

**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)
)

**PETITION FOR RECONSIDERATION
SUBMITTED BY
NATIONAL ASSOCIATION OF BUSINESS POLITICAL ACTION COMMITTEES**

The National Association of Business Political Action Committees (“NABPAC”) hereby petitions, pursuant to Section 1.429 of the Commission’s rules, for reconsideration of certain rules the agency adopted in its June 26, 2003 Report and Order in the above-captioned proceeding.¹

Though the Commission has delayed until 2005 the effectiveness of certain recent amendments to its unsolicited fax rules,² NABPAC seeks reconsideration of the newly adopted rules – 47 C.F.R. § 64.1200(a)(3) in particular – that pertain to unsolicited facsimile advertisements (“unsolicited fax rules”) insofar as the rules may apply to political action committees (“PACs”), and/or clarification that these regulations do not apply to PACs. Faxed PAC communications are constitutionally protected, subject to regulation by the Federal Election Commission (“FEC”), and are not “commercial” within the meaning of 47 U.S.C. § 227(a)(4).

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

² *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 03-208 (released Aug. 18, 2003).

INTRODUCTION AND SUMMARY

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

Although the FCC surely appreciates the important role of PACs in the election process, the Commission may not fully appreciate the extent to which faxes are used in routine communication with PAC donors. NABPAC directs most of its faxes to its members and prospective members, who are PAC and government affairs professionals. NABPAC maintains an established business relationship with members, and these members are accustomed to receiving faxes from NABPAC as a value and result of their NABPAC membership. PAC professionals who are not members also value hearing from NABPAC.

Similarly, NABPAC's member PACs use faxes to communicate with former and known contributors who fully appreciate the efficiency of the medium. PAC contributors not only have indicated that they welcome such faxes (indeed, persons join PACs in order to receive such updates), these PAC donors expect such faxes as a benefit of membership.

Engagement in the political process requires NABPAC members to fax fundraising notices and other items on a regular basis. These could include, for example, invitations to political events and solicitations to attend or otherwise participate in fundraisers. Faxes also are used by PACs to solicit voluntary political contributions pursuant to detailed FEC regulations.

Although fax communications from PACs convey political messages and solicit political contributions, NABPAC nevertheless understands that FCC staff has stated publicly that the fax

rule applies to PACs, including fax invitations and registration forms to nearly all political fundraising events.³

If such faxed PAC communications were covered by the new unsolicited fax rules, NABPAC and its members would be required either to obtain written, signed consents for such faxes that include the fax number(s) to which faxes may be sent, or cease sending important faxes. Obtaining and storing signed, written permissions from all such PAC members and those interested in becoming members would constitute an onerous burden. Furthermore, under the new rules, an “established business relationship” – including past contributions to and participation in a PAC’s activities – will no longer suffice to demonstrate express permission. This would force NABPAC and its members to curtail important political communications.

None of these results are necessary or appropriate under the law. PAC communications are constitutionally protected political speech, and applying the FCC’s unsolicited fax rule to such communications would interfere with core First Amendment associational rights. Furthermore, FCC regulation is unnecessary because PAC communications already are subject to regulation by the FEC. Finally, applying the rules to PAC communications would conflict with the Telephone Consumer Protection Act of 1991 (“TCPA”) itself because PAC communications are not “unsolicited advertisements” under the TCPA, inasmuch as they do not advertise “the commercial availability or quality of any property, goods or services.” 47 U.S.C. § 2227(a)(1)(4).

³ See American Society of Association Executives, Frequently Asked Questions (summary of comments by Margaret Egler of the FCC), *available at* http://www.asaenet.org/publicpolicy/FCC_FAX_FAQ/0,5195,,00.html (last visited August 20, 2003).

I. PAC COMMUNICATIONS ARE FULLY PROTECTED CONSTITUTIONAL SPEECH

The FCC, of course, is well aware that political action committee activity is central to the political process, and that restrictions on political speech may be subject to strict or “exacting scrutiny” under the First Amendment. *Buckley v. Valeo*, 442 U.S. 1, 44-45 (1976). PACs allow “like-minded persons to pool their resources in furtherance of common political goals” and “enhance[] the opportunity of bona fide groups to participate in the election process.” *Id.* at 22, 35. Restrictions on PACs implicate “the right of association . . . which, like free speech, lies at the foundation of a free society.” *Id.* at 25 (internal quotations omitted).

A PAC’s associational freedoms are not lessened by a PAC’s chosen medium of communication. The Supreme Court reasoned: “The electorate’s increasing dependence on television, radio, and other mass media . . . has made these expensive modes of communication indispensable instruments of effective political speech.” *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985) (quoting *Buckley*, 424 U.S. at 19). The Court thereafter rejected the notion that a PAC’s method of communicating “diminishes [its] entitlement to First Amendment protection.” *Id.* at 494 (discussing PAC solicitations). A rule promulgated by the FCC limiting the manner in which a PAC may communicate by fax would violate these firmly established First Amendment principles.

Nonetheless, the FCC may not have been fully cognizant of the consequences of applying the unsolicited fax rules to PACs at the time of their adoption. Given the complete absence of any constitutional analysis of these rules, NABPAC assumes that application to political action committees was inadvertent and unintended.

The section of the Report and Order adopting the new fax rules contains no discussion of the effect of the First Amendment on those rules. Indeed, the principle First Amendment analysis in the Report and Order begins at paragraph 63, which addresses the bearing of the First

Amendment on the national Do Not Call list. Notably, the Commission’s analysis there applies the “commercial speech” standard of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), not the more rigorous *Buckley* political speech standard. The *Central Hudson* standard provides no legal support for extending the new fax rules to PAC communications. Therefore, the Commission must reconsider the application of its fax rule to PAC communications.

II. PAC COMMUNICATIONS ARE FULLY REGULATED BY THE FEDERAL ELECTION COMMISSION

Not only do PAC communications constitute protected political speech, but they also are subject to regulation (within constitutional bounds) by the Federal Election Campaign Act (“FECA”) and the implementing regulations promulgated by the FEC. The FECA and FEC regulations govern virtually all aspects of PAC conduct, including their communications. NABPAC believes that the FCC can and should decide as a matter of law and enforcement discretion that any unsolicited fax rule would unnecessarily interfere with existing PAC regulation.

The FECA and the FEC’s implementing regulations specifically authorize corporations, unions and trade associations to establish, administer and solicit voluntary contributions to a PAC.⁴ FECA’s comprehensive reach even regulates who may be solicited. Specifically, a corporation and its PAC are barred from soliciting contributions from anyone other than the corporation’s stockholders and its executive or administrative personnel and their respective families.⁵

⁴ 2 U.S.C. § 441b(b).

⁵ 2 U.S.C. § 441b(b)(4)(A)(i). Trade association PACs face similar restrictions. *See* 11 C.F.R. § 114.8.

FEC regulations specify the manner in which PACs may contact these individuals and request a voluntary donation to be used for political purposes.⁶ In addition to using facsimile to communicate with supporters, FEC regulations permit PACs to use that medium in communicating with the public. Of particular relevance is the following definition of “mass mailing,” found at 11 C.F.R. § 100.27, which has various applications to PAC activity: “*Mass mailing* means a mailing by United States mail or facsimile of more than 500 pieces of mail matter” One application of the term “mass mailing” is in the definition of “public communication.”⁷ And FEC regulations permit PACs to make “public communications” provided that the PACs include appropriate disclaimer language in the communications.⁸ Therefore, a rule by the FCC that would restrict PAC communications by facsimile would conflict with a preexisting FEC rule.

Any conflict in agency regulations that govern PAC activity must be decided in the FEC’s favor. Recent legislation affecting political speech confirms this. The Bipartisan Campaign Reform Act of 2002 (“BCRA”) regulates, among other things, the medium through which certain political speech is communicated.⁹ Yet, when Congress empowered the executive branch to promulgate regulations in this area, it explicitly commanded the FEC to do so.¹⁰ Congress expressed no desire to delegate authority to the FCC to regulate the manner in which

⁶ 11 C.F.R. § 114.5.

⁷ 11 C.F.R. § 100.26. The definitions of “mass mailing” and “public communication” are derived from recent amendments to the FECA that similarly define these terms, including the specific reference to facsimiles. 2 U.S.C. § 431(22) & (23).

⁸ 11 C.F.R. § 110.11. FEC regulations restrict “public communications” by political committees in other situations. However, none do so for reasons that could justify a restriction based upon the mode of transmission such as facsimile.

⁹ 2 U.S.C. § 434(f)(3) (definition of “electioneering communication”).

¹⁰ BCRA § 402(c)(1). The BCRA also made amendments to portions of the Communications Act of 1934, e.g., BCRA § 305(a) (lowest unit rate), pursuant to which the FEC obviously would not have authority to promulgate regulations.

PACs could use facsimile in effecting political communications. Nowhere in the Report and Order does this Commission recognize, much less address, potential conflicts between its TCPA rules and FEC regulation of PAC communications. Accordingly, NABPAC respectfully submits that the Commission should reconsider its fax rules insofar as they purport to apply to PAC communications, and defer to FEC regulation of such speech.

III. PAC COMMUNICATIONS ARE NOT “COMMERCIAL” ADVERTISEMENTS WITHIN THE MEANING OF THE TCPA

The TCPA forbids the use of a fax machine to send an “unsolicited advertisement.” 47 U.S.C. § 227(b)(1)(C). The term “unsolicited advertisement” is expressly defined by the TCPA as “any material advertising the *commercial* availability or quality of any property, goods, or services without that person’s prior express invitation or permission.” 47 U.S.C. § 227(a)(4) (emphasis added).

PAC communications are not “commercial” communications. They communicate information pertaining to either politics generally, or to particular political activities engaged in by the political action committee. Typically PAC communications consist of patently political speech, including endorsements of particular candidates, initiatives, or legislative activity. These communications, which are core to the purpose and mission of a PAC, differ significantly – and materially – from faxes advertising ordinary products and services.

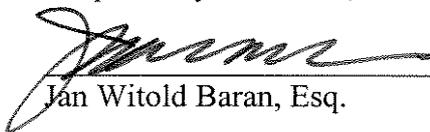
This distinction between “commercial” and non-commercial speech draws further support not only from the well-recognized First Amendment constitutional jurisprudence discussed above, but in the TCPA’s own definitions of “telephone solicitation” and “unsolicited advertisements.” 47 U.S.C. § 227(a)(3) & (4). In particular, the term “telephone solicitation” does not use the word “commercial,” which explains why Congress deemed it necessary to specifically exclude calls by tax-exempt nonprofit organizations. In contrast, the term “unsolicited advertisements” is expressly limited to commercial advertising.

For these reasons, NABPAC respectfully submits that the Commission should clarify that the fax solicitation rule at 47 C.F.R. § 64.1200(a)(3) does not apply to communications by political action committees.

CONCLUSION

For the foregoing reasons, the National Association of Business Political Action Committees respectfully requests the Commission to reconsider the applicability of its fax regulations to political action committees, and to clarify that faxed PAC communications are not subject to the unsolicited fax rules.

Respectfully submitted,



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