

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

In the Matter of)
)
Rules and Regulations Implementing the) CG Dkt No. 02-278
Telephone Consumer Protection Act of 1991)
)
)

**Petition for Reconsideration
of the Office of Advocacy, U.S. Small Business Administration**

The Office of Advocacy (“Advocacy”) of the U.S. Small Business Administration (“SBA”) respectfully submits this Petition for Reconsideration, requesting that the Federal Communications Commission (“FCC” or “Commission”) modify its recent decision to regulate unsolicited commercial fax communications in the above-captioned proceeding.¹ The Office of Advocacy is an independent office within the SBA, so the views expressed by the Office of Advocacy do not necessarily reflect the views of the SBA or the Administration.

On July 3, 2003, the FCC released the Report and Order (“Order”) in the “do-not-call” proceeding, which the FCC initiated to curb intrusive telemarketing and promote consumer privacy. The FCC intended the Order to maximize consistency with the recent amendments made by the Federal Trade Commission (“FTC”) to its Telemarketing Sales Rule.² As part of the “do-not-call” rules, the FCC adopted a “do-not-fax” provision, which required any person to obtain prior express permission in writing, with a signature from the recipient, before sending an

¹ *In the Matter of* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CG Dkt. No. 02-278, FCC 03-153 (rel. July 3, 2003).

² FTC Telemarketing Sales Rule, 68 Fed. Reg. 4500 (Jan. 29, 2003) (to be codified at 16 CFR Pt. 310).

unsolicited fax advertisement.³ Unlike the general “do-not-call” provisions of the Order, the Commission removed the “Established Business Relationship” exemption and did not grant an exception to trade associations or non-profit organizations when communicating through a facsimile device to their members.

This rule will have an enormous impact on small businesses, small trade associations, and small non-profit organizations.⁴ Advocacy requests that the FCC revisit this decision in light of the economic impact on these small entities and the fact that the Commission did not conduct an adequate Regulatory Flexibility Analysis (“RFA”) of the impact. Specifically, Advocacy requests that the Commission reinstate the Established Business Relationship exemption and the non-profit exemption, create a presumption that membership in a trade association acts as consent, and clarify the definition of an unsolicited commercial advertisement.

I. Advocacy Background.

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305⁵ to represent the views and interests of small business within the Federal government. Advocacy’s statutory duties include serving as a focal point for the receipt of complaints concerning the government’s policies as they affect small business, developing proposals for changes in Federal agencies’ policies, and communicating these proposals to the agencies.⁶ Advocacy also has a statutory duty to monitor and report to Congress on the Commission’s compliance with the RFA.⁷

Congress designed the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply

³ Order at paras. 185-93.

⁴ Small non-profit organizations, small trade associations, and small governmental entities are also covered by the RFA as per §601(3)-(6).

⁵ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996).

with the regulation.⁸ An objective of the RFA is for agencies to be aware of the economic structure of the entities they regulate and the effect their regulations may have on small entities. To this end, the RFA requires agencies to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small businesses.⁹ The RFA does not seek preferential treatment for small businesses. Rather, it establishes an analytical requirement for determining how public issues can best be resolved without erecting barriers to competition. To this end, the RFA requires the agencies to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule's effectiveness in addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing burdens on small entities.¹⁰

On August 13, 2002, President George W. Bush signed Executive Order 13272 that requires federal agencies to implement policies protecting small entities when writing new rules and regulations.¹¹ This Executive Order highlights the President's goal of giving "small business owners a voice in the complex and confusing federal regulatory process"¹² by directing agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities.

II. The FCC's Report and Order Does Not Comply with the RFA.

⁶ 15 U.S.C. § 634(c)(1)-(4) (1996).

⁷ 5 U.S.C. § 612 (1996).

⁸ 5 U.S.C. § 601(4)-(5) (1996).

⁹ See generally, Office of Advocacy, U.S. Small Business Administration, *A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act* (2003).

¹⁰ 5 U.S.C. § 604 (1996).

¹¹ Exec. Order. No. 13272 § 1, 67 Fed. Reg. 53,461 (2002).

¹² White House Home Page, *President Bush's Small Business Agenda*, (announced March 19, 2002) (last viewed August 22, 2003) <<http://www.whitehouse.gov/infocus/smallbusiness/regulatory.html>>

Advocacy believes that the “do-not-fax” portion of the rulemaking does not comply with the RFA. Both the initial regulatory flexibility analysis (“IRFA”) and the final regulatory flexibility analysis (“FRFA”) do not satisfy the requirements of the RFA as they failed to adequately address the costs that the rule would impose on small business, small trade associations, membership organizations, and small non-profit organizations. Further, the FCC did not adequately consider alternatives that would minimize the impact on small entities while still advancing the Commission’s objectives. The FCC should reconsider the “do-not-fax” provision in light of the impact on small entities and the availability of alternatives.

A. The IRFA Does Not Meet the Requirements of the RFA.

As Advocacy stated in its letter in support of the requests for stay,¹³ the IRFA does not meet the requirements set forth in the RFA.¹⁴ The Commission did not adequately describe the requirement to obtain signed written permission from all fax recipients and it did not adequately estimate the costs on small businesses or small organizations.¹⁵

Furthermore, the FCC did not consider adequately alternatives in the IRFA to minimize the impact on small businesses or organizations as required by the RFA.¹⁶ Instead, the Commission asked commenters to propose alternatives, which shifts the burden off the FCC and onto small entity commenters. Asking for proposed alternatives from small businesses does not satisfy the RFA, as the law requires the agency to describe, consider, and discuss any significant alternatives.

¹³ Letter from Thomas M. Sullivan, Chief Counsel for Advocacy, to Michael J. Powell, Chairman, FCC, CG Dkt. No. 02-278 (August 14, 2003).

¹⁴ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking*, CG Dkt. No. 02-278, FCC 02-2503, Paras 70-80 (rel. Sept. 18, 2003) (“NPRM”).

¹⁵ 5 U.S.C. §603(b)(4) (1996).

¹⁶ NPRM at paras. 77-79.

B. The FRFA Does Not Meet the Requirements of the RFA.

The FRFA does not meet the requirements of the RFA, as it does not contain an adequate analysis of the compliance costs of “do-not-fax” provision of the Order nor does it consider alternatives that would legitimately minimize the economic impact of the “do-not-fax” provision on small businesses, membership organizations, and non-profit associations.¹⁷

1. The Compliance Requirements of the “Do-Not-Fax” Provision Will Be Substantial.

In the FRFA, the Commission mentions that small businesses and small organizations will be required to maintain records of permission forms from each of the recipients of unsolicited fax advertising,¹⁸ but the Commission does not estimate the costs, time required, or professional skills necessary to comply with the Order.

To comply with this requirement, the small business must: (1) develop a policy on how to handle unsolicited fax advertising; (2) draft a permission form (which will require legal expertise) that satisfies the requirements of the Order; (3) send the permission form to all customers, potential customers, and business partners; (4) receive the permission forms; (5) file and store the permission forms; and (6) update and maintain the file of permission forms as needed.

The costs to comply will be substantial. As the FCC stated in its FRFA, this rule could potentially regulate all 22.4 million small business in the country.¹⁹ The fax machines are an affordable means of communications for almost every small business and small organization. Advocacy does not have data on the time required for each of these small businesses to comply with the rule, but judging from the list of actions necessary to comply as described above, it is

¹⁷ Order, Appendix B, paras. 1-39.

¹⁸ Order, Appendix B at para. 26.

¹⁹ Order, Appendix B, paras. 20-1.

likely to be substantial. The small entities must get in touch with each of their clients, potential clients, and business partners – a task that could take from days to months. Also, the small business must store and file each of these permission forms, which could require from several hours per week by one employee with a single file drawer to multiple employees maintaining an entire room of file cabinets.

Advocacy encourages the FCC to look at its own data and information submitted by other commenters and petitioners to gauge an accurate assessment of the costs on small entities. If the Commission still needs further information on the cost to small entities, Advocacy urges the Commission to contact small business groups and membership organizations through the *ex parte* process to help identify and analyze impacts of this rule and of the alternatives described below and in other petitions for reconsideration. Advocacy stands ready to assist the Commission in collecting this information as needed.

2. The FCC Should Consider the Alternatives to Minimize Impacts on Small Business

The FRFA’s treatment of alternatives is also insufficient. The FCC described how the “do-not-fax” portion of the rule would benefit small businesses who were receiving unsolicited commercial faxes, but the Commission did not discuss any of the alternatives to lessen the burden on small businesses and small organizations that use fax communications for commercial purposes.²⁰ As part of the FCC’s reconsideration, Advocacy recommends that the Commission consider the following alternatives to minimize the burden on small businesses and organizations, while still helping reduce the number of unsolicited faxes to small businesses and other recipients.

First, the FCC should reinstate the “Established Business Relationship” (“EBR”)

²⁰ Order, Appendix B at para. 37.

exemption. Many small businesses use faxes to communicate with customers, potential customers, and business partners. These parties expect to receive fax communications as part of their business dealings and the permission form is an unnecessary legal hoop that slows down commerce and adds regulatory costs to every transaction. If the FCC reinstates the EBR, small businesses can more readily communicate with their customers and business partners who desire this information. Additionally, by reinstating the EBR, the FCC will make the “do-not-fax” provision consistent with larger “do-not-call” rule, which simplifies and streamlines the rule, making it easier for small businesses to comply with the rule.

Second, the FCC should create a presumption that joining a membership organization acts as consent to receive unsolicited commercial faxes from the organization. Membership organizations rely upon faxes to communicate with members, donors, and other interested parties. Requiring these entities to gather permission forms from all of their members is a time-consuming and expensive proposition, especially for groups that serve small businesses because they often have many members. In addition, members of a membership organization expect to receive fax communications from the organization as part of their association with the group. The company-specific “do-not-call” rule would still apply to membership organizations. If a member wishes to stop receiving faxes, they can let the organization know and have their name removed from the distribution list. Advocacy believes that a presumption of consent in this narrow case is fair and consistent with the intent of the rule.

Third, the FCC should reinstate the exemption for non-profit organizations. Similar to membership organizations, non-profit groups rely upon faxes to communicate with members, donors, and other interested parties. The “do-not-fax” provision has the potential of muzzling the voice of small businesses and other non-profit groups. Many organizations have gone on the

record with the FCC and stated that the provision will prevent quick communications they need to make sure that all of their small business members are aware of new laws, regulations, and other developments both in Washington and in state capitols across the country. Similarly, contributors and associates of non-profit organizations expect to receive faxes from these entities. As with reinstating the EBR, reinstating the exemption for non-profit organizations will make the “do-not-fax” provision consistent with larger “do-not-call” rule.

Finally, the FCC should clarify what is an unsolicited advertisement. The current definition of “any material advertising the commercial availability or quality of any property, goods, or services”²¹ is a good general guideline, but it leaves many details open to interpretation. Does a trademark or name of a business constitute an advertisement? What if it includes a motto such as “Buy and Save!” or “Join Today”? Does the advertisement have to be for a specific good or service or does it include general good will advertising for the business? Does a notice of an upcoming conference count as an advertisement? It is important that small entities know exactly what is permitted and what is not so that they are able to comply with the rules. Therefore, Advocacy requests that the FCC clarify what is a commercial advertisement on reconsideration.

IV. Conclusion.

Advocacy requests that the FCC reconsider the “do-not-fax” provision in the Order because small businesses are disproportionately burdened by the requirements of this provision, and the Commission did not comply with the RFA as it did not adequately describe the impact of these compliance requirements. Nor did the Commission adequately consider alternatives to minimize the impact. Advocacy asks that the Commission reinstate the “Established Business

²¹ Order at para. 185.

Relationship” exemption and the non-profit exemption, create a presumption that membership in a trade association acts as consent, and clarify what is an unsolicited advertisement.

Thank you for your consideration of these matters, and please do not hesitate to contact me or Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov if you have questions, comments, or concerns.

Respectfully Submitted

/s/ _____
Thomas M. Sullivan
Chief Counsel for Advocacy

/s/ _____
Eric E. Menge
Assistant Chief Counsel for Telecommunications

Office of Advocacy
U.S. Small Business Administration
409 Third St., S.W.
Washington, DC 20416

August 25, 2003

Certificate of Service

I, Eric E. Menge, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this August 25, 2002, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Petition for Reconsideration to the following:

/s/ _____
Eric E. Menge

Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, DC 20554

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

Honorable Kathleen Q. Abernathy
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115
Washington, DC 20554

Richard Lee
Acting Director
Office of Communications Business
Opportunities
445 12th Street, S.W.
Room 7-C250
Washington, DC 20554

Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington, DC 20554

K. Dane Snowden
Chief
Consumer & Governmental Bureau
Federal Communications Commission
445 12th St., S.W.
Room 5-C755
Washington, DC 20554

Honorable Kevin J. Martin
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204
Washington, DC 20554

Dr. John D. Graham
Administrator
Office of Information and Regulatory
Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Honorable Jonathan S. Adelstein
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-C302
Washington, DC 20554