

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

In the Matter of:)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act)	
of 1991)	
)	
To: The Commission)	
)	

**REQUEST FOR RECONSIDERATION OR CLARIFICATION
OF NEW UNSOLICITED FAX REGULATIONS**

In reiteration of its previously submitted Request for Clarification, the American Dietetic Association (“ADA”), a not-for-profit corporation incorporated and operating under the laws of the State of Illinois, hereby submits this request for reconsideration or clarification of certain aspects of the Amended Rules formulated under the Telephone Consumer Protection Act of 1991 (the “TCPA”), 47 C.F.R. §64.1200 *et seq.* As the only disposition of ADA’s prior submission was the Commission’s dismissal without prejudice of that portion requesting a stay of the effective date of the new rules, the procedural status of ADA’s Request for Clarification is unclear, and ADA therefore submits this request for reconsideration in order to ensure that its views are formally on record for consideration by the Commission. To the extent that this submission is redundant, ADA apologizes to the Commission. ADA also joins and supports the position adopted by the American Society of Association Executives that similarly seek reconsideration and clarification of the Amended Rules..

I. BACKGROUND

ADA is a professional association of dietitians and nutritionists with nearly 70,000 individual members. It provides a wide array of ongoing services to its members, including updates and reports on current events relevant to the practice of dietetics, educational programs and seminars, research into various aspects of nutritional therapy, and accreditation and certification of dietitians with appropriate qualifications, all of which services also benefit the public and the health care community. In order to render these and other services, it is essential that ADA be able to communicate freely with its members on a regular basis.

Communications with members are accomplished in many ways, including via facsimile, depending upon the particular communication and the particular members. These communications may include, but are not limited to, educational or informational pieces; announcements of forthcoming meetings, seminars, or programs; membership materials relating to membership benefits, membership renewals and applications; and responses to specific requests from members who may be seeking information or assistance with specific problems.

ADA must also from time to time communicate, by facsimile or otherwise, with members of the public or representatives of various businesses. Again, such communications may take the form of responses to specific inquiries, as where a prospective or former member requests membership materials or applications, or of ongoing communications with vendors, contractors, or business entities with which ADA may be involved in a transaction. On many such occasions, the requests are extremely time-sensitive.

While all these communications may be transacted electronically, via e-mail or otherwise, they may also be achieved via facsimile, and many are as a result of direct request by the party with whom ADA then communicates. Indeed the requesting party in many instances has indicated an aversion to e-mails with lengthy attachments.

II. DISCUSSION

The TCPA Rules regarding Unsolicited Faxes announced by the Commission in late June 2003 and published in the Federal Register on July 25, 2003, unless reasonably construed, create a significant risk of imposing substantial financial and operational burdens on ADA and its fellow not-for-profit membership associations. As formulated and discussed in the Report and Order issued by the Commission, the Rules are in some respects unrealistic, burdensome, and insensitive to the relationships between non-profit professional associations and their members, and in other respects simply confusing, ambiguous and defiant of common sense. To address these issues, ADA requests that the Commission reconsider, and issue clarification with respect to, the following aspects of the Rules:

A. Recognition that Membership in a Professional or Trade Associations, or Similar Organization, Constitutes Express Consent to Receive Faxes and Fax Advertisements from the Association.

Professional associations and their members enjoy a special relationship. Members are the owner, customers, and officers of the associations. In this context, members expect and welcome an ongoing stream of communications from the associations with which they are affiliated. Indeed, the dues that the members pay to

retain their membership are intended, among other things, to finance and facilitate those continual communications. It is difficult to imagine, or to argue, that members of an association who join the association to avail themselves of the information generated by the association and the benefits provided to them and to the public, have not with their membership provided express permission to the association to send faxes to them when, as part of the membership process, they have made their fax numbers available to the association.

This is quite a different matter than the issue addressed in Paragraphs 192 and 193 of the Commission's Report and Order dated July 3, 2002. On the contrary, those paragraphs discuss the use by a third-party company of the fax numbers published in a trade directory for advertising the company's goods or services. They did not consider, except obliquely, the question of the relationship between an association and its members, or the implication created by the members' willingness to provide their fax numbers to the association for association purposes and activities.

Indeed, the Commission's reconsideration of whether an EBR should be viewed as creating an implied permission on the part of the consumer was premised on the nature of the relationship being considered. Whether or not the Commission's rationale makes sense in the context of a purely commercial relationship premised on a commercial transaction, it does not make sense in the context of the relationship between a not-for-profit membership organization and the members who populate it.

The ADA acknowledges that associations may, under the new Rule, utilize their membership applications and renewals to attempt to obtain the signed, written permission of their members to send facsimile advertisements. Such a mechanism, however, is

fraught with difficulties, risks, and expense. To effectuate an appropriate system, time and resources will need to be expended to revise existing materials or create new ones, and additional mailings will undoubtedly be required to ensure that all members are given the opportunity to respond. It is, in the context of the membership relationship, a superfluous and burdensome undertaking, *especially where it is the members who ultimately bear the expenses incurred by the association*. It is indeed a strange and curious result that the very individuals for whom the Rule openly claims to be saving trouble and expense will be caused additional expense through the burden imposed on their membership organization.

ADA respectfully requests that the Commission direct its attention to this specific issue and to find that the Membership Relationship does in fact create an express permission for the association to send faxes to its members.

B. A determination that an express request, whether written or oral, for the faxing of a *particular or specified item* shall not constitute an “Unsolicited Fax”.

Especially in the context of membership associations, it is not uncommon that a member, prospective or former member, or non-member makes a specific request, often by telephone, that the association fax that person a particular item. The item is frequently a membership application, materials descriptive of membership, or documents promoting or describing a symposium or educational program. While it defies logic and common sense that a return fax in response to such a specific request would violate the TCPA Rules, that is exactly what is suggested by Paragraph 187 of the Report and Order (“*This*

express invitation or permission must be in writing and include the recipient's signature.")

It is particularly confusing, of course, that this absurd result does not follow from the actual language of the Rule. The Rule itself reads as follows:

- (i) For purposes of paragraph (a)(3) of this section, a facsimile advertisement is not "unsolicited" if the recipient has granted the sender prior express invitation or permission to deliver the advertisement, as evidenced by a signed, written statement that includes the facsimile number to which any advertisements may be sent and clearly indicates the recipient's consent to receive such facsimile advertisements from the sender.

47 C.F.R. §64.1200(a)(3)(i). While the Rule thus indicates that a facsimile advertisement will **not** be unsolicited in the face of a signed, written statement of permission, it does not state that **any** facsimile advertisement sent without such a signed, written statement **will** fall within the definition of unsolicited. In other words, while the Rule creates a safe harbor in which the sender of a facsimile advertisement may be certain that the facsimile is not unsolicited, the Rule does not purport to **define** an "unsolicited fax" or to conclude that any facsimile advertisement without the written permission will in every instance be an unsolicited fax.

A logical interpretation of the Rule, therefore, admits the possibility that an oral request for a facsimile advertisement should not constitute an unsolicited fax. One can understand that the Commission may not wish to permit the sender of facsimile advertisements to treat a one-time oral statement of permission to stand as a blanket invitation for facsimile advertisements to a particular recipient, but the treatment of a one-time particularized request by a consumer for the faxing of a specified document or item should raise no similar concerns. To permit a sender to respond to a specific contemporaneous request for faxed materials would create no disservice to the public, but

would instead be in the consumers' best interests, especially where the request is time-sensitive.

ADA thus requests that the Commission expressly recognize that an item falling within the definition of facsimile advertisement, when sent in response to a specific request, whether oral or via e-mail or similar medium, should not fall within the definition of "unsolicited fax".

- C. A Statement of Policy or Intent that a person who has made a specific request for particular materials, which may be a "facsimile advertisement", may not seek recovery under the TCPA on account of the faxing of the requested materials.**

As an adjunct, or corollary, to the preceding discussion, the Commission should also clarify that a person who actually requests the faxing of specified materials from an entity should not be able to assert a violation of the Rule when the sender simply complies with that request. One can imagine, though obviously with some cynicism, that some individuals might seek to profit from these rules by making an oral request that certain materials be faxed to them, and then filing a lawsuit or claim based upon the sender's compliance with their request. While a court might properly find that such individuals are *estopped* from recovering damages based upon what might easily be called "entrapment", it is also possible, without guidance from the Commission, that a court might find that a strict application of the law should penalize, though unfairly, this technical violation.

Of course, should the Commission provide the interpretive clarification request in the previous section of this petition, the relief sought here should be unnecessary, Nevertheless, out of extreme caution, ADA requests this clarification as well.

D. Confirmation that the solicitation of charitable or political contributions does not constitute an “unsolicited advertisement”.

The term “unsolicited advertisement” is defined in the Rule as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” 47 C.F.R. §64.1200(f)(10). Although this definition would clearly appear *not* to include solicitations of charitable contributions or political contributions, which do not in any way deal with the commercial availability or quality of property, goods, or services, various public discussions and statements subsequent to the announcement of the Rules amendments have cast some doubt as to the obviousness of this conclusion. At least one government official, for example, opined that the fact that money is being solicited renders any such solicitation to be commercial in nature, and thus within the definition.

ADA asks that the Commission clarify this issue, even though it should require no clarification under the explicit terms of the rule. Many not-for-profit associations, including ADA, have established political action committees to which the association members can contribute for political purposes, and foundations that seek contributions to be used for various charitable purposes. Those organizations, and others acting in similar capacity, are entitled to a clear and unequivocal statement that their activities do not fall within this Rule.

III. CONCLUSION

ADA thus seeks reconsideration and clarification as to the issues identified above in this request. These are matters of critical importance to ADA and other not-for-profit associations, especially the recognition of an exception for Membership Relationships. In addition, ADA supports the petitions of other associations or organizations, such as the American Society of Association Executives (ASAE), which may raise other issues of importance to not-for-profit associations.

ADA respectfully requests the Commission to give full and serious consideration to these issues.

Dated: August 25, 2003

AMERICAN DIETETIC ASSOCIATION

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