

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

In the matter of

Rules and Regulations Implementing
The Telephone Consumer Protection
Act of 1991.

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CG Docket No. 02-278

**REQUEST FOR RECONSIDERATION
AND CLARIFICATION
OF
AMERICAN BUSINESS MEDIA**

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August 25, 2003

SUMMARY

American Business Media applauds the Commission's action staying the effective date of the new fax regulations, thus providing time for a thorough reconsideration of the proposed rules and their impact. We believe that our earlier Petition for Stay and the pleadings of other parties amply demonstrate not only that the proposed rules would do irreparable damage if implemented now but also that implementing them later without modification will merely defer much of that damage.

In this Request, American Business Media seeks two types of relief. First, we ask the Commission to reconsider and reverse its finding that only a written, signed document will meet the statutory standard of "express invitation or permission." Congress chose not to insist that consent be in writing, and the Commission's proposal, while no doubt intended at least in part to provide specificity, establishes a standard that cannot be met by American Business Media members and many other businesses.

We ask the Commission to consider that the TCPA uses the phrase "express invitation or permission," and that each of these words must be given meaning. In a business context, when a person directly and voluntarily provides his fax number to a business, it is fair to conclude that he is inviting that business to use it and that he expects it will be used for a business purpose. Thus, the "express" providing of a fax number (as opposed to having it appear on letterhead or in a directory) represents express invitation to fax promotional material. Without this type of modification, the rule runs a substantial risk of

being found to be overly restrictive of speech and therefore unconstitutional, especially as applied to the press.

American Business Media also asks the Commission to further clarify the definition of "advertisement," so that the chilling effect of the enormous penalties under the TCPA does not serve to eliminate even the legitimate faxing of non-advertisements. Specifically, we seek a ruling that a subscription or request renewal form is not an advertisement, because it is not making the product known to the recipient, who is already a subscriber or requester. Rather, it is a form of customer service that permits the reader to continue to receive the publication. Furthermore, renewal request forms for publications distributed without charge are not advertisements as defined by the Commission, because they do not seek the payment of money.

Finally, due to the prevalence of their use in the publishing industry, and in an excess of caution, we seek a Commission determination that insertion orders faxed to advertisers are not advertisements but confirmations of an advertising order.

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

With these familiar words, the Nation's founders established two of the foundations upon which our democracy is built. With the new rules proposed to implement the fax provisions of the Telephone Consumer Protection Act, the Federal Communications Commission has shaken those foundations by vaulting far over the permissible boundaries of speech and press regulation.

American Business Media is grateful that the Commission has listened to its pleas and those of others who would be seriously and irreparably injured by the broad and, we believe, unintended reach of those regulations. By staying the effective date of the fax rules, the "Order of Reconsideration" issued on August 18th, preserves the status quo (except for implementing the new definition of "established business relationship"), provides the time for thoughtful consideration of the various requests for clarification and modification of the rules that have been and will be filed.

As shown below and in American Business Media's request for Stay filed August 6, 2003 (which is incorporated herein by reference), there are substantial burdens placed on speech and on the press by these rules, most notably (1) the newly-created and totally unsupported requirement that "express permission" must be in the form of a signed, written document and (2) the ambiguity of the term "advertisement," in a context in which a wrong guess can destroy a

company that wishes merely to communicate with its own customers. In our Request for Stay, American Business Media asked the Commission to delay the effective date of the new rules, and the Commission agreed. Here, we ask that the Commission withdraw its ill-considered finding that the statutory requirement for “express invitation or permission” can be satisfied only with a signed document. We also ask the Commission (1) to clarify in both in general and with reference to specific types of documents the scope of the term “advertising” and (2) to clarify the meaning of the last two sentences of ¶ 191 of the July 3rd order, which some read as expanding the definition of “advertising” beyond any reasonable limit.

Request for Reconsideration

The July 3rd Order modifies the previously (and currently) effective means of establishing the existence of “express invitation or permission” in two ways. First, the Order essentially revokes the Commission’s prior ruling that the existence of an “established business relationship” evidences such invitation or permission. Second, it finds that the TCPA requires that express consent to receive an advertising fax can be obtained only with a written, signed statement to that effect. In reaching these conclusions, the Commission erred in several respects as set forth below.

We submit that the Commission’s failure to recognize, much less to address the significance of, the conjunctive in the TCPA’s prohibition (“express invitation or permission”) is a threshold error that could well by itself have led to this overly-restrictive result. The Commission’s discussion of faxes begins (¶¶

185, 187 and 188) by quoting accurately the entire statutory phrase “express invitation or permission” in describing the restriction. Thereafter, however, in reversing its prior ruling and substituting the new restriction, the Commission by our count uses the phrase “express permission” (which does not exist in the law or regulations) nine times in paragraphs 190-93 without a single mention of the word “invitation.”

Each of the words used by Congress should be given meaning. It is a black-letter rule of statutory construction, and black-letter law, that “[t]he existence of surplus words should never be presumed.” 6 *Sutherland Statutes and Statutory Construction* § 47:37 at 387. Rather, meaning must be given “if possible, to every word in a statute.” *Id.* at 392. *See also, American Relay Radio League v. FCC*, 617 F. 2d 875, 879 (D.C. Cir. 1980). Yet by dropping all references to “invitation” in the operative sections of the order, the Commission has failed to give independent meaning to that word. As a result, it has crafted a rule that ignores congressional intent.

Even if we accept the Commission’s reasoning that led to elimination of the established business relationship exception as providing absolute permission to fax an advertisement, that reasoning does not support the Commission’s failure to give meaning to the word “invitation” in the context in which it is used. American Business Media submits that the Commission could and should have considered the nature of an “invitation” in a business context and found that when a person provides a fax number directly to another entity

(either a business or a person) in a business context, that act represents the granting of express permission to send an advertisement by fax.

There are only two assumptions that must be made to validate this interpretation. First, it must be assumed that a person giving a fax number to another intends that it be used. Second, it must be assumed that a business will use a fax for business purposes. Each of these assumptions is reasonable, and each would implement the intent of the TCPA.

To be clear, we are not suggesting that once an individual reveals his fax number to a business entity, that fax number becomes fair game to all. Rather, we are suggesting that if, for example, a subscriber to a magazine provides his fax number to the publisher of that magazine, an attendee at a trade show provides his fax number to the owner/operator of that trade show when registering, or when a potential advertiser provides his fax number in a request for information, that person can reasonably be said to be "inviting" the entity to which he provided his fax number to use it for the purpose, perhaps among others, of sending related promotional material to that fax number.

Broadening the Commission's rule in this way would not only be consistent with the statute on which it is based, it would also go a long way toward removing the impossible burden placed on legitimate businesses—including the members of American Business Media—if the new rule is implemented on January 1, 2005.

As it stands now, the burden placed on most small (and large) businesses to obtain signed, written permission to send faxes is excessive and, in

combination with the enormous penalties for violating an ambiguous regulation, comes very close to establishing an outright ban on faxes for many companies. While the Commission's conclusion—without any supporting evidence—at ¶ 191 of the June 26th Order that small businesses “may easily obtain [signed, written] permission from existing customers. . .when customers patronize their stores or provide their contact information” fails to recognize the realities of the publishing business and many other businesses.

American Business Media attaches to this Request affidavits from two American Business Media members.¹ As they explain (Wendler at ¶18, Tyler at ¶¶ 11 and 13), publishers cannot obtain signatures from those with whom they do business, at least not easily, quickly, inexpensively or universally. Publishers do not have stores. They publish magazines, typically in a single location, and mail them to subscribers across the country. Stamats and National Trade Publications are small companies, yet their subscriber lists total about 270,000 and 100,000, respectively. (Wendler at ¶ 2; Tyler at ¶ 3.) Clearly, neither these two publishers, which are typical of the industry, nor other, larger publishers, can obtain signatures in person.

American Business Media members cannot readily obtain signatures when the requesters provide their contact information as the Commission

¹ Affidavits are submitted by Guy H. Wendler, President of Stamats Communications in Cedar Rapids, Iowa, the publisher of four business-to-business periodicals and other business-to-business and educational products, and Susan Tyler, Vice President of National Trade Publications in Latham, New York, publisher of four business-to-business periodicals and owner of eight trade shows.

suggests, for at least two reasons. First, in order to comply with postal regulations, the publisher must obtain "requests" from at least 50% of a publication's recipients. In recent years, however, these requests have increasingly been obtained via the Internet, or telemarketing.² Neither of these situations make it feasible to obtain a written signature. No matter how "express" the invitation or permission to send faxes might be at the time that the contact information is obtained via the Internet or with telemarketing, under the new rule that permission would be invalid.

Second, even to the extent that requests and contact information are provided in hard-copy form, and the opportunity to obtain a signed consent is presented, such contact information is typically sought and provided no more frequently than once a year and many times once every three years.³ Therefore, absent an extensive and extraordinarily expensive faxing, telemarketing and direct mail effort, obtaining signatures, as the Commission suggests, at the time contact information is provided would take between one and three years. Meanwhile, the publisher would have to figure out how to store and have access to hundreds of thousands of signatures.

² Such non-paper, unsigned requests undergo separate, more stringent, audit procedures by both the Postal Service and the independent audit bureaus, so publishers prefer written requests. The realities of the market, however, have resulted in the trend noted above. Biggerstaff (at 2, note 1) misses the point. Publishers can comply with postal regulations *without* written signatures. He also appears to be asserting (at 5) that one can obtain electronic signatures through telemarketing.

³ A request is valid, for postal purposes, for three years.

As a practical matter, if publishers are required to operate under the “written, signed consent” rule, their ability to communicate with their readers will be substantially and adversely affected. The attached affidavits explain in detail how the theoretically available alternatives, such as direct mail, are prohibitively costly and how a combination of the overly aggressive signature rule combined with the ambiguity in the definition on “advertisement” combine to undermine their businesses and thus the press. Moreover, the enormous penalties for guessing wrong could bankrupt companies quickly. The attached affidavits compellingly explain why the Commission should modify the proposed rule before it becomes effective.

Apart from these infirmities in the rule, American Business Media submits that, especially with the overlay of the new requirement for written, signed permission, a reviewing court is likely to find the TCPA, as it would be implemented under the new rules, to be an unreasonable restriction on speech, especially as applied to the press.

We recognize that several courts have ruled that the TCPA’s fax provisions are constitutional.⁴ However, they did so in the context of, and at times expressly relying upon, the FCC’s current rule permitting faxes where there is an established business relationship and without the added burden of

⁴ The latest such decision is *State of Missouri v. American Blastfax, Inc.*, 323 F. 2d 649 (8th Cir. 2003).

obtaining signed, written permission.⁵ Those courts also failed to address the unique protections accorded the press under the First Amendment.

The June 26th Order recognizes that the limitations on the restriction of commercial speech are set forth in *Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980). Among the criteria established by that opinion are that the restriction must promote a legitimate governmental interest and that the restriction is no more extensive than necessary to promote that interest. For purposes of this discussion only, American Business Media will concede that eliminating unwanted advertising faxes is a legitimate governmental interest. However, we maintain that the requirement of written, signed consent added in the new rules is far more extensive than necessary and more extensive than the “invitation or permission” disjunctive in the law.

As previously discussed, courts affirming the constitutionality of the TCPA have done so in part because the ban on faxed advertising permitted such advertising where there is an established business relationship. Not only has the FCC now chosen to remove that crucial condition, but it has also extended the ban to all faxed ads, even when there is express invitation, if that invitation is not written and signed. In going beyond the congressional directive, the

⁵ See *Destination Ventures Limited v. FCC*, 844 F. Supp. 632, 639 n. 1 (D. Oregon 1994) and *State of Missouri, supra*, at 659, where the court determined that the TCPA is not a total ban on faxing because permission can be obtained “through such means as telephone calls. . . .”

Commission has crossed the line from arguably permissible to patently excessive restraint. As the Supreme Court recently held in *Thompson v. Western State Medical Center*, 535 U.S. 357, 371 (2002), "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, it must do so."

As already explained, the Commission has chosen to restrict more speech than Congress directed, and has done so with a single, faulty reference (without citation) to the record. The Commission stated (at ¶ 189 of the June 26th Order) that the established business relationship defense must be abandoned because consumers are still receiving unwanted faxes. However, the Commission failed to draw a link between that alleged harm and the proposed cure, for it is not only possible but also highly likely that the unwanted faxes were sent in the absence of an established business relationship.⁶ In other words, the faxes most complained about were no doubt illegal under the existing regulations, and will continue to be illegal.⁷ The Commission's action here terminating the established business relationship defense and substituting an

⁶ The well known class actions that have been brought against certain senders of faxes appear to be based on faxes to those with whom there was no established business relationship.

⁷ The oppositions to stay requests repeat this same error. In the Opposition of Joe Shields to the petition of Proximity Marketing, Mr. Shields gives examples of undesirable faxes where there is no established business relationship, noting that 400 faxes have been received this year at his company's fourteen fax machines. Yet even this level of faxes amounts to only about one fax per week per machine! Similarly, in opposing American Business Media's stay request, Wayne G. Strang (at 6) decries the burden created by fax.com's ability to send three million faxes a day. Surely, those are not "established businesses relationship" faxes.

insurmountable hurdle will restrict the speech of those companies who wish to communicate generally desired messages to their own customers while doing nothing to stem the tide of unwanted faxes that have always been plainly illegal under the TCPA.

For these reasons, the next court to review the fax provisions of the TCPA is likely to find that, in its latest iteration, it represents an unreasonable and therefore unconstitutional burden on speech. Even if, however, a court is unwilling to go that far, it could well be willing to recognize the special First Amendment protection enjoyed by the press and find that, as applied to the press (such as American Business Media members), the TCPA is unconstitutional.⁸

When applied to the press, any restriction on the faxing of subscription and certain other information to existing or potential subscribers clearly treads on press freedoms protected by the First Amendment. The Commission has embraced the notion that certain types of entities are entitled to heightened First Amendment protection, agreeing in the context of the telemarketing rules that charities and religions have certain First Amendment rights that others do not (June 26th Order at ¶ 73). American Business Media raised this very point in its November, 2002 comments, and it was improperly ignored by the Commission,

⁸ As far as we know, this would be a matter of first impression. Although American Business Media raised the issue of the press in an amicus brief to the Eighth Circuit in *State of Missouri*, it had not been raised by any party, and the court did not reach the issue.

which may not “ignore a constitutional challenge” *Meredith Corp. v. FCC*, 809 F.2d 863,874 (D.C. Cir 1987).

Furthermore, Supreme Court precedent is clear that the First Amendment covers sales and circulation of magazines as well as the mere printing of them; it directly follows that any attempt to restrict or restrain direct-to-person solicitations for magazine subscriptions must be subjected to strict First Amendment standards, not lesser commercial speech standards. Freedom of press does not stop at the pressroom door.

In *Lovell v. City of Griffin*, 303 U.S. 444 (1938), the United States Supreme Court held that a municipal ordinance restricting *circulation* of publications “strikes at the very foundation of freedom of the press by subjecting it to license and censorship.” *Id.* at 451. The Court recognized that “[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed without the circulation, the publication would be of little value,” and that state action that has a “direct tendency to restrict circulation” runs afoul of the First Amendment. The attached affidavits make clear that the proposed rule, if not modified and clarified, will substantially restrict the members of American Business Media by virtually eliminating their ability to fax non-advertising renewal forms to subscribers. These regulations would therefore “restrict circulation.” *See also Substitutes United For Better Schools v. Rohter*, 496 F. Supp. 1017, 1020 (N.D. Ill. 1980) (newspaper sales held inextricably bound up with the expressions in the newspaper itself and hence protected by the First Amendment).

For all of these reasons, American Business Media requests that the Commission revisit and modify the determination that only a signature is acceptable as proof of “express invitation or permission.”

Request for Clarification

As noted above, American Business Media seeks clarification of the June 26th order in two respects: first, we seek clarification of the term “advertising” to ensure that it does not apply to certain common and very important types of communication in the publishing business. Second, we seek clarification of the Commission’s pronouncement (June 26th Order at ¶ 193) concerning the sending of faxes seeking permission.

In asking the Commission to opine on certain types of communication, we are mindful that the Commission will not wish to assume the role of an issuer of advisory opinions on every conceivable communication that would-be faxers can create. On the other hand, we are hopeful that the Commission will recognize that a part of its responsibility to enforce the TCPA is to assist citizens who wish to comply. In that spirit, and in recognition that few if any publishers could survive a class action lawsuit if a single state-court judge disagrees with a publisher on what constitutes an advertisement, we will press on.

As stated in some detail in American Business Media’s Request for Stay, and as further explained in the affidavits (Wendler at ¶ 5, Tyler at ¶ 3), “request” publications do not charge for subscriptions but, to satisfy both advertisers and the Postal Service, are required to obtain request renewals no less than every three years. They do so in a variety of ways, such as “cover wraps,” direct mail,

telemarketing and faxes. The affidavits (*id.*) demonstrate that faxes are both efficient and effective for this purpose. Typically, the publisher will send a fax to a requester seeking a reaffirmation of the qualifying demographic data and a signature (required for Postal Service audits of hard-copy requests). A typical form is attached to the Tyler affidavit.⁹

American Business Media does not believe that these documents are advertisements, for several reasons. They are sent to those who are already readers of the publication and are not intended, in the words of the applicable definition, to promote it or make known the “availability or quality of any property goods or services.” The recipient of the fax, as an existing paid or request subscriber, already knows of the availability of the product, and the renewal notices typically do not tout its quality. Instead, they provide valuable information to the reader concerning his subscription.

Moreover, there is precedent for a finding that renewal notices are not advertisements. Although we recognize that the analogy is imperfect, we refer the Commission to the practice of the United States Postal Service. The postage rates for Periodicals are complex, and they include separate per-pound rates for “advertising” material and for “non-advertising” (that is, editorial) material. The

⁹ A large number of new and renewal forms are also attached to the August 8th Shields opposition to the Stay request of Proximity Marketing, and one is attached to the Biggerstaff opposition to American Business Media’s stay request. Although Biggerstaff mockingly claims that such notices “extol the virtues of the publication,” and he purports to paraphrase such a notice, the Commission would search in vain to find any such language in the notice Biggerstaff himself attaches, the notices attached by Shields, or the notice attached hereto.

Postal Service is strict in defining advertising, in that the term encompasses even advertising of the publishers' own products and services. However, subscription requests and order forms printed on a "cover wrap" or a so-called "blow-in card"¹⁰ are not considered advertising when calculating the advertising/non-advertising weight split. Nor should they be here.

Finally, even if it could be argued reasonably that the renewal notice and form make known the existence or quality of a product, they are not "advertisements" for "commercial" products with regard to request publications, either as those words are commonly defined or in the words of the applicable definition. Both terms are typically used in the context of *selling* an item, not offering it at no charge (to qualified recipients). The Commission has itself confirmed this distinction in the June 26th Order. In addressing the scope of the term "advertisement" for application of the rule exempting prerecorded messages that do not contain "advertising" from the prohibition applied to such messages, the Commission stated (at ¶ 145 of the June 26th Order) that if the "purpose of the message is merely to invite a consumer to listen to or view a broadcast," it is not an advertisement because, like requester publications, there is no purchase being encouraged. By this entirely valid reasoning, neither a renewal notice nor

¹⁰ A "blow-in card" is the loose subscription order card frequently found in periodicals.

even a solicitation for a request publication is an “advertisement” under the TCPA.¹¹

The dilemma faced by American Business Media members is brought into sharp focus by the oppositions to stay filed by two opponents thereof. Shields (at 2) is adamant that subscription renewal forms, even for free publications, are advertisements under the TCPA. Strang, on the other hand, concludes (at 5) that such renewal notices are not advertisements. What is a publisher to do? He may either stop sending renewal notices by fax, thus jeopardizing his circulation and advertising revenues, or he may, like National Trade Publications’ current practice, send 10,000 renewal notices per month in the belief that they are not advertisements. However, if Mr. Shields were to be the judge in a class action lawsuit, the annual penalty for such faxing could be \$180,000,000. Given the prevalence of this type of subscription renewal fax, and given their importance to publishers, we urge the Commission to rule that renewal notices for all publications, whether paid or request, are not advertisements under the TCPA and its regulations.

A similar, though less ambiguous, situation exists with respect to another common form of fax used by publishers—an advertiser insertion order. Susan

¹¹ Shields (at 2) contends that even if the subscription renewal is not an advertisement, the periodical involved contains advertisements. Even if that were universally true (and it is not, because there are some 100% editorial publications that, although usually paid for, may be offered free for a limited period), the analogy to the Commission’s ruling on radio and television broadcasts still applies, for those broadcasts undoubtedly contain commercial messages.

Tyler's affidavit describes (at ¶ 10) and attaches a sample insertion order.

Although American Business Media believes that such forms are not advertisements, since they are sent to the advertiser by the publisher to confirm and provide the detail for an order that was already placed, we fear that some might argue that it nevertheless makes known the availability of a service and therefore would fall within the applicable definition.¹² Once again, we ask the Commission to confirm that, once an advertising or any other transaction or business relationship has begun, subsequent faxes addressing actual and potential terms and conditions are not advertising.

American Business Media's second clarification request deals with the final two sentences of Paragraph 193 of the June 26th order. They read (footnote omitted):

Finally, the Commission confirms that 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.

Some have read this language as forbidding the faxing of a notice identifying the new rules and seeking permission to send advertising faxes. Others read the same language, especially the repeated references to opt out/negative option, as

¹² Strang (at 3) falsely attributes to American Business Media the contention that insertion orders will require written permission. That is not what we said. Our concern is that members will be drawn into lawsuits unless the Commission rules that they do not.

warning potential faxers that the failure of a recipient of such a notice to “opt out” does not indicate consent.

If the Commission intended the former, more restrictive reading, neither the words “including toll free opt-out numbers” in the first quoted sentence nor the entire second sentence would be necessary. Did the Commission mean “facsimile requests for permission to transmit faxed ads that consist of toll free opt-out numbers” are unacceptable because that type of negative option is contrary to the statute?

American Business Media urges the Commission, in issuing a clarification, to bear in mind that Congress banned unsolicited faxed advertisements, not notices seeking permission. The Commission’s authority to implement the TCPA does not permit extension of the word “advertisement” beyond recognition merely to fulfill what it believes was Congress’ goal. Stated simply, a notice to a customer seeking permission to fax ads in the future does not fit within the Commission’s or any other reasonable definition of advertising. Therefore, the Commission is without authority to sweep such notices within the purview of the TCPA.

Conclusion

American Business Media’s active participation in this docket reveals the importance of this issue to its members. They have grown to depend upon legitimate, targeted, and almost always well-received faxes to sustain their businesses. Those businesses, in turn, help sustain the nation’s businesses, by providing information of vital interest to business leaders and professionals.

Although the Commission must work within the mandate laid down by Congress, it ought to be clear that the type of faxes sent by the members of American Business Media members are not the type of "junk faxes" that Congress sought to eliminate. The Commission should therefore exercise its discretion and its authority as requested here.

Respectfully submitted,

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Counsel for American Business Media

Dated: August 25, 2003

AFFIDAVIT

1. My name is Guy H. Wendler and I am the President/CEO of Stamats Communications, Inc., which is located at 615 5th St., S.E, Cedar Rapids, Iowa.

2. Stamats publishes four business-to-business monthly publications with total circulation for the four of about 127,000 and four annual directories. *Buildings* subscribers total 57,000 major building owner/facility management professionals involved with commercial, institutional, and government buildings; *Meetings West* subscribers total 26,000 meeting planning professionals covering the western United States, western Canada, and Mexico; *Meetings South* subscribers total 22,000 meeting planning professionals covering the southern United States, the Caribbean and the Islands; *Meetings East* subscribers total 22,000 meeting planning professionals covering the eastern and midwestern United States and Canada.

3. Most business-to-business publications are so-called "requester" or "controlled circulation" publications, which means that they qualify for the Postal Service's lower Periodicals rates by having at least 50% of their distribution to people that have expressly requested the publication. By contrast, "paid" publications, which includes nearly all consumer (as opposed to business-to-business) magazines, qualify by having at least half of their distribution to people that have paid for the publication. The requester model works well for the business press, because by exchanging a "free" subscription for employment information, the publisher can be sure and assure advertisers that the audience consists of those whom the advertisers would like to reach.

4. In order to keep its publications in business, and in order to maintain qualification as a Periodical under postal regulations, Stamats must obtain requests from new subscribers as well as from existing subscribers. For postal purposes, a request is counted as valid for only three years, at which point it must be renewed. Because of the Postal Service's audit procedures, a "request" in writing is preferable to one received over the Internet or through telemarketing, although those sources have been growing in recent years for us and for all business publishers.

5. Stamats has found targeted fax communication to be a cost effective way to seek "direct written request" renewal responses from existing subscribers, and to communicate with subscribers about such related matters as industry news, seminars, and trade shows. Stamats also uses fax communication as a cost effective way to update and verify our annual directories. We certainly have no interest in sending faxes to people who are outside of the businesses our publications cover, so we do not and never would engage in broadcast faxing. Rather, we fax only to those who we know are interested in what we have to offer.

6. If we are required to eliminate faxing except in those cases in which we have received written, signed authorization, it will force us to use other, more costly approaches that produce less satisfactory results, thus increasing the number of communications as well as our cost. In theory, we could ask each of our subscribers and potential subscribers to provide the required written, signed permission, but it is simply not rational to expect that a substantial number would be received except, perhaps, over a several-year cycle.

7. Even if we could obtain signatures from a high percentage of our subscribers, which I do not believe to be the case, we could certainly not do so before the end of this month, when the rules are to take effect. That means that, unless we want to bet the company and continue to use faxes in the ways we always have, without complaint, our efforts to maintain our subscribers and pass postal audits will be jeopardized. The postal issue is very important. I doubt that we could stay in this line of business if we are forced out of the Periodicals class because we have been unable to obtain the required 50% requests. The FCC fax ruling will make it far more difficult, far more costly and, I fear, next to impossible to maintain the necessary level of qualified requesters at our current level of circulation. If circulation drops substantially, so will ad revenues, and we would be caught in a downward trend.

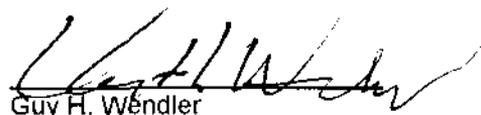
8. Under the new rules, Stamats and many other publisher members of American Business Media will find it increasingly difficult to find new subscribers and maintain existing subscriptions levels,

spend more money, and lose a fast and cost-effective method of communicating with *their own subscribers—people who have already indicated a desire to communicate with us*. As an industry we will lose the enormous potential of this legitimate and well-accepted method of informing our subscribers of important information about their industry, trade or profession.

9. I understand that some of the restrictions we face are in the law and that the FCC cannot undo what Congress has done. But I also understand that the new rules go way beyond what the law requires. We believe that we can at least take a shot at obtaining the required "express permission" from most of our subscribers, as long as it does not have to be in writing with a signature. I don't understand why the FCC, which for years has permitted faxes with only a established business relationship to demonstrate permission, has now pushed the pendulum so far in the other direction by requiring permission in a form that for most of us is unattainable. Keep in mind that if we believe that we have express permission, and the fax recipient disagrees, we are faced with the no-win choice of trying to defend a baseless law suit or settling it even though we have done nothing wrong. The express permission requirement should therefore be self-policing.

10. We are also troubled by the fact that there may be disagreement about whether a particular communication is an ad. If we guess wrong on a communication to the 57,000 subscribers to *Buildings* we could be exposed to as much as a truly staggering \$85 million (!) in damages. If anything will have a chilling effect on legitimate, constitutionally protected speech, that will. This is not a theoretical problem. If we send a subscriber a notice that her subscription is expiring, is that an ad? I would not think so, because it does not offer a good or service. But if the notice is accompanied by a form that the recipient can send back in order to keep the free subscription in effect, is that an ad? Some would say so. We say it's simply good customer service. We hope that the Commission will clarify the definition and, when asked, advise us and the public whether particular types of communications are ads. If it does not, and we are exposed to the views of hundreds of judges in fifty states, we cannot do business in a rational manner.

11. Finally, given the uncertainty and given our need to re-examine our communications needs, we hope that the Commission will defer the effective date of at least some portions of the fax rule, in order to give us a fighting chance.


Guy H. Wendler

On this 31st day of July, 2003, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Guy H. Wendler, to me know to be the identical person named in and who executed the above and foregoing affidavit and acknowledged that he executed the same as his voluntary act and deed.


Notary Public in and for the State of Iowa

8-28-04

**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)

AFFIDAVIT OF SUSAN TYLER

1. My name is Susan Tyler and I am the Vice President for National Trade Publications, Inc. (NTP), a closely held multi-media communications company located in Latham, New York. It was originally incorporated in March 1981 and currently employs 45 individuals in the Latham geographic area.

2. As discussed below, the newly-announced restrictions on our ability to reach our customers and subscribers by fax will impose an enormous financial burden on our company while, at the same time, depriving those customers and subscribers of information in the form that they appear to prefer it.

3. NTP produces the following products:

Print Media:

- Four monthly trade magazines in small, targeted industries, with circulations ranging from 18,000 to 40,000 and a combined controlled monthly circulation of over 100,000 subscribers located primarily in the United States. The industries we cover are: Professional car care; point of use/point of entry water treatment; building cleaning and maintenance; and carpet cleaning and restoration.

Electronic Media:

- Three e-mail daily news services with a combined subscriber recipient list of over 47,000 recipients per day. These news services are provided free of charge to recipients and contain daily news items of interest in the industry as well as online advertising.
- Five websites supporting the four industries served by National Trade Publications products, with nearly 2.3 million unique users in 2002.

Exhibit Media:

- Eight regional trade shows aimed at the building cleaning and maintenance and carpet cleaning and restoration industries. These shows include both exhibit space and an educational seminar component.

Professional Training and Development Media:

- Numerous educational books, training courses, and membership services provided to the professionals in the industries served by National Trade Publications.

3. NTP uses faxes extensively in support of its products and services in the following ways:

Advertising/Marketing:

- We have the only overnight faxed sales lead program in our industries. We fax sales leads overnight to our magazine advertisers thus enabling them to get potential customer information extremely quickly.
- We describe and market our advertising products and services to existing and potential customers through more than 20,000 faxes per month.

Circulation:

- We use faxes as an essential method of notifying our “requesters” of the need to requalify and providing the appropriate form to gather the information required by the Postal Service and the audit bureaus. We estimate that approximately 10,000 faxes are sent per month to subscribers for the purpose of verifying their subscription information. We have an 8-10% return rate on these faxes, a highly favorable return. It is also a convenient method of communicating with our subscribers, who are busy professionals in our industries. If we were unable to continue to fax to these subscribers, we would have to resort to the use of telemarketing (costing as much as \$4.00 per requalification) and/or direct mail (costing nearly \$.75 per effort) compared to the \$.065 per fax we are now spending. In addition, we would have a more difficult time passing postal audits if we obtained more of our requesters via either the Internet or telemarketing.

Exhibit:

- Faxing is an integral component of our marketing plan to solicit attendees and exhibitors at our regional trade shows, for which an estimated 5,000-10,000 faxes are sent per year.

4. For all of the fax efforts described above, provision is made for a recipient to choose not to receive these faxes in the future, and a fax block list is maintained/updated on a daily basis.

5. Faxing has proved beneficial to NTP and, we are absolutely confident, to our customer base. It costs us from \$.043 to \$.065 per fax to inform/notify our customers of **important information regarding their subscriptions and potential interest in our various products.** This cost compares very favorably to about \$4.00 per telemarketing effort and up to \$.75 per direct mail effort. Our return per dollar invested is much higher with faxes than with any of the other options, which itself shows that there is not widespread **opposition among those receiving our targeted messages.** We believe that in this respect we are vastly different from broadcast faxers who send travel and other information to a broad range of people. When we fax information to readers of our publications, it is information that will be of interest them. We would be wasting our money to send it to an undifferentiated list, and we do not.

6. Faxing is a convenient mode of communication for us and for those who receive our faxes. It can be accomplished accurately and timely without absorbing **additional manpower to deliver the information.** Staff can fax directly from their **computer workstations, while alternative modes require more labor-intensive staff activity.** At the receiving end, our customer usually obtains the information in hard-copy form, without it being lost among dozens or even hundreds of spam emails and a pile of **unwanted direct mail pieces.**

7. Faxing also provides the ability to update customers quickly on changing products and services in which many are interested. No other communication medium **permits us to retain such flexibility.**

8. If the rule is implemented as is, we will be forced to replace most of our faxes with alternative, much more expensive marketing instruments. This change will result in **a substantial increase in cost, while revenues from these products and services would be expected to remain the same, as long as we are willing and able to spend a great deal more money to achieve that result.** Consequently we and other companies will see a reduction in profit (or, these days, an increase in loss for many media companies) due to **the dramatic increase in cost.** Obviously our ability to **continue to grow, hire additional staff and expand our product offerings will be negatively affected by this economic equation.** Some companies in our industry are likely to suffer contraction. Worse still, these rules will make it more difficult to sustain a new and struggling publication and will **certainly inhibit the startups that are so important to small publishers and the readers and industries they would serve.**

9. Reduced worker productivity will be another effect of the new rule, and the required replacement of faxes with direct mail, telemarketing, etc., will have will also **affect the bottom line.** In addition, the **administrative systems that will have to be put into place to request, receive, update and monitor the written consent of fax recipients**

will similarly erode worker productivity by diverting staff energy toward a completely non-revenue generating activity.

10. Not only are the new rules onerous and threatening our economic viability, they are also vague, which is a real problem given the enormous potential liability we face if we guess wrong. This uncertainty over whether particular communications—such as a subscription expiration and renewal notice or an advertiser insertion order—meets the definition of an “advertisement,” coupled with the hefty penalty fines if we determine it is not but a judge in any of the fifty states believes that it is, will necessarily make companies err on the conservative side. I am attaching samples of each. In our case, virtually all faxing we do could come under the umbrella of the proposed FCC definition of an advertisement.

11. Furthermore, although I understand the rationale for eliminating the “established business relationship” defense (although I disagree with it), I have neither seen nor heard any rationale for taking Congress’ requirement for express permission and greatly expanding it into a requirement for signed, written permission. It is impractical in all but a limited number of situations to expect a company to obtain written signatures for approval. Especially in this time, when much and in some instances the only communication between the supplier and the customer is electronic, any effort to turn back the clock to the hard copy days will fail. Our customers reside all over the United States and are busy professionals who may not take the time to comply despite the fact that they do not mind receiving faxes. Even if we could obtain signatures from most of our readers, it would take years, not a mere thirty days. Finally, if they do mind receiving faxes, they can let us know, and we will of course stop faxing to those that object. We have no desire to offend our customers or potential customers. It strikes me as ironic that the national do-not-call regulations apply only to residential phones but that the use of business-to-business faxes where recipients do not object must nevertheless be terminated.

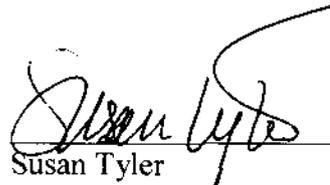
12. There is further ambiguity, and therefore unacceptable risk, resulting from the fact that commercial fax numbers typically reside with an entity such as a company, not an individual. We might not know who is authorized to provide approval for a company fax number and what the impact will be on that approval if that particular individual leaves.

13. As I understand the new rules, if a potential exhibitor at one of our trade shows asks one of our salespeople to fax her some information about the trade show, or if that exhibitor calls our office with the same request, we cannot provide that information unless (1) the salesperson immediately produces and has the potential exhibitor sign a consent form, or (2) the recipient of the phone call states that he cannot fax the requested information unless the potential exhibitor first provides a written and signed request. Congress could not have intended, and we hope that the Commission did not intend, a result that is so preposterous and, by the way, destructive.

14. I know that American Business Media, our trade association, will be filing comments to which this affidavit will be appended and will be making certain suggestions for relief. From my perspective as a fax user, and a fax receiver I might add, I urge the Commission to exempt from this ruling any company that can demonstrate a structured program of permitting the recipient to refuse to receive faxes and the responsible use of a fax block list. I am not an attorney and I do not know how much discretion there is to implement a law in a reasonable fashion, but this approach, I believe, would quickly take care of the problem of unwanted faxes.

STATE OF NEW YORK)
) SS:
COUNTY OF ALBANY)

Susan Tyler, first being duly sworn, deposes and says that the statements contained in the foregoing Affidavit are true and correct to the best of her knowledge, information, and belief.



Susan Tyler

SUBSCRIBED TO AND SWORN TO before me, this 31 day of July, 2003.



Notary Public

BARBARA A ALBERT #01AL5047276
Notary Public, State of New York
Commission Expires July 31, 2005

My Commission Expires:

TIME IS RUNNING OUT...

...to verify your postal address and subscriber information

Postal regulations require that we verify each subscriber's name and address on a regular basis in order to qualify for periodical-class mailing rates.

We will need you to verify this information in order to continue to mail your copy of *CM/Cleaning & Maintenance Management*®.

Do you know of someone else that should be reading *CM/Cleaning & Maintenance Management*®? Please enter their name & title below:

Name: _____
 Company: _____
 Address: _____
 City/State/Zip: _____

*Please deliver to correct party if misaddressed



PLEASE CHECK

YES! I want to receive

CM/Cleaning & Maintenance Management®

No, I do not wish to receive

SIGNATURE (REQUIRED)

DATE

E-MAIL ADDRESS

CMVF0703A

PLEASE MAKE ADDRESS CHANGES BELOW:

%{SUB ID} %{TYPE}
 %{START} %{QUAL}
 %{FIRST NAME} %{LAST NAME} %{TITLE}
 %{COMPANY}
 %{ADDRESS 1} %{ADDRESS 2}
 %{CITY} %{STATE} %{ZIP CODE}
 %{PHONE} %{FAX}



Complete form and fax to
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TYPE OF ORGANIZATION

- A. School/College/University
- B. Hospital/Sanitarium/Rest Home /Nursing Home
- C. Office Building/Gov't Building
- D. Hotel/Motel/Apartment Building
- E. Retail-Comm. Building/Club /Airport/Church/Auditorium
- F. Industrial Plant/ Manufacturing Plant
- G. Contract Cleaner
- H. Supply Distributor
- I. Residential/Maid Cleaning Service
- J. Carpet Contract Cleaner
- K. Manufacturer of Cleaning Equipment and Supplies
- L. Property Maintenance
- O. Other (Specify) _____

JOB DESCRIPTION

- A. Dir. Physical Plant Facility
- B. Dir. Envir. Services/Hskpg
- C. Supt. Buildings & Grounds
- K. Director of Maintenance
- L. Building/Facilities Engineer
- D. Executive Housekeeper
- E. Manager Building Services
- F. Building Maintenance Manager
- G. Physical Plant Administration
- H. Custodial/Maint. Supervisor
- I. Business Owner or Manager
- J. Sales Manager/Rep
- M. Property Maintenance Manager
- Z. Other (Specify) _____

PURCHASING AUTHORITY

- 1. Sole Purchasing Decision Maker
- 2. Specify/Recommend Purchases
- 3. Approve Purchases
- 4. Not Involved

ANNUAL PURCHASES Equip. Materials & Supplies

- H. Over \$1 million per year
- D. \$50,000 to \$99,999 per year
- G. \$500,000 to \$1 million per year
- C. \$20,000 to \$49,999 per year
- F. \$250,000 to \$499,999 per year
- B. \$10,000 to \$19,999 per year
- E. \$100,000 to \$249,999 per year
- A. Less than \$9,999 per year

NUMBER OF EMPLOYEES

- 5. 200 or more
- 4. 100 - 199
- 3. 50 - 99
- 2. 20 - 49
- 1. 4 - 19

AVERAGE SQUARE FEET CLEANED PER MONTH

- 5. 5,000,000 or more
- 4. 3,000,000 - 4,999,999
- 3. 1,000,000 - 2,999,999
- 2. 500,000 - 999,999
- 1. 100,000 - 499,999

PROFESSIONAL CARWASHING & DETAILING

INSERTION ORDER

Date: July 23, 2003

Company: ABC Company

Contact: John Doe

Insertion Date: September 2003

Number of Insertions: 1

Rate: \$544.00 NET

Size/Dimensions: 1/4-page black & white

Materials: On file

Authorization: _____

John Doe

Please sign to confirm order. Fax to 518-783-1386. Thank you.

**National Trade Publications will run advertisements as submitted by advertisers.
We are not responsible for omissions or typographical errors.**

**Professional Car Care B2B Trade Group
13 Century Hill Drive, Latham, NY 12110
(518) 783-1281 Fax: (518) 783-1386
www.carwash.com**