

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

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

PETITION FOR RECONSIDERATION OR CLARIFICATION

**AMERICAN ASSOCIATION OF
ADVERTISING AGENCIES
ASSOCIATION OF NATIONAL
ADVERTISERS
NATIONAL ASSOCIATION OF
BROADCASTERS**

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EXECUTIVE SUMMARY

The American Association of Advertising Agencies, the Association of National Advertisers, Inc., and the National Association of Broadcasters respectfully submit that the FCC must reconsider its revision of rules governing transmission of unsolicited facsimile advertising under the Telephone Consumer Protection Act. 47 U.S.C. § 227 (“TCPA”). The new rule no longer allows “established business relationships” to suffice as “prior express invitation or permission” for a fax, and instead requires prior written invitation or permission to authorize a commercial fax. The new, overly burdensome FCC solution to the problem of unsolicited fax advertisements not only will have far-ranging and unintended adverse effects, it also presents issues of major constitutional import.

By removing the “established business relationship” or “EBR” exemption for faxes, the FCC inserts itself between businesses and their customers in a manner that interferes with constitutionally protected communications. That it did so without fully considering the ramifications, offering sufficient record support for its decision, or even attempting a constitutional justification for the new rule renders its action unlawful under both First Amendment and basic administrative law precedents. Moreover, in addition to the general constitutional and business issues it creates, the new rule is particularly problematic for trade associations that require a cost-effective and expeditious means of routinely reaching their members.

When it first adopted the “established business relationship” or “EBR” exemption for faxes in 1992, the Commission properly reasoned that under such relationships, a fax communication “can be deemed to be invited or permitted by the recipient” to comport sufficiently with the statutory requirement. Yet in eliminating the exemption in its most recent order, the Commission did not discuss the expectations of consumers and other recipients of

faxes that reference goods or services and that come from companies with which they have an established business relationship. Consequently, the new rule does not reflect consumer expectations, and it undermines businesses that must communicate with each other via fax. At the same time, though the Commission endeavored to demonstrate the constitutionality of its new national “do-not-call” registry rules, it paid no attention to the First Amendment implications of changing the rules on faxes from businesses to their customers.

The Commission therefore must reconsider eliminating the fax EBR exemption because the rule change in no way balances individual “privacy” rights and freedoms of speech and trade, and the Commission failed to make either the constitutional or evidentiary showing necessary to support its decision. Far from attempting to sustain a balance of interests as the TCPA requires, elimination of the fax EBR exemption jettisons a rule that reconciled the intrusiveness of unsolicited faxes against reasonable business practices and consumer expectations, in favor of a written pre-approval requirement that represents the most extreme solution. Eliminating the fax EBR exemption will have far-ranging – and presumably unintended – ramifications. The new written permission rule will prevent businesses from faxing even such everyday transmissions as restaurant menus, price lists or information about product updates. This would be the case *even if the prospective recipient calls the would-be sender on the phone and requests the information by fax*. The new requirement also imposes onerous new record-keeping and tracking burdens.

In addition, the new written consent requirement also imposes special burdens on trade groups that communicate extensively with members and allow constituents to manage their memberships via efficient, cost-effective faxes. Requiring written consent from each association member before faxes may be transmitted will be expensive and time-consuming. In particular, it

will present onerous administrative and economic burdens that in the present climate of dwindling association budgets and staffs will impose true hardship.

The decision to change the rule from allowing a fax EBR exemption to requiring written consent is insupportable from either a constitutional or administrative law perspective. The Commission entirely failed to conduct any constitutional analysis of this new, more onerous burden on protected speech, and for that reason alone the new rule violates the First Amendment. In addition, the Commission cites no record evidence that actually supports the rule change. It cites only a relative handful of the several thousand comments received in this proceeding, and among the comments it does cite, not one demonstrates or offers any evidence that faxes transmitted under a legitimate established business relationship pose any kind of problem. The Commission also erred in effectively presuming that consumer expectations dictate the only way they can consent to faxes is in a prior writing.

In addition to violating First Amendment protections for commercial speech – which have grown considerably since the FCC first adopted the fax EBR exemption – because the Commission failed to conduct a constitutional analysis, the new rule violates the *Central Hudson* test for commercial speech regulations by being more extensive than necessary to serve any FCC interest. The new prior written approval rule is overbroad and not narrowly tailored, and the Commission failed to consider *any* less restrictive alternatives. In addition, the FCC’s order adopting the new written consent requirement does not anywhere suggest that the Commission gave any consideration to what it means for a fax to be “unsolicited.”

Apart from the general problems created by the rule change, elimination of the fax EBR exemption poses particular problems in the context of faxes by associations to their members. When the Commission first recognized the exemption in first implementing the

TCPA, its identification of implied consent by the recipient was accurate and especially appropriate as to associations and their members. Faxes from associations to their members do not adversely affect consumer privacy, and may be deemed invited or permitted by the ongoing nature of the relationship, especially since “the TCPA does not intend to unduly interfere with ongoing business relationships.” The rules should reflect these realities and expectations.

Accordingly, the Associations respectfully request that the Commission:

- reconsider its elimination of the EBR exemption from the unsolicited fax rules in light of the constitutional and evidentiary considerations overlooked in the Commission’s most recent order;
- retain the fax EBR exemption, and vigilantly enforce the TCPA and FCC rules against unsolicited facsimile advertisements that fall outside the exemption; and
- clarify that association membership constitutes “prior express invitation or permission” for faxes to members (unless a member indicates otherwise), or create a new exemption for faxes by associations to their members.

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PETITION FOR RECONSIDERATION OR CLARIFICATION

The American Association of Advertising Agencies (“AAAA”), the Association of National Advertisers, Inc. (“ANA”), and the National Association of Broadcasters (“NAB”) (together, the “Associations”) hereby request that the Commission reconsider its decision to modify its rules governing the transmission of unsolicited facsimile advertising under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”). ^{1/} Under the Commission’s prior rule, an “established business relationship” generally sufficed as “prior express invitation or permission” for the receipt of facsimile messages. The Associations believe that the decision to change the former interpretation was not fully considered or supported by the record and has unintended, far-ranging adverse consequences. Accordingly, it should be reconsidered to modify the new requirement of written invitation or permission at 47 C.F.R. § 64.1200(a)(3)(i) to more accurately reflect consumer expectations, the exigencies of long-standing business practices, and First Amendment requirements.

PETITIONERS

AAAA, founded in 1917, is the national trade association representing the American advertising agency business. Its nearly 450 members represent virtually all the large, multi-

^{1/} *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 18 FCC Rcd 14014, 14125-29, ¶¶ 187-91 (2003) (“*TCPA Rule Review Order*”) (construing 47 U.S.C. §§ 227(a)(4), (b)(1)(C) and reversing *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 7 FCC Rcd 8752, 8779, ¶ 54 n.87 (1992) (“*TCPA Report & Order*”).

national advertising agencies, as well as hundreds of small and mid-sized agencies, which together maintain 13,000 offices throughout the country. Together, AAAA's members account for approximately 75 percent of all national, regional and local advertising placed by agencies on behalf of corporate clients in the United States.

ANA is the advertising industry's oldest trade association, representing companies offering more than 8,000 brands of goods and services, and is the only organization dedicated to companies that advertise on a national and regional basis. Its membership is a cross-section of American industry, consisting of manufacturers, retailers and service providers across the country. ANA serves the needs of its members by providing marketing and advertising industry leadership, serving as an information resource, and facilitating industry-wide networking.

NAB is the full-service trade association representing the interests of free, over-the-air radio and television broadcasters, serving as the industry's voice before this Commission, other federal agencies, Congress, and the courts. NAB advises its members on key policy and technological issues and management trends. It provides ongoing and "late breaking" broadcast news, industry research, and legal expertise, and offers its member stations the tools to compete by providing a range of products and services.

BACKGROUND

The TCPA authorizes the FCC to regulate telephone solicitations and facsimile advertisements so long as it balances "privacy rights ... and commercial freedoms of speech and trade" in a manner that "protects ... individuals and permits legitimate telemarketing activities." *See, e.g., TCPA Rule Review Order*, 18 FCC Rcd at 14033, ¶ 26 (quoting Section 2(9), Pub. L. No. 102-243). Among other things, the TCPA, and the FCC rules implementing it, prohibit "send[ing] an unsolicited advertisement to a telephone facsimile machine," thereby precluding fax transmission of "material advertising the commercial availability or quality of any goods or services ... to any person without that person's prior express invitation or permission." *See*

47 U.S.C. §§ 227(a)(4), (b)(1)(C); 47 C.F.R. §§ 64.1200(a)(3), (f)(5). When it first implemented the TCPA in 1992, the Commission adopted an “effective exemption” for “established business relationships” from some TCPA statutory and regulatory prohibitions, specifically, those involving prerecorded messages and unsolicited fax advertisements. *TCPA Report & Order*, 7 FCC Rcd at 8770-71, ¶ 34, 8779 n.87. In creating the “established business relationship” or “EBR” exemption, the Commission reasoned that under such relationships, a recorded message or fax communication “can be deemed to be invited or permitted by the recipient” to comport sufficiently with the statutory requirement. *Id.* at 8779 n.87.

Notwithstanding the sound logic on which adoption of the EBR exemption rested, the Commission partially reversed course last month in the *TCPA Rule Review Order*, wherein it eliminated the EBR exemption from the rules governing unsolicited faxes. *TCPA Rule Review Order*, 18 FCC Rcd at 14125-29, ¶¶ 187-91. At the same time, however, it retained the EBR exemption for purposes of the prerecorded message ban, and it incorporated an EBR exemption into its newly adopted national “do-not-call” registry rules. *Id.* at 14077-78, ¶ 112; *id.* at 14042, ¶ 42. The Commission stated that “based on the record, an established business relationship exemption is necessary to allow companies to communicate with their existing customers.” *Id.* at 14077, ¶ 112. It also refined the exemption, crafting rules that allow the established business relationship to arise out of either a transaction or from an inquiry. *Id.* at 14078-80, ¶¶ 113-14.

In eliminating the fax EBR exemption, the Commission did not discuss the expectations of consumers and other recipients of faxes that reference goods or services and that come from companies with which they have an established business relationship. *See generally id.* at 14123-28, ¶¶ 185-91. Conversely, recipient expectations played a central role in the decision to retain the EBR exemption for recorded messages and to incorporate it into the “do-not-call” rules. *See, e.g., id.* at 14078, ¶ 112 (“consumers have come to expect calls from companies with whom they have such a relationship”). Similarly, the Commission endeavored to justify the

constitutionality of the national “do-not-call” registry rules, *id.* at 14052-59, ¶¶ 63-73, but paid no attention to the constitutional implications of inserting itself into fax communications between parties engaged in ongoing business relationships.

In the short time since it eliminated the fax EBR exemption, the FCC has received petitions, comments and protests from literally hundreds of businesses and trade associations asking it to reconsider reversing the long-standing recognition that established business relationships constitute “prior express invitation or permission” under the unsolicited fax rules. Dozens of entities have weighed in to show that the new written consent requirement the Commission has adopted in the fax EBR’s place will be immensely time-consuming and costly.^{2/} The submissions reflect that the written permission requirement will greatly interfere with myriad business-to-business relationships that rely on fax transmissions to conduct business in an expeditious and cost-effective manner.^{3/} While consumers have come to expect telephone calls from companies with which they have an established business relationship,^{4/} companies over

^{2/} *E.g.*, Comment of Paul Brady, filed July 29, 2003 (chief staff officer of seven trade associations and foundations stating “rules on requiring signed permission to send a commercial fax will impose a tremendous hardship on these organizations and hinder our ability to serve our members and the public”); Comment of National Poultry & Food Distributors Association, filed July 28, 2003; Comment of Richard Mason, filed July 28, 2003. Unless otherwise noted, all comments cited herein were filed in CG Docket No. 02-278.

^{3/} *E.g.*, Comment of Duane Lambrecht, filed August 22, 2003 (“change in how the fax is used by business ... is huge and shows a lack of understanding of the convenience created by” faxes, especially as “[w]e currently are being overwhelmed by requests to allow fax communication in the future with our business partners”); Comment of Tammy Betancourt, filed July 28, 2003 (removing fax EBR exemption “is absolutely bad for business, forcing ... companies to obtain the written consent of clients and industry partners before transmitting any fax that could be interpreted as commercial in nature”); Comment of Beverly Barsook, filed July 28, 2003 (“Our industry ... uses the fax machine to send and receive merchandise orders as part of normal business procedures, it appears that this will now be prohibited without written permission from each client. This will have a negative business impact”).

^{4/} *TCPA Rule Review Order*, 18 FCC Rcd at 14077-78, ¶ 112.

the last ten-plus years that the fax EBR exemption has been in effect have come not just to expect, but to *rely* on the ability to fax one another in the ordinary course of business. 5/

DISCUSSION

The Commission must reconsider its elimination of the fax EBR exemption because the rule change in no way balances individual “privacy” rights and freedoms of speech and trade, and the Commission failed to make either the constitutional or evidentiary showing necessary to support its decision. Far from endeavoring to sustain the balance of interests the TCPA requires, the Commission’s elimination of the fax EBR exemption jettisons a rule that reconciled the intrusiveness of unsolicited faxes against reasonable business practices and consumer expectations, in favor of a written pre-approval requirement that represents the most extreme solution. 6/ The new overly burdensome FCC solution to the problem of unsolicited fax advertisements not only will have far-ranging and unintended effects, it also presents issues of constitutional import. By removing the fax EBR exemption, the Commission inserts itself between businesses and their customers in a manner that interferes with constitutionally protected communications between them. That it did so without fully considering the ramifications, offering sufficient record support for its decision, or even attempting a constitutional justification for the new rule renders its action unlawful under both First Amendment and basic administrative law precedents.

5/ Cf. *Kaufman v. ACS Sys., Inc.*, 2 Cal.Rptr.3d 296, 302 (Cal. App. 2 Dist. 2003) (“the facsimile machine has become a primary tool for business to relay instantaneously written communications and transactions”) (quoting H. Rep. 102-317, 102nd Cong., 1st Sess. (1991) at 10).

6/ Conceivably, a total ban on unsolicited faxes would be more extreme, but such a prohibition would exceed the authority of the TCPA and violate the First Amendment. See *TCPA Rule Review Order*, 18 FCC Rcd at 14125, ¶ 188 (“TCPA does not act as a total ban on fax advertising”); *Kaufman*, 2 Cal.Rptr.3d at 316 (upholding constitutionality of TCPA and finding “TCPA does not act as a total ban on fax advertising” because it allows “advertisements to those with whom ... [an] advertiser has an established business relationship” and “consent for ... faxes”) (citing *Nixon v. American Blast Fax, Inc.*, 323 F.3d 649, 659 (8th Cir. 2003); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1556 (8th Cir. 1995); *Moser v. FCC*, 46 F.3d 970, 975 (9th Cir.1995); 47 U.S.C. § 227; 47 C.F.R. § 64.1200; 15 U.S.C. §§ 6101-6108; 16 C.F.R. §§ 310.1-310.9).

Moreover, in addition to the general constitutional and business issues it creates, the new rule is particularly problematic for trade organizations such as the Associations that require a cost-effective and expeditious means of routinely reaching their members. Accordingly, the FCC must reconsider its elimination of the fax EBR exemption.

I. Eliminating the Fax EBR Exemption Will Have Significant Adverse Consequences

Eliminating the fax EBR exemption will have far-ranging, and one can only assume, unintended ramifications. For example, under the new written permission rule, businesses will not even be able to fax such everyday transmissions as restaurant menus, price lists or information about product updates. This would be the case *even if the prospective recipient calls the would-be sender on the phone and requests the information by fax.* ^{7/} Businesses would have to go through the baroque process of having the requesting party first provide written permission – which the business would not be able to acquire through a fax it sends to the recipient – before it could comply with the caller’s request. ^{8/} Moreover, every new business relationship that contemplates or would be facilitated by the exchange of information by fax must now be preceded by carefully orchestrated exchanges of not only contact information but written consents that conform to FCC requirements. The new rule also will erect a substantial barrier to fax-on-demand services that operate without any direct activity on the part of the

^{7/} See Comment of Beverly Barsook, *supra* note 3 (“The rule raises customer service problems because in spite of being asked by phone to fax an application we are prohibited from doing this. People simply will not understand why you cannot fax something they have specifically asked you to fax to them.”); Comment of Susan Kalian, filed July 28, 2003 (“The FCC implementation of this rule presents problems for both consumers and business. As a consumer I cannot receive information by fax after a simple call to a business.”).

^{8/} See *TCPA Rule Review Order*, 18 FCC Rcd at 14127, ¶ 191 (listing only “direct mail, websites, and interaction with consumers in stores” as means of obtaining “express permission” to “any faxes” that must be obtained “before transmitting” them) (emphasis added).

sender and that, consequently, cannot assure that the requesting party, with whom the sender may have an ongoing business relationship, has already provided written consent. ^{9/}

The new written consent requirement also imposes onerous new record-keeping and tracking requirements. Because the written consent must include not only the recipient's signature and expressly stated permission, but also the telephone number(s) for which faxes are permitted, ^{10/} any time a company changes one or more of its fax numbers, or a business' contact undergoes a change in position, location, etc., that results in assignment of a new fax number, a new consent must be secured. Businesses sending faxes also will have to maintain databases of fax consents that they will have to consult each time they wish to send a fax though such a step is expensive and unnecessary to protect against businesses sending faxes to their customers and/or business counterparts. The requirements also will require companies to construct compliance programs that somehow reach any and all personnel with the responsibility – or even simply the opportunity – to send faxes to ensure that every recipient's telephone number appears on the company's fax database. *Cf. Rudgayzer & Gratt v. Enine, Inc.*, 749 N.Y.S.2d 855, 860 (Civ. Ct. N.Y. 2002) (discussing circumstances “when the recipient is a large workplace, and one of the employees might have consented to, or invited, the fax”).

The new written consent requirement, and the government's insertion into ongoing relationships, also imposes special burdens on trade groups such as the Associations that communicate extensively with members, and who allow constituents to manage their memberships, via efficient, cost-effective faxes. Association membership is a critical means for many businesses

^{9/} Fax-on-demand services typically provide direct, 24-hour access to frequently requested documents. Prospective fax recipients seeking information may obtain it instantly based only on the requirement that they have a touch-tone phone. Callers dial a dedicated fax-on-demand number and are connected to a series of voice prompts that permits access to a document or even a library of documents. The requested information is then transmitted via fax without any direct interaction on the sender's part. *See, e.g.*, <http://www.faxquestintl.com/faxondemand.htm>.

^{10/} 47 C.F.R. § 64.1200(a)(3)(iii).

to remain current in their industries and to learn of developing situations, breaking news and other time-sensitive matters. Fax machines that provide hard copy on a near-instantaneous basis are particularly well-suited for such purposes. In addition, a key benefit of membership is access to manuals, bulletins, newsletters, and other publications, and announcements of seminars, training, and other informational and educational services, that associations are uniquely able to provide and that are particularly well-suited to being offered via fax.

The decision to require prior written consent from every association member before these kinds of faxes may be transmitted will impose an expensive and time-consuming burden on the Associations and similar organizations. A myriad of submissions in response to the rule change have already testified to this impact. They have cited “onerous administrative and economic burdens,” 11/ that in the present climate of dwindling association budgets and staffs will impose true hardship. 12/ Trade associations that lack the financial, manpower or other resources necessary to obtain and track written consent from all their members face having to “curtail communications [with them], reducing ... efficiency and effectiveness and increasing costs” even apart from those created by the written consent requirement. 13/ They have noted

11/ National Poultry & Food Distributors Association, *supra* note 2. These administrative and economic burdens arising from elimination of the fax EBR exemption include not just the costs of compliance, but also the expense and effort of responding to overly zealous “professional plaintiffs” who attempt seek out rule violations and/or isolated breakdowns in compliance efforts and file frivolous claims, as one of the Associations has already experienced. This not only drains association resources, it has a chilling effect on associations’ willingness to rely on faxes due to fear of accidental misdirection. The fact that the rule change opens the door to such opportunities for “greenmail” runs counter to FCC efforts to preclude such prospects. *Compare* 47 C.F.R. § 1.935 (barring settlement payments in excess of legitimate and prudent expenses).

12/ Comment of Susan Newman, filed July 29, 2003 (“In today’s economy, our association is struggling financially and just eliminated 1 of our 2 staff positions.”); Comment of Mert Scholten, filed July 28, 2003 (filing for Fresno-Madera (CA) Medical Society with “staff of three”); Comment of Victoria Andrews, filed July 28, 2003 (referencing “already overworked small staff”). *See also* Comment of the Marble Institute of America, filed July 28, 2003.

13/ Request for Stay of Facsimile Advertisement Rules, Chamber of Commerce of the United States, et al., CG Docket No. 02-278, filed August 8, 2003.

the new rule “will eliminate [their] ability to market our programs to members” and will force communication “to return to ... regular mail, which is neither efficient nor cost effective.” 14/

Because of the immediate hardship that enforcement of its new interpretation would cause, the Commission granted reconsideration on its own motion to extend the effective date of the new rule for at least sixteen months. 15/ However, it did not indicate whether it was planning to rescind its new approach either in whole or in part. The Associations are concerned about the above-described impact that elimination of the fax EBR exemption will have not just on their ability to communicate with the members, but also their members’ ability to engage in reasonable and vital commercial activities. Accordingly, the Associations respectfully request that the Commission rethink or refine how the unsolicited facsimile advertisement rules apply in general, as well as in the context of trade associations and their members.

II. The *TCPA Rule Review Order* Provides Neither the Constitutional Analysis Nor the Evidentiary Basis Needed to Support Elimination of the Fax EBR Exemption

The Commission must grant reconsideration and re-establish the fax EBR exemption because its elimination of the rule in favor of written pre-approval is legally insupportable. Elimination of the exemption is constitutionally infirm for several reasons, not the least of which is the complete failure to conduct any kind of First Amendment analysis of the new burden on protected speech that the written permission rule poses. This alone violates the well-settled precept that the FCC bears the burden of establishing the constitutionality of any rule it adopts restricting protected speech. 16/ Yet the Commission failed in eliminating the fax EBR exemp-

14/ Comment of the Washington State Medical Association, filed August 14, 2003.

15/ *Rules and Regulations Implementing the Telephone Consumer Protection Act*, CG Docket No. 02-278, Order on Reconsideration, FCC 03-208 (rel. Aug. 18, 2003) (“*TCPA Rule Review Recon. Order*”) (extending written consent requirement effective date to January 1, 2005).

16/ *Time Warner Entm’t Co., L.P. v. FCC*, 240 F.3d 1126, 1128 (D.C. Cir. 2001). See also *Kaufman*, 2 Cal.Rptr.3d at 313 (“The party seeking to uphold a restriction on commercial speech carries the burden of justifying it” by more than “mere speculation or conjecture [but] rather [by

tion to attempt even the nominal effort offered elsewhere in the *TCPA Rule Review Order* to justify the constitutionality of rule changes that will affect commercial speech, or to show how eliminating the exemption satisfies the TCPA’s balancing requirement. ^{17/} This dereliction is fatal under the TCPA, Section 2(9), Pub. L. No. 102-243 (requiring balance of interests), the First Amendment, *Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987) (“no precedent ... permits a federal agency to ignore a constitutional challenge to the application of its [rules]”), and the Administrative Procedure Act. *E.g., Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (reversing agency action where it “entirely failed to consider an important aspect of the problem”) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

A. The Commission’s Failure to Conduct a Constitutional Analysis Concerning the Elimination of the Fax EBR Exemption Renders the Rule Change Invalid

The Commission’s failure to undertake necessary constitutional analysis makes elimination of the fax EBR exception wholly unsustainable. Had the Commission even attempted to justify the change under the First Amendment, it would have had to start by recognizing that commercial speech increasingly has been accorded substantially greater constitutional protection since the original implementation of the TCPA over a decade ago. ^{18/}

showing] the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993), and citing *Greater New Orleans Broad. Assn., Inc. v. United States*, 527 U.S. 173, 188 (1999)).

^{17/} See *TCPA Rule Review Order*, 18 FCC Rcd at 14052-59, ¶¶ 63-73 (analyzing national “do-not-call” registry under *Central Hudson Gas & Elec. v. Public Serv. Comm’n*, 447 U.S. 557 (1980), and commercial speech doctrine); *id.* at 14036, ¶ 29 (claiming to be “mindful of the need to balance the privacy concerns of consumers with the interests of legitimate telemarketing”).

^{18/} In generally strengthening its overall test for protecting commercial speech, the Supreme Court since 1992 has invalidated (1) an ordinance regulating commercial but not noncommercial newsracks, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410; (2) a state ban on in-person solicitation by CPAs, *Edenfield v. Fane*, 507 U.S. 761 (1993); (3) a state ban on using the designations “CPA” and “CFP” on law firm stationary, *Ibanez v. Florida Dept. of Bus. and*

Ostensibly, this enhanced and still growing protection should have lead to *more* rather than *less* protection for faxed advertisements from businesses to their customers. At the very least it should have argued in favor of the FCC retaining the fax EBR exemption as an indispensable accommodation under a rule that otherwise bars protected speech. *Kaufman*, 2 Cal.Rptr.3d at 316 (upholding constitutionality of TCPA in part because FCC construed it as permitting “fax ... advertisements to those with whom the advertiser has an established business relationship”). Instead, the Commission adopted a rule that imposes a much greater burden on businesses seeking to communicate with their customers via fax, and thereby imposes a greater restriction on commercial speech.

The Commission’s action is all the more troubling given that it cites no record evidence that actually supports the rule change. ^{19/} As a threshold matter, though the *TCPA Rule Review Order* purports to base elimination of the fax EBR exemption on the fact that “consumers feel ‘besieged’ by unsolicited faxes,” 18 FCC Rcd at 14124, ¶ 186, the portion of the order eliminating the exemption cites only a relative handful of the several thousand comments received in this proceeding. *See id.* at 14123-28, ¶¶ 185-91. Moreover, not one of them demonstrates or offers any evidence that faxes transmitted pursuant to a legitimate established business relationship pose any kind of problem. In fact, some of the comments cited do not even

Prof'l Regulation, 512 U.S. 136 (1994); (4) a restriction on printing a designation of alcohol content on beer labels, *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); (5) a state ban on advertising alcohol prices, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); (6) a federal ban on broadcast advertising of casino gambling, *Greater New Orleans Broadcasting*, 527 U.S. 173; (7) a state regulation of tobacco advertising, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); and (8) FDA restrictions on advertising drug compounding. *Thompson v. Western States Med. Ctr.*, 536 U.S. 357, 366-69 (2002).

^{19/} *AT&T Corp. v. FCC*, 86 F.3d 242, 247 (D.C. Cir. 1996) (“under the APA, we must set aside a Commission order if the record lacks ‘substantial evidence’ to support its conclusion” that is “more than a mere scintilla,” *i.e.*, constitutes “such relevant evidence as a reasonable mind might accept as adequate”) (quoting *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (internal quotations omitted), and construing 5 U.S.C. § 706(2)(E)).

discuss unsolicited faxes. 20/ Others complain about unsolicited faxes but make no mention whatsoever of problems arising from the EBR exemption. 21/ And most of the complaints involve faxes transmitted in violation of the TCPA and FCC rules by senders unable to make even a colorable claim to the EBR exemption. 22/

The fact that these comments cite examples that violated existing rules rather than faxes sent under a colorable established business relationship is strong evidence that the asserted problem of consumers feeling “besieged” with unwanted faxes arises from those who would not comply with either the former rules or the FCC’s new version. They also argue strongly in favor of the fact that the solution is not eliminating the fax EBR exemption for entities that can legitimately claim ongoing business relationships, but heightened enforcement of the rule as it existed against transgressors. Even commenters the FCC cites as allegedly supporting elimination of the EBR exemption agree that stronger enforcement is the answer. *See* Michael J. Blich Comments (citing “unsolicited fax[es that] ignore the law” and “implor[ing] the FCC to take immediate and swift actions concerning these violations”). Moreover, it is notable that several of the comments the Commission cites in the section of the *TCPA Rule Review Order*

20/ *See, e.g.*, Chris Hernandez Comments (cited at *TCPA Rule Review Order*, 18 FCC Rcd at 14124 n.682).

21/ *E.g.*, Damien Blevins Comments; Peter LeCody Comments; Joe Shields Comments; Anthony Oppenheim Comments; Jim Carter Comments; JC Homola Comments; Mark R. Lee Comments; Mark Aratow Comments (all cited at *TCPA Rule Review Order*, 18 FCC Rcd at 14124-27 nn.682-83, 687, 697, 703).

22/ *E.g.*, Michael J. Blich Comments (cited at *TCPA Rule Review Order*, 18 FCC Rcd at 14127 n.700) (citing faxes that “ignore the law completely”); John Holcomb Comments (cited at *TCPA Rule Review Order*, 18 FCC Rcd at 14126 n.697 (citing faxes sent based on fax number in trade association directory); Mathemaesthetics Comments (cited at *TCPA Rule Review Order*, 18 FCC Rcd at 14125 n.682) (citing “faxes [that] violated state law [and] TCPA,” including faxes from “secretary of ... church” who sent “solicitations for a multi-level marketing scheme” for which no EBR existed, and sender that claimed EBR exemption but was denied in court).

eliminating the fax EBR exemption do not favor such evisceration of the rule but rather solutions short of elimination that would preserve the rule in some form. 23/

A corollary to the Commission’s decision to eliminate the fax EBR exemption despite a lack of record support for doing so, and which also undermines that decision, is the presumption of consumer expectations that dictate the only way they can consent to faxes is in a prior writing. Again, since the new written pre-approval rule significantly restricts protected speech, the Commission has the burden of justifying the requirement. *See supra* at note 16. Yet here, too, the Commission did not even delve into what consumers consider to be sufficient “prior express invitation or permission” to receive a fax. 47 U.S.C. § 227(b)(1)(c). This is most glaringly evident in the way the new rule would preclude faxing a price list, product fact sheet, or even a mere menu – *even if the recipient calls and requests the fax* – without first obtaining written permission to do so. The fact of the matter is that consumers expect to be able to “invite” or “permit” a fax in a variety of ways, yet the rule does not reflect this reality and the *TCPA Rule Review Order* did not even consider it. The same holds true for business interactions, wherein companies expect to be able to deal with each other via fax. This much is evident even from comments the Commission cites as allegedly supporting the rule change. 24/

23/ *See id.* (favoring solution where “rights of businesses to contact those with whom they have a distinct business relationship is still protected” and suggesting enhanced enforcement and rules that “specif[y] what level of prior relationship there was”); Comments of Allen Wilkins, Jr. (cited at *TCPA Rule Review Order*, 18 FCC Rcd at 14127 n.703 (advocating “control[ing] this [fax] activity to some reasonable point without creating ... just more bureaucracy”); NCL Comments at 6 (advocating solution that allows fax solicitations from “companies with which the recipient has established an account”).

24/ *See Mathemaesthetics Comments* at 3 (discussing “legitimately faxed purchase order” as part of apparent business-to-business transaction).

B. Elimination of the Fax EBR Exemption in Favor of a Prior Written Permission Requirement is More Restrictive Than Necessary to Serve the FCC's Interest

While the absence of record support for eliminating the fax EBR exemption shown above means the rule change satisfies neither *Central Hudson's* substantial interest test nor its direct advancement constraint, thereby rendering it invalid, ^{25/} the written permission requirement also runs afoul of the First Amendment because it violates *Central Hudson* by being “more extensive than is necessary to serve [the asserted] interest[s].” *See* 447 U.S. at 566. The comments, objections and petitions the FCC received in the wake of the *TCPA Rule Review Order* amply demonstrate that the written permission requirement imposes an onerous burden on ongoing relationships. ^{26/} The Commission acknowledged the great weight of this burden in the *TCPA Rule Review Recon. Order* by finding that companies will need as long as a full sixteen months to come into compliance with the rule. FCC 03-208, ¶¶ 5-6.

The new prior written approval rule is constitutionally infirm because it is overbroad and not narrowly tailored to advance the FCC's asserted interests. As noted, the Commission took a less restrictive alternative, *i.e.*, allowing established business relationships to comprise “invitation or permission” to a fax, and replaced it with an excessively restrictive alternative. In doing so, it failed to consider *any* less restrictive alternatives, as *Central Hudson* requires.

^{25/} *E.g.*, *National Advertising Co. v. Town of Babylon*, 900 F.2d 551 (2d Cir. 1990) (finding unconstitutional ordinance that did not identify governmental interests); *Adolph Coors Co. v. Bentsen*, 2 F.3d 355 (10th Cir. 1993) (Act was unconstitutional restraint on commercial speech in violation of First Amendment where it did not directly advance government's goal).

^{26/} *E.g.*, Comment of Amanda Buttenshaw, filed July 29, 2003 (requesting FCC to “[f]ind another way to deal with unsolicited faxes ... without interfering with good business relationships that have taken years to develop”); Comment of Shasta Johnson, filed July 29, 2003 (“By removing the [EBR] qualification from the fax regulations, you are hampering my ability to communicate with my clients” and “will unjustly punish me and fellow businesses that have made a conscientious effort to respect others and obtain permission before sending faxes.”).

For example, even as far back as the original implementation of the TCPA, commenters proposed company-specific and other “do-not-fax” alternatives, but the Commission dismissed them out of hand. *See TCPA Report & Order*, 7 FCC Rcd at 8779 n.87. This created a significant problem, however, that contributed significantly to consumers “feeling besieged” by unwanted faxes. *TCPA Rule Review Order*, 18 FCC Rcd at 14124, ¶ 186. Specifically, it denied consumers any means of terminating the established business relationship pursuant to which they may have received unwanted faxes. That this was a significant gap in the regulations is now apparent not only from consumers’ feelings of powerlessness to stop unwanted faxes, *id.* at 14024, ¶ 186, but also from the fact that in extending the EBR exemption to its “do-not-call” rules at the same time it eliminated it from the fax rules, the Commission embedded a way to terminate the relationship into the “do-not-call” rules. *See id.* at 14069-70, ¶ 96. Nothing in the *TCPA Rule Review Order* suggests that the Commission even considered this intermediate, less-restrictive step of communicating a “do-not-fax” request as a means of dealing with potential harm arising from the fax EBR exemption.

The Commission also ignored less restrictive alternatives offered by commenters it cited as supposedly supporting elimination of the fax EBR exemption. For example, whereas the Commission chose to impose the onerous prior written consent requirement, Mathemaesthetics offered a less onerous approach. Mathemaesthetics Comments at 4-5. It would require only that the sender of a fax “maintain a record of the prior express permission” including the “method of opting in,” which presumably would include means in addition to prior written consent. *Id.* This conceivably would include a phoned-in request for information to be faxed, which as noted above the new rule denies though it is likely the most obvious means of inviting or permitting a particular fax. Consumer advocate organization NCL would permit an even more flexible rule. It advocated an approach where “[o]nly companies with which the recipient has an established account [w]ould be allowed to send fax solicitations.” NCL Comments at 6. Though this

construction is still unduly narrow because, for example, it would preclude consumers calling to request faxed information, it would largely preserve the fax EBR exemption but would ensure a sufficient record that would allow an entity to meet its burden of “clear and convincing evidence of existence of such a relationship.” *TCPA Rule Review Order*, 18 FCC Rcd at 14078, ¶ 112.

Though these less restrictive options were presented in comments that the Commission clearly reviewed and in fact relied upon, the *TCPA Rule Review Order* makes clear that it considered neither these, nor any other less restrictive options. For example, though the prospect of “do-not-fax” rules were proposed when the Commission adopted the fax EBR exemption (and again in this proceeding), the Commission rejected that option on grounds that the statute does not allow it to make exceptions for any unsolicited fax advertisements. *TCPA Report & Order*, 7 FCC Rcd at 8779 n.87. This reasoning, however, is internally inconsistent with the contemporaneous decision in 1992 to adopt the fax EBR exemption.^{27/} Rejection of the fax EBR exemption also is inconsistent with the Commission’s observations that “based on the record, an established business relationship exemption is necessary to allow companies to communicate with their existing customers,” and that “consumers have come to expect calls from companies with whom they have such a relationship.” *Id.* at 14077-78, ¶ 112.

Furthermore, the *TCPA Rule Review Order* does not anywhere suggest that the Commission, in eliminating the fax EBR exemption, gave any consideration to what it means for a fax to be “unsolicited.” Plainly when a consumer (or business) phones a business and orally requests information by fax, it cannot be said to be “unsolicited.” Nevertheless, the

^{27/} *Id.* Adoption of “do-not-fax” rules allowing unwilling recipients to terminate an established business relationship that would otherwise permit unsolicited faxes, or that would allow consumers to inform would-be senders that a fax is “unsolicited,” is no more an “exception” to the statutory prohibition than the fax EBR exemption itself. Notably, even in eliminating the fax EBR exemption the Commission did not suggest that the exemption is not permitted under the statute, but rather (wrongly) that established business relationships can no longer be construed as invitations or permission by a consumer or business to the receipt of faxes. See *TCPA Rule Review Order*, 18 FCC Rcd at 14126-27, ¶ 89.

Commission's new rule would require prior written permission before such a request may be fulfilled. This is not only inconsistent with the Commission's new "established business relationship" definition that reflects consumer expectations arising out of "inquiries," it demonstrates that the Commission's rule is over-inclusive and thus not narrowly tailored as the First Amendment requires. 28/

While the FCC need not "consider every conceivable means that may restrict less speech," it must at least consider "obvious and substantially less restrictive alternative[s]." *US West, Inc. v. FCC*, 182 F.3d 1224, 1238-39 & n.11 (10th Cir. 1999). Yet it is clear here that it failed to consider *any* alternatives to a rule that requires written prior consent to faxes containing information about the commercial availability or quality of goods or services. The Supreme Court has stressed that the tailoring requirement of *Central Hudson's* fourth prong requires "targeting those practices" that cause the problems sought to be avoided "while permitting others." *Lorillard*, 533 U.S. at 563. *See also Utah Licensed Beverage*, 256 F.3d at 1073-74. In its most recent construction of this *Central Hudson* requirement, the Supreme Court stressed that "if the Government could achieve the interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Western States Med. Ctr.*, 535 U.S. at 372. *See also U.S. v. Playboy Entertainment Group*, 529 U.S. 803, 823-24 (2000). Accordingly, the Commission must retain the fax EBR exemption, and vigilantly enforce the TCPA and FCC rules against unsolicited facsimile advertisements that fall outside the exemption.

28/ *Time, Inc. v. Regan*, 539 F.Supp. 1371, 1390 n.22 (1982) ("over-inclusivity indicates a failure to be a narrowly tailored means of serving a compelling state interest") (quoting *Consolidated Edison v. Public Serv. Comm'n*, 447 U.S. at 530, 535 (1980)) (internal quotation omitted), *aff'd in part, rev'd in part*, 468 U.S. 641 (1984). It is also a patently unreasonable interpretation of the statute that denies any meaning to the word "unsolicited" in the fax ad ban. *See AT&T Corp. v. FCC*, 292 F.3d 808, 812 (vacating FCC action, noting that "all parts of a statute are to be given effect") (citing *Weinberger v. Hynson, Westcott & Dunning*, 412 U.S. 609, 633 (1973)).

III. The FCC Should Ensure that the Unsolicited Facsimile Advertisement Rules that Emerge from Reconsideration Accommodate Faxes By Associations to Members

The Commission should reinstate its prior decision on established business relationships or at least narrow its rule change as it applies to associations and their members. If it takes the second option, it could create a new exemption for faxes by associations to their members, or clarify that association membership constitutes sufficient prior express permission to receive faxes from the association. Such accommodation would reflect the sound reasoning underlying the prior FCC interpretation of the interplay between express permission to receipt of a fax and the EBR exemption, which is still accurate for associations and their members, notwithstanding recent findings to the contrary in the broader context. It would also be consistent with the current FCC analysis of the established business relationship and consumer expectations. 29/

The Commission's recognition of the fax EBR exemption when first implementing the TCPA, based on implied consent by the recipient, was accurate and particularly appropriate in the context of associations and their members. In acknowledging the exemption with respect to faxes, the FCC referenced findings it made in creating an EBR exception for telephone solicitations. 30/ These included the facts that communication with someone with whom a prior business relationship exists does not adversely affect consumer privacy, that such communication may be deemed invited or permitted by the ongoing nature of the relationship, and that "the TCPA does not intend to unduly interfere with ongoing business relationships." 31/

The *TCPA Rule Review Order* found that consumers now report receiving faxes far exceeding the scope of whatever implicit consent may arise from their established business

29/ *TCPA Rule Review Order*, 18 FCC Rcd at 14084, ¶ 112 ("consumers have come to expect calls from companies with whom they have such a relationship, and ... under certain circumstances, they may be willing to accept these calls").

30/ *TCPA Report and Order*, 7 FCC Rcd at 8779 n.87 (citing *TCPA Report and Order* ¶ 34).

31/ *Id.* ¶ 34 (citing, *inter alia*, H. Rep. 102-317 at 13).

relationships, and that the current rules thus may be “ineffective.” 32/ Whatever merits those findings may have as a general proposition (and the above discussion makes clear there may be none), the Commission’s prior findings regarding implied consent to faxes under established business relationships remain valid for association faxes to their members. Nothing in the record or the *TCPA Rules Review Order* suggests consumers receive many – or even any – unsolicited faxes from trade associations. 33/ This is unsurprising, as trade groups such as the Associations typically have businesses, rather than individuals and/or consumers, as their members. The privacy and cost-shifting problems associated with unsolicited faxes are thus not present with respect to faxes associations transmit to their members. Natural checks and balances inherent in the ongoing member relationship prevent abuse, as members will notify association managers if they feel “besieged” by too much fax communications. 34/ On the other hand, loss of the ability to fax members absent onerous and time-consuming consent procedures would significantly interfere with the ongoing relationship. 35/ Nothing in the record undermines these conclusions.

If anything, there would be even greater evidence showing more conclusively that the fax EBR exemption remains appropriate for association faxes to their members had the issue been presented squarely for comment prior to the *TCPA Rule Review Order*. However, with respect to association members, the Notice of Proposed Rulemaking (“NPRM”) in this docket inquired only whether publication of members’ fax numbers in a directory or listing constitutes

32/ *TCPA Rule Review Order*, 18 FCC Rcd at 14124, ¶ 186.

33/ Even where comments cited in support of eliminating the fax EBR exemption mention abuse of trade association membership to send faxes, it is in the context of members assuming an establishing business relationship with one another, or outsiders construing the listing of a fax number in an association registry as consent to faxes, and does not involve faxes by associations to their members. *See, e.g.*, Michael J. Blich Comments.

34/ *Compare TCPA Rule Review Order*, 18 FCC Rcd at 14124, ¶ 186 (“some consumers feel “besieged” by unsolicited faxes”).

35/ *See supra* notes 2, 26.

prior consent to the receipt of faxes for senders other than the association. 36/ And as to whether an established business relationship may imply prior invitation or permission, the NPRM only raised the issue generically, and did not inquire at all how the fax EBR exemption works in the association-member context. 37/ In fact, the *TCPA Rule Review NPRM* couched EBR questions exclusively in the context of protecting consumers from unsolicited faxes, *id.*, a problem which, as noted above, has little relevance in the context of faxes by associations to their members.

Given the *TCPA Rule Review NPRM*'s perspective on the implied consent and EBR issues as they relate to faxes, comments leading to the *TCPA Rule Review Order* did not address the specific need of associations to send faxes to their members, or the specific expectations of members to receive them. The issue only now is being explored in light of spreading awareness of the unintended impact of the revised TCPA rules on faxes by associations to their members. The FCC's failure to address the question of faxes by associations to their members may render the *TCPA Rule Review Order* and new written-permission rule vulnerable to judicial challenge as applied to such faxes, unless it reconsiders the full implications of its change in policy. 38/

On reconsideration, the FCC should clarify that membership in an association constitutes "prior express invitation or permission" for an association to send faxes to members, unless a member indicates it does not wish to receive such faxes. Membership in an association properly may and should be deemed consent to receive such faxes, particularly where the member provides the association a fax number for that purpose. The numerous petitions and

36/ *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 17 FCC Rcd 17459, 17482-83, ¶ 38 (2002) ("*TCPA Rule Review NPRM*"). *See also supra*, note 33.

37/ *Id.* at 17483, ¶ 39.

38/ *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1051 (D.C. Cir. 2002) (a decision is arbitrary and capricious if the agency fails "to consider an important aspect of the problem") (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); *Sprint Corp. v. FCC*, 315 F.3d 369, 374-76 (D.C. Cir. 2003) (reversing Commission action for failure to provide adequate notice of rule change).

requests for relief already on file are more than adequate evidence that members expect to be contacted by fax by associations they join. ^{39/} Indeed, there is no record of any complaints from trade association members that they are “besieged,” or even ever subject to, unwanted faxes from associations they have joined. ^{40/} Notably, the staunchest opponents of “junk faxes” that have spoken out in favor of leaving the new fax rules intact have not suggested that faxes from associations to members pose a problem for consumers or home businesses. ^{41/} Even comments praising the elimination of the fax EBR exemption support making the rules “less onerous to the likes of associations.” Comments of John Koch, CG Docket No. 02-278, filed August 14, 2003.

^{39/} See, e.g., Comment of Betty Kjellberg, filed July 29, 2003 (“Although I absolutely DETEST fax advertising, I do not consider the faxes I receive from organizations to which I pay membership dues, to be ‘advertising.’”) (emphasis in original); Comment of Mary R. Tebeau, filed July 29, 2003 (“Individuals and companies JOIN associations to stay abreast of current information ... via fax.”) (emphasis in original); Comment of Robert Hirsh, filed July 29, 2003 (“When our members join the Association, they expect [us] to send them needed information and would resent the Association securing permission to send information via fax[.]”); Comment of Harry A. Gallis, filed July 29, 2003 (“As a member of several professional organizations that communicate with me via fax or email, I have great concerns about this new regulation severely curtailing effective communication and placing burdens on us for the conduct of normal business.”); Comment of Lauren Barnett, filed July 29, 2003 (“Association members receive education and information through fax and by virtue of their voluntary membership in the association expect to receive this information without having to sign up for it or continue to receive it.”).

^{40/} See, e.g., Comment of Art Castle, filed July 28, 2003 (“In 15 years in association management ... I have never had one request not to fax a member company.”); Comment of Sierra Sacramento Valley Medical Ass’n, filed July 28, 2003 (“In 16 years, I have never had a complaint from any physicians regarding a fax from this office.”); Opposition of Rob Usakowski, CG Docket No. 02-278, filed August 21, 2003 (comparing no “problem with faxes received from businesses with an established business relationship [or] complaints from our customers regarding material we fax to them” with “faxes at our place of business from companies with which we have no established business relationship”).

^{41/} See generally, e.g., Opposition of Robert Biggerstaff, CG Docket No. 02-278, filed August 18, 2003 (abuse of claimed EBR); Oppositions of Wayne Strang, CG Docket No. 02-278, filed August 11-12, 2003.

Accordingly, the Commission must act to remove impediments to the ability of trade groups like the Associations to communicate with their members by fax. ^{42/} Any of the foregoing actions will give effect to the expectations of trade association members to be contacted by fax as one of the benefits of membership. ^{43/} It will allow associations to continue to fulfill their missions in a cost-effective manner without requiring the onerous and expensive extra step of securing written consent from what may be thousands of members. ^{44/} Accordingly, the FCC should act to ensure that entities like the Associations are not unduly hamstrung in their ability to provide meaningful benefits to their members.

^{42/} There are several ways it might achieve this. First, it could revise Section 64.1200(a)(3)(i) of the rules by adding a sentence reflecting that “a member’s application or enrollment in a trade association or similar organization shall be deemed evidence of the member’s prior express invitation or permission for the association or organization to transmit messages to the member’s telephone facsimile machine, unless the member expressly communicates otherwise to the association or organization.” The Commission also could add a new subsection (iii) to Section 64.1200(a)(3) exempting the transmission of messages from an association to its members’ telephone facsimile machines. Alternatively, it could revise Section 64.1200(f)(10) by adding a clause reflecting that the definition of “unsolicited advertisement” “does not include materials transmitted via facsimile from an association to its members.” Finally, the Commission could clarify that “unsolicited advertisements,” defined in Section 64.1200(f)(10) as “material advertising the commercial availability or quality of any property, goods, or services,” does not include any communication between an association and its members that relates to or arises from the membership.

^{43/} Elimination of the fax EBR exemption is problematic for associations for the additional reason that a number of them host one or more very large trade shows/conventions each year as a member and/or industry service. Such shows require the assistance of various contractors to help disseminate information to exhibitors and attendees. Typically, official vendors of electricity, AV equipment, computers, moving, etc., contact exhibitors to inform them as to what is available, when their order is due, etc., and exhibitors must have this information for proper set-up at the trade show. Other vendors must receive information on advertising banners and other types of business transactions. The most efficient and cost-effective way for most of this communications, including the transactions arising from it, to take place is via fax.

^{44/} *See, e.g.,* Comment of American Academy of Wound Management, filed July 28, 2003; Comment of Catherine A. Apker, filed July 29, 2003; Comment of Ann Guiberson, filed July 29, 2003. *Cf.* Comment of Fred A. Watson, filed July 29, 2003 (“Georgia Nursing Home Association performance to the 40,000 sick and infirm patients in this state will be impaired.”).

CONCLUSION

For the foregoing reasons, AAAA, ANA and NAB request that the Commission reconsider or clarify its rules prohibiting unsolicited facsimile advertisements to reinstate the “established business relationship” exemption or, at minimum, to permit trade associations to fax their members without having to first secure prior written permission.

Respectfully submitted,

AMERICAN ASSOCIATION OF ADVERTISING AGENCIES
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