invitation or permission” requirement of the Telephone Consumer Protection Act (TCPA). The new rules are overly broad and will impede many routine business communications, and the FCC failed to consider less restrictive means of obtaining consent.

CONSIDERATION OF PMA’S REQUEST IS IN THE PUBLIC INTEREST

PMA is filing simultaneously a Request for Stay, which is necessary so that the Commission may review this Request for Clarification, as well as the petitions and requests filed by several other parties, develop a full record, and reconsider the business, financial and constitutional implications of the new rules for for-profit and non-profit organizations. PMA did

¹The fax rules are contained in 47 C.F.R. §§ 64.1200(a)(3) and 68.318.

not have an opportunity to comment earlier in this proceeding because the proposed rule did not adequately provide notice to the business community that the FCC was contemplating both eliminating the established business relationship exemption for faxing altogether, and imposing onerous new consent requirements that effectively apply to a broad range of routine and desired business communications.² The Commission's final rule therefore is not predicated on a fully developed record, and clarification of certain requirements pertaining to unsolicited faxes in light of the facts presented in this pleading is in the public interest.

BACKGROUND

PMA is a non-profit global trade association serving more than 2,400 marketers in the production, distribution, retail, and foodservice sectors of the produce industry. PMA's membership represents ninety percent of all produce sold to consumers in the United States. Members and others interested in the produce industry depend on PMA to provide up to date information on the produce industry, on events and activities of interest to industry members that we and others sponsor, and government regulations affecting the industry. The new fax requirements will restrict PMA's ability to communicate with its members, as well as non-members with a stake in the produce industry, necessitating thousands of signed consent forms from members, prospective members, past trade show and conference attendees, our own vendors and suppliers, and even our own employees. The cost of processing, retaining and

² The Notice of Proposed Rulemaking sought comment on whether the established business relationship exemption has had an adverse impact on consumer privacy, whether the Commission should amend its rules to expressly provide for such an exemption, and whether it should clarify the scope of the "exemption." The Commission did not suggest that it would eliminate the exemption altogether, however. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 17 FCC Rcd 17459, ¶ 39 (2002)*. Concerning the consent requirement, the Commission sought comment on whether publication of a fax number in an organization's directory constitutes invitation or permission to receive an unsolicited fax, not whether a signed, written consent should be required. *See id.* ¶ 38. In that regard, notice and an opportunity to opt-out would be a far less restrictive approach to obtaining consent.

managing the volume of consents will strain our resources. A recent poll conducted at a PMA web conference on the do not fax rules revealed that many of the participants conduct a significant amount of business with customers and vendors through fax communications, with approximately 40 percent indicating that they rely on faxes for 60 percent or more of their business communications. The burden of managing the consent process is thus magnified throughout our industry. Efforts to inform our members and to bring PMA into compliance with these new regulations already have cost PMA more than \$14,000.

THE RULES SHOULD EXEMPT ESTABLISHED BUSINESS RELATIONSHIPS

The proposed rule did not adequately provide notice to the business community that the FCC was contemplating eliminating the “established business relationship” exception for faxing altogether. Thus, PMA requests that the Commission at a minimum reinstate this exception for unsolicited faxes. Such an exception is necessary for all businesses, and non-profit organizations in particular (specifically trade associations, commodities boards, and cooperatives). PMA and its member companies that have not been greatly affected by the existing fax rules will now be significantly burdened. PMA members and their customers rely on fast and effective communication of information on a daily basis. Financial and administrative constraints have forced non-profit organizations to rely on the fax machine as an important and almost exclusive means of business communication. This technology enables a single person to transmit information on upcoming trade shows, new product offerings, and price lists, order confirmations, and shipment notifications to thousands of people on a daily basis in a short period of time.

AN “UNSOLICITED ADVERTISEMENT” SHOULD BE NARROWLY DEFINED

The FCC has so broadly defined the term “unsolicited advertisement,” and linked the definition to mandatory written, prior consent, that it potentially covers most routine business fax communications.³ By definition, PMA believes that a communication, even if it is an “advertisement,” should not be deemed to be “unsolicited” if the sender had a reasonable basis, including a pre-existing business relationship, to believe that the communication was desired by the recipient. PMA therefore urges the Commission to clarify that information incidental to a business transaction, such as an order confirmation, shipment notification, invoice, or price list is not “unsolicited,” regardless of whether it advertises the commercial availability of a product or service.

The Commission should also find that a consent form itself is not an “unsolicited advertisement” if it merely requests consent and does not include any type of advertising material, and should exempt from the definition of an “unsolicited advertisement” any fax that is predominantly non-commercial in nature (*i.e.*, a newsletter that contains less than 25 percent advertising material). Time is of the essence in business transactions, and fax is often the only way to conveniently transmit certain documents long distance in a timely manner. Fax newsletters are a common and cost-effective way for companies and for non-profit organizations to communicate with customers and members. Newsletters are a critical source of industry information for PMA members, and PMA and its members should not have to bear the burden of determining whether the inclusion of references to trade shows, conferences or meetings, where attendance requires payment of a fee, could be interpreted as an “unsolicited advertisement.”

³ See 47 C.F.R. § 64.1200(f)(10) (defining “unsolicited advertisement” as *any* material advertising the commercial availability or quality of any property, goods, or services transmitted to *any* person without prior express invitation or permission). The Commission has interpreted “prior express invitation or permission” to mean a signed, written statement. 47 C.F.R. § 64.1200(a)(3)(i). This represents an extraordinary and unexpected change in the meaning of this term.

ACCEPTABLE ALTERNATIVE METHODS OF CONSENT

The new consent requirement, effectively requiring prior written consent before any business can send any fax that might qualify as an “unsolicited advertisement,” is not narrowly tailored and is inconsistent with the First Amendment.⁴ Apart from the concern, expressed above, that the term “unsolicited advertisement” is defined too broadly, the rule’s limitation on mechanisms to obtain consent does not comport with constitutional rights to communicate with interested customers and prospects, particularly those who have, through their course of dealing or other indicia, expressed their desire to be contacted. To the extent some individuals or small businesses feel burdened by receiving unsolicited faxes, the same interest in minimizing their burden could be served with far less burden on other businesses by permitting any commercially reasonable means of consent to satisfy the “prior express invitation or permission” requirement of the statute. PMA requests that the Commission revise the rule to reflect this approach, and to explicitly recognize alternative methods of consent, such as a customer’s or member’s verbal request to receive information in person or by phone, opt-in or opt-out mechanisms on a website, or faxed consents, satisfy the “prior express invitation or permission” requirement. Many companies already use opt-in and opt-out check boxes to identify a customer or consumer’s preferred method for receiving information or contacts (*e.g.*, telephone, facsimile, or e-mail), and it is an efficient way for businesses, whether for profit or non-profit, to obtain the prior permission. These alternatives would achieve the same effect (*i.e.*, ensure that a recipient has provided their express invitation or permission to be contacted), but minimize the burdens of obtaining hard-copy written consents and would avoid the massive disruption of routine business communications that will be the inevitable result of this rule.

⁴ See 47 C.F.R. 64.1200(a)(3)(i).

The Commission should also clarify that consent is not required for every number to which a recipient agrees to receive a fax.⁵ This requirement is impractical and fails to take into account the reality that phone numbers and area codes frequently change, that many individuals work at home as well as at their offices, and that business travelers and other “moving targets” are not always available at the same fax numbers. Practical problems with the rule abound. The blanket prohibition on sending faxes without consent, for example, raises questions about whether members of our industry are obliged to seek consents from a hotel at which a customer is staying before sending a faxed price list or invoice to a guest at the hotel, even where the guest had previously indicated a willingness to receive faxed information. Members of the produce industry are especially affected by the number requirement; people moving produce across the country would constantly have to provide new fax numbers and consents, and buyers traveling to grocery stores around the country will not always know in advance every fax number where they might need to receive information.

Business realities make compliance with the number requirement impractical; large companies with several business locations may have many, many fax numbers. One PMA member with which we do business has seventy-five fax numbers on record with us. With the technological capability to fax to a personal computer, it is possible to have as many fax numbers as there are PCs. With companies supporting part-time and work-at-home situations for employees, the new requirement would effectively prohibit a company from transmitting a fax to its own employees absent consent, surely an absurd result.

When the Commission revised its rules, it perhaps assumed that the practical impact of the rules would be limited as recipients of information that might otherwise fall in its definition

⁵ This requirement is not explicitly stated in the new rule, but FCC staff have indicated that they interpret the consent requirement to include every number associated with a particular individual or entity.

of an “unsolicited advertisement” would not bring an action against the sender if the recipient specifically requested the fax (albeit not in a signed writing). However, the legal reality is that many businesses, especially in the post-Sarbanes Oxley environment, actively monitor corporate compliance, and their corporate responsibility policies require them to take steps to adhere to all applicable laws. Since individuals and companies can bring actions for violations, responsible companies are obviously anxious to comply with the law while minimizing unnecessary costs and burdens.

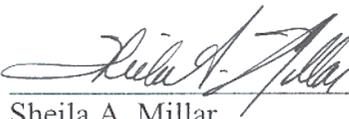
CONCLUSION

For the foregoing reasons, PMA requests clarification of the new requirements to ease the burden of the new rule on the for-profit and non-profit business community.

Respectfully submitted,

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