

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

**AMERICAN TIRE DISTRIBUTORS, INC.
PETITION FOR RECONSIDERATION
OF FACSIMILE ADVERTISEMENT RULES**

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August 25, 2003

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INTRODUCTION AND SUMMARY

In an era when many large companies and governmental organizations rely heavily on emails and the Internet, it may come as a surprise to learn that the wholesale/retail tire business, a \$20 billion industry, relies heavily on faxes. Each day, American Tire Distributors, Inc. (“American Tire”) sends by fax information on tire availability and prices to its approximately 30,000 customers. The vast majority of these customers are owner-operated small businesses, and their connection to the supply chain is by phone or fax. Elimination of the established business relationship exception to the Commission’s rules on unsolicited fax messages and the requirement of written and signed consent in order to send pricing information to its customers would severely interfere with the company’s tire distribution and sales nationwide. For that reason, American Tire hereby petitions the Commission for reconsideration

of certain aspects of the rules implementing the Telephone Consumer Protection Act of 1991¹ (“TCPA”) adopted pursuant to the Report and Order in the above-captioned docket that pertain to unsolicited facsimile advertisements (“fax advertising rules”).² The requirement that businesses must obtain from their customers written, signed consent serves no public interest benefit and could substantially harm not only American Tire’s business, but also thousands of small tire stores around the country.

BACKGROUND

American Tire is an amalgam of seven companies, and is the country’s largest wholesale distributor of automobile tires. As a tire distributor, American Tire purchases tires from manufacturers such as Bridgestone, Goodyear, and Michelin, and then sells those tires to its customers. American Tire has more than 30,000 customers nationwide, and has been selling tires to some of them since the 1920s. Nearly all of American Tire’s customers are owner-operated small auto repair and tire stores: American Tire’s largest customer accounts for just over one percent of the company’s annual business. Many of these small shops are located in isolated and rural sections of the United States, and are run without the benefit of computer technology or email or web pages. These stores receive information from American Tire exclusively by telephone, fax machine, and mail.

Every day, American Tire receives from its suppliers information on product specials, including information on pricing and availability. American Tire prepares this information for distribution, then faxes these daily product updates and specials to its customers

¹ Pub. L. No. 102-243, 105 Stat. 2394 (1991).

² Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (rel. July 3, 2003) (“Report and Order”).

across the country. Each morning, the company sends out approximately 12,500 faxes from its 62 distribution centers nationwide, and in a given week, more than 20,000 of American Tire's customers receive faxes regarding product specials and updates.³ *American Tire transmits product information by fax only to its existing customers: the company does not send faxes to consumers or to entities other than tire retailers with whom it has an established business relationship.* A key component of that relationship for American Tire and its customers alike is these faxed daily product bulletins, which are the primary way that American Tire communicates each day with its customers.

Because of developments in the automotive industry, American Tire's faxed product updates are highly targeted. For example, many automobiles require particular tires with exact specifications from certain manufacturers. In addition, tire manufacturers frequently offer regional specials on particular tires: for instance, one Goodyear tire suitable for warm weather might be on sale in California, while another tire designed for maximum performance on wet roads may be on sale in the Southeast. These specials are frequently advertised in the media by tire manufacturers to consumers, who then visit their local tire store to purchase the specific tires that are on sale. Finally, some stores sell only certain brands of tires: a Goodyear store, for example, does not sell Bridgestone tires. American Tire sends only those faxed product updates to the customers that require them, so that the California store receives manufacturer-, region-

³ American Tire's 62 distribution centers are the company's regional tire warehouses that in many cases hold the inventory for small tire dealers. Because most tire stores and automobile mechanics have limited space to stock supplies, they are unable to keep on their premises the vast majority of tires that their customers may need. When a consumer requests a specific tire from a store, that store often calls its local American Tire distribution center, which then delivers the tire to the store for the consumer – usually the same day.

and store-specific information pertinent to the cars driven by its customers, while the Atlanta store receives different manufacturer-, region- and store-specific updates.⁴

As noted, the vast majority of American Tire's customers are owner-operated "Mom and Pop" tire stores that run without the benefit of computerization. Thus, there are only two ways that these shops can receive written product information from American Tire – by mail and by fax. Because most of the material that American Tire currently provides to these stores by fax is time-sensitive information about product specials, availability, pricing, and safety, sending this information by mail is simply not an option. Without these daily faxes, local tire stores would be unaware of the availability and pricing of specific tires, and would therefore be unable to serve their customers. Simply put, these small businesses would suffer serious hardship without the ability to receive faxed product information from American Tire. They and their customers rely on this information every day, and American Tire depends on its ability to provide this product and pricing information to those stores.

⁴ Approximately eighty percent of the faxed materials sent by American Tire concerns these product updates and specials. The other twenty percent includes a variety of information about tires that is important to the company's customers. Most notably, American Tire faxes information on product recalls and defects to its customers as soon as it receives this information from the manufacturers. It is critical that tire stores receive these notices as soon as possible so that they can inform their customers, who are consumers, and avoid selling tires that are defective or damaged. Moreover, tire manufacturers rely on this distribution system to disseminate this critical information to the general public. Though this information presumably is not covered by the FCC rule, it is frequently part of the same transmission that contains pricing information.

ANALYSIS

I. THE COMMISSION SHOULD RECONSIDER CERTAIN ASPECTS OF THE FAX ADVERTISING RULES TO REDUCE THE HARMFUL IMPACT ON BUSINESS-TO-BUSINESS COMMUNICATION.

American Tire and its customers rely on the ability to send and receive daily product bulletins with information on pricing and product availability by fax, and the Commission's new rules would prohibit their transmission without express written consent. This would severely harm the industry, forcing American Tire to fundamentally change the way it does business, or obtain consent from its own customers for no public interest benefit.

A. The Established Business Relationship Exception for Faxed Advertisements Should Be Reinstated.

The Commission's unexpected decision to abruptly change the fax advertising rules by eliminating the established business relationship ("EBR") exception addresses a problem that no one identified, and does so in a way that will adversely affect American Tire and its customers across the country. As the Commission's 1992 Report and Order implementing the TCPA stated, "facsimile transmissions from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient."⁵ The Commission reiterated this point in its 1995 Report and Order amending the regulations implementing the TCPA: "[T]he existence of an established business relationship establishes consent to receive telephone facsimile advertisement transmissions."⁶

⁵ Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, ¶ 54 n.87 (rel. Oct. 16, 1992) (CC Docket No. 92-90) ("1992 Report and Order").

⁶ Report and Order, *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* ¶ 37 (rel. Aug. 7, 1995) (CC Docket No. 92-90) ("1995 Report and Order").

The Commission correctly analyzed consumer expectations and the affected privacy interests in 1992 when it noted that “a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests.”⁷ Perhaps most importantly, the Commission’s do-not-fax rules have worked. In reversing the 1992 decision, the Commission did not note significant evidence of *business-generated* complaints that were a result of the EBR rule. Indeed, there is scant evidence of harm to justify the Commission’s abrupt change; in contrast, there is overwhelming evidence of over ten years of business expectations in reliance on that exception. American Tire implemented a practice of faxing to its customers every morning time-sensitive information regarding its products. American Tire’s customers depend on these daily product updates in order to serve the consumers who are their customers. These small tire stores cannot conduct business during the day without this information on product specials, availability, and pricing sent by fax every morning. There is simply no public interest reason to prohibit these transmissions in the absence of express written consent, because there is *no* privacy interest implicated by these faxes. Far from the “junk” faxes that the TCPA and Commission rules were designed to prohibit, the faxed product bulletins that American Tire sends to its customers are essential business communications between parties that depend on those faxes as the only way to do business.⁸

⁷ 1992 Report and Order ¶ 34; *see* 1995 Report and Order ¶ 54 n.87.

⁸ *See Telemarketing/Privacy Issues: Hearing on H.R. 1304 and H.R. 1305 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 102nd Cong. 3-4 (1991) (statement of Rep. Rinaldo) (“Another festering problem has arisen from the so-called ‘junk fax’. Junk fax is more than merely irritating. It represents an unfair shifting of the cost of advertising to the unwitting customer. Also, like autodialers, unsolicited and unwanted faxes can tie up a machine for hours and thwart the receipt of legitimate and important messages.”); 137 Cong. Rec. H11307-01, H11314 (1991) (statement of Rep. Markey) (“I would just like to say that this is the beginning of the end for junk faxes and junk calls in America. . . . When those junk faxes start coming over your machine, you do not think like a Republican or a (continued...)”).

The Commission's new rule, however, inadvertently sweeps those legitimate business communications into its overly broad net. The EBR exception therefore should be reinstated.

Moreover, the Commission's decision to reverse its rulings on the EBR exception to the fax advertising rules was made without adequate notice and comment. In the Notice of Proposed Rulemaking, the Commission did seek comment generally on its "determination that a prior business relationship between a fax sender and recipient establishes the requisite consent to receive telephone facsimile advertisement transmissions."⁹ However, the specific comments that the Commission solicited gave no indication that it was considering eliminating the critical established business relationship exception; rather, the Commission asked merely whether the exception had preserved existing business relationships or adversely affected consumer privacy. The Notice further asked about the exemption, but all of these questions dealt only with issues faced by recipients that were consumers – not businesses – *and all of the comments cited by the Commission concerned faxes sent to individuals with whom the seller had no established relationship.*¹⁰ Had the Commission asked directly about dropping the exemption it would have received numerous comments from companies such as American Tire emphasizing both the importance of the exception to businesses and the fact that the faxes sent by American Tire have no impact on consumer privacy. Indeed, the only impact on consumers of these faxes is that

Democrat; you just think how are you going to be able to get your hands around the neck of the person making you pay with your paper for whatever message they are trying to send you."). In fact, the House Committee Report emphasized that a key reason for prohibiting junk faxes was because during the time that those faxes are transmitted, "the fax machine is unable to process actual business communications." H.R. Rep. 102-317, at 25 (1991).

⁹ 67 Fed. Reg. 62667, 62674 (2002).

¹⁰ See, e.g., Report and Order ¶ 186.

without them, consumers would have a much harder time finding the tires they needed – or American Tire and its customers would be mailing consent forms before they could do business.

B. The Commission Should Allow Consent To Be Provided Orally.

If the Commission does not reinstate the EBR portion of its old fax rules, it should – at a minimum – permit consent for a fax advertisement to be given orally, especially in the business-to-business context. The Commission’s new rules prohibit the transmission of an “unsolicited advertisement” to a person’s fax machine “without that person’s prior express invitation or permission.”¹¹ A fax 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.”¹²

The impact of this requirement is enormous and unnecessary, and the requirement should therefore be modified. A written consent requirement for faxes is superfluous, imposes a solution far out of proportion to the harm it seeks to address, and contradicts the intent of Congress in adopting the TCPA. Simply put, Congress thought about imposing a written

¹¹ 47 C.F.R. § 64.1200(f)(10). An “unsolicited advertisement” is “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).

¹² 47 C.F.R. § 64.1200(a)(3)(i). One interpretation of the new rules is that written and signed consent is only one of a number of possible ways to grant permission to send a faxed advertisement. The regulations provide that a faxed advertisement is not unsolicited “if” prior express invitation or permission that is signed and in writing is provided - not that the fax is unsolicited “unless” or “only if” this is the case. The text of the rule suggests that the example of signed and written consent is not meant to be exhaustive, but rather demonstrates one way that permission can be granted. If that interpretation is correct, then the Commission should so indicate because the language is less than clear. Report and Order ¶ 191; *see* 47 C.F.R. § 64.1200(a)(3)(i), (f)(10).

requirement and opted out. The House Report accompanying the TCPA states that Congress “did not see a compelling need for such consent to be in written form. Requiring written consent would, in the Committee’s view, unreasonably restrict the subscriber’s right to accept solicitations of interest and unfairly expose businesses to unwarranted risk from accepting permissions or invitations from subscribers.”¹³ The Senate Report is equally on point. The Senate bill as introduced contained the phrase “express written consent” for consent on telemarketing, but the requirement that consent be written was deleted from the bill because it was ill-suited to the interests of consumers and sellers.¹⁴ Thus, if the Commission decides to eliminate the established business relationship exception – in the face of more than ten years of business expectations and practices that have developed based on that rule – in order to effectuate the intent of Congress in enacting the TCPA, it must also at minimum allow businesses to give oral consent to receive faxes.

The imposition of the requirement of signed and written consent to receive a fax is regulatory overkill and imposes costs on society and the economy that are out of proportion to the benefit and thus is not in the public interest. Clearly, a written consent is better evidence of consent than an oral expression, and in other areas the Commission regulates, such as “slamming,” the Commission has been steadfast in requiring a high form of evidence of consent that is signed and written. An unauthorized change of one’s telephone company is more than inconvenient – it can interfere with one’s ability to conduct business and potentially result in higher telephone charges. The need for a high form of evidence in that context is clear. In the

¹³ H.R. Rep. 102-317, at 13 (1991). Though this statement was made in the context of telephone solicitations, the underlying rationale applies equally to the fax context.

¹⁴ S. Rep. 102-178, at 5 (1991).

context of faxes, however – and especially faxes going to businesses – the interest at stake, while important, is not as substantial, and so the form of evidence should not be as high. If a small business or consumer receives unwanted faxes for which the sender mistakenly believed that it had obtained oral consent, the recipient can simply ask the sender to stop. The harm in those instances where there was a dispute about consent by a business or consumer is minimal.

By contrast, the harm of a rule that says no person can send a fax to a business or consumer without prior written consent is substantial. As noted, American Tire's daily faxed product updates to its customers are a routine and critical business communication for both parties: without those daily updates, American Tire could not inform its customers of important and time-sensitive product information, and its customers could not serve the consumers who enter their stores. Because American Tire's customers expect and need this information promptly and on paper, but do not have the resources to convert it from another form, the fax machine is the only available means of communication. Most of these customers do not have computer systems or Internet connections on which to conduct business. For that reason, American Tire asks the Commission to clarify that consent may be obtained by fax, and that a fax to a recipient explaining and requesting the requisite consent will not be prohibited as an unsolicited advertisement. Such an interpretation would obviously circumvent the consent requirement in the first place, and virtually paralyze entities, such as American Tire and its customers, that trade primarily in faxes.

For American Tire to obtain written and signed consent from all of its customers imposes an inordinate burden on all parties. Because American Tire's customers already have a credit account with the company, communication between local stores and American Tire is limited primarily to the daily faxed bulletins and telephone calls regarding pricing and

availability of tires. Requiring American Tire to obtain written and signed consent from all of its approximately 30,000-plus customers nationwide – most of which are owner-operated small tire shops and automobile service centers that would be confused, to say the least, as to why the FCC was suddenly prohibiting them from receiving the long-standing daily product updates on which their businesses depend from American Tire – would be onerous at best and serve no public interest purpose.¹⁵

C. The Commission Should Permit at Least One Year After Reconsideration to Implement the Rule.

If the Commission retains its new rules and maintains that faxed advertisements may be sent only after signed and written consent is provided by the recipient, it should set the effective date of the rule for one year after the petitions for reconsideration are decided to enable entities such as American Tire to complete the enormous task of complying with these rules without a serious disruption of their businesses. Without a one-year phase-in period, American Tire may not be able to obtain the requisite consent from its customers; without the requisite consent and the ability to send daily faxed product bulletins, the business of American Tire and its thousands of small business customers would be severely harmed. A one-year phase-in period after the Commission decides the petitions for reconsideration would give American Tire

¹⁵ American Tire also requests that the Commission clarify that a sender need only obtain the recipient's express permission once – and not each time that the recipient asks the sender to transmit faxes to a different fax machine or fax number. Such a requirement of continuously updating permission forms to reflect changes in recipient fax numbers would impose a stifling and unnecessary burden on American Tire and its customers. It would be difficult enough to obtain the written and signed consent once; a requirement of obtaining that consent each time a store changes its fax number or adds an additional fax machine would be unduly burdensome, and would halt essential communication between supplier and retailer until that requirement is met.

reasonable time to obtain the requisite consent from its customers in the course of periodic credit applications and renewals, site visits, and notifications by mail.

* * * *

For the reasons stated herein, American Tire asks the Commission to reconsider and clarify certain aspects of its new fax advertising rules.

Respectfully submitted,

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SERVICE

Courtesy copies of the foregoing Petition for Reconsideration were delivered by hand this 25th day of August, 2003, as follows:

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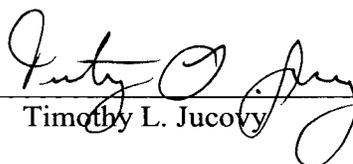
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