

**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)	
)	

**FINANCIAL SERVICES COALITION PETITION
FOR RECONSIDERATION AND CLARIFICATION**

Gerard J. Waldron
Aaron Cooper
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000

Its Counsel

August 25, 2003

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INTRODUCTION AND SUMMARY

A group of trade associations representing the financial services industry, including the Mortgage Bankers Association of America, National Association of Mortgage Brokers, Consumer Mortgage Coalition, American Financial Services Association, American Bankers Association, America’s Community Bankers, Consumer Bankers Association, and the Financial Services Roundtable’s Housing Policy Council (collectively the “Financial Services Coalition” or “Coalition”),¹ seeks reconsideration and clarification of the new rules adopted June 26, 2003, by the Commission. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, (2003) (“Report & Order”). The Financial Services Coalition requests reconsideration and clarification of the Report & Order only as it affects the ability of the several trade associations and their members to communicate, conduct business, and disseminate information via facsimile. The

¹ The Mortgage Bankers Association of America, National Association of Mortgage Brokers, and Consumer Mortgage Coalition filed a Petition for Emergency Stay with the Commission on August 7, 2003, as part of the Business Users Coalition.

Commission's new unsolicited facsimile advertisement rules ("do-not-fax rules") are contrary to the public interest because they will disrupt the manner in which members of the Financial Services Coalition conduct their mortgage and other lending business by eliminating the established business relationship ("EBR") exception and otherwise imposing changes on how the Coalition members and its constituent groups handle various loan information and loan documents.

I. A BROAD CROSS-SECTION OF THE FINANCIAL SERVICES INDUSTRY URGES COMMISSION RECONSIDERATION

The Mortgage Bankers Association of America ("MBA") is a national trade association representing the real estate finance industry. Its membership of approximately 2,600 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, life insurance companies and others in the residential and commercial mortgage lending field.

The National Association of Mortgage Brokers ("NAMB") is the nation's largest organization exclusively representing the interests of the mortgage brokerage industry. NAMB has more than 16,000 members and represents mortgage brokers in all 50 states and the District of Columbia. While many factors have contributed to the recent record rate of home ownership, one of the principal factors has been the rise of wholesale lending through mortgage brokers, who provide consumers with more choices in loan programs and products.

The Consumer Mortgage Coalition ("CMC") is a trade association of national residential mortgage lenders, servicers, and service providers, including both independent businesses and members of large, diversified financial services holding companies. CMC

represents some of the nation's largest fully-private participants in the residential mortgage business.

The American Financial Services Association ("AFSA"), established in 1916, is the national trade association for market-funded providers of financial services to consumers and small businesses. AFSA represents over 300 diversified financial services companies, automotive finance companies, consumer finance companies, mortgage companies, commercial finance companies, credit card issuers and merchandise and department store retailers with significant financial businesses.

The American Bankers Association ("ABA") is an association that brings together all elements of the banking community to represent the interests of this rapidly changing industry. Its membership—which includes community, regional, and money center banks and holding companies, as well as savings associations, trust companies, and savings banks—makes ABA the largest banking trade association in the country.

America's Community Bankers ("ACB") represents the nation's community banks. ACB members, whose aggregate assets total more than \$1 trillion, pursue progressive, entrepreneurial and service-oriented strategies in providing financial services to benefit their customers and communities. ACB's member banks originate more than 25 percent of all mortgages in the United States, and significantly more than half of all mortgages originated by depository institutions. In addition, ACB members operate a large number of mortgage banking affiliates that originate a substantial part of the business from that segment of the industry.

The Consumer Bankers Association ("CBA") was founded in 1919 and is a trade association that provides leadership and representation on retail banking issues such as privacy, fair lending, and consumer protection. CBA members include most of the nation's largest bank

holding companies as well as regional companies and hold two-thirds of the industry's total assets. Member institutions are the leaders in consumer finance (auto, home equity and education), retail electronic commerce, small business services, and community development.

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. In April 2003, The Financial Services Roundtable formed the Housing Policy Council ("HPC") as a way to represent the interests of the Roundtable member companies who play a large role in the mortgage industry. The HPC currently consists of 15 Roundtable member companies.

Lenders and mortgage brokers represented by the above referenced trade associations rely heavily on facsimiles to communicate with their business partners, which include lenders, mortgage brokers, loan correspondents, real estate brokers, home builders, mortgage insurance companies, hazard insurance companies, outsourced service providers, appraisers, title insurance companies, real estate settlement providers and other providers of real estate services. Financial institutions also use facsimiles when communicating with automobile dealers, including sending dealer rate sheets and dealer specials. Any action that would restrict the ability of lenders or mortgage brokers to communicate with their business partners will severely impede their ability to make loans.

II. THE FINANCIAL SERVICES INDUSTRY RELIES HEAVILY ON FACSIMILES TO GENERATE, PROCESS AND MAKE LOANS

Financial service companies rely on facsimiles to communicate among themselves, with the real estate community, and ultimately with the consumer. One heavy use of facsimiles in the mortgage industry is between wholesale mortgage lenders (aggregators of

mortgages for securitization) and their delivery channels, namely mortgage brokers and correspondents. Although many mortgage lenders have retail branches, according to a recent study by Wholesale Access approximately 60 percent of loans are originated by mortgage brokers and correspondent lenders with funding from the wholesale lenders. It is the mortgage broker and correspondent businesses that have contributed to the virtual explosion in availability of mortgage funds to consumers in the last fifteen years. In 2002, the mortgage industry originated \$2.5 trillion in residential mortgages. MBA forecasts residential mortgage originations will reach \$3.2 trillion in 2003. While unprecedented low interest rates have played a crucial role in today's volume, the efficient delivery system has allowed supply to keep up with demand for residential mortgage financing because traditional brick-and-mortar branches are no longer necessary. Under the wholesale/broker and correspondent model, full service mortgage lenders act as intermediary investors to smaller lenders and mortgage brokers, providing liquidity to the market. To ensure a smooth operation, mortgage lenders must provide mortgage brokers and correspondents with up-to-date information about products they are willing to purchase or fund and at what prices. Mortgage brokers often send information about products and applicable rates by facsimile to entities such as real estate brokers and home builders, who, in turn, provide this information to consumers.

The benefit of the wholesale and broker/correspondent relationship is to make residential mortgage financing easily accessible and affordable to consumers. Borrowers benefit from this free flow of business-to-business information because mortgage brokers and correspondents have access to thousands of investors' products and prices. If mortgage brokers and correspondents are faced with impediments to obtaining mortgage product and pricing information from investors, consumers will have fewer choices of mortgage products and rates

and may risk losing valuable rate-lock opportunities. The same reasoning holds true for mortgage brokers, who provide product and pricing information to real estate agents, home builders and other entities. Allowing businesses to share mortgage information quickly and easily benefits consumers by making more products available for consumers and increasing competition among originators. The free flow of pricing and related information, via facsimile, is thus crucial to the efficient and effective operation of the mortgage and housing industries.

The information sent between members of the residential mortgage community is most efficiently sent and received via facsimile for two reasons. First, many of the recipients of product availability and rate information are small businesses that may not be equipped to receive this information by other electronic means. Second, mortgage brokers and other users of the information ultimately need the product information in hard copy form. Despite advances in email and other technology, sending information via facsimile is still the most efficient and most commonly used means of communicating interest rate and mortgage product information.

Business necessity demands that mortgage lenders and mortgage brokers be permitted to fax documents that flow from the borrower's verbal request or inquiry about mortgages without the consumer's written request. Remote lending has grown in popularity because it allows consumers to conduct mortgage loan transactions over the telephone or via the Internet without the delay of a face-to-face meeting with a loan officer. These transactions are often processed with the aid of a facsimile machine, which allows critical underwriting documents to be transmitted almost instantaneously. Facsimiles also allow the lender/broker/correspondent to send statutorily required disclosures to consumers, such as the Good Faith Estimate (required by the Real Estate Settlement Procedures Act), the Truth in Lending disclosure (required by the Truth In Lending Act) and the HUD-1 (required by RESPA).

Advance receipt of these disclosures allows the borrower greater rate shopping opportunities and review of critical costs prior to closing. Furthermore, other documentation sent during the origination process, whether or not required under Federal or state law, is often requested by the consumer to be sent via facsimile. Some of these documents could be found to fall within the Commission's broad definition of "unsolicited advertisement," and the threat of litigation will prompt companies to proceed cautiously, if not to abandon faxing entirely.

Consumers will find it cumbersome to provide a written consent when shopping for mortgage products, but more importantly, requiring consents will delay initiation of the loan transaction and the borrower's ability to lock-in a favorable rate. Faxing documents that flow from a mortgage inquiry or mortgage application should not trigger the need to obtain written consent from the borrower.

III. THE COMMISSION SHOULD REINSTATE AND REVISE THE ESTABLISHED BUSINESS RELATIONSHIP EXCEPTION

A. The Commission Should Reinstate the EBR Exception

As described above, the lending community relies heavily on sending and receiving information via facsimile. For the past eleven years, those facsimiles that are commercial advertisements under the Commission's rules have been sent under the EBR exception, which has been applied to facsimiles since 1992. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752, ¶ 54, n.87 (1992).² Both businesses and consumers have settled

² Although the EBR exception is not applied to facsimile advertisements in the text of 47 C.F.R. Section 64.1200, the Commission confirmed in 1995 that it did apply. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, Memorandum Opinion and Order, 10 FCC Rcd 12391, ¶ 37 (1995).

expectations based on the Commission's interpretation of the Telephone Consumer Protection Act of 1991 ("TCPA") that the EBR exception applies to facsimile advertisements. A complete reversal at this stage will wreak havoc on the residential and commercial mortgage industry and other lending industries without providing comparable advantages to consumer privacy.

The primary concern of the Coalition is with the scope of the do-not-fax rules. The Report & Order does not state any basis for imposing express written consent on *business-to-business* faxes. In fact, the Report & Order states the Commission's intent to protect consumers from unwanted faxes and relies heavily on positions expressed by consumer advocacy groups.³ Consumer advocacy comments are not probative on the question of whether business-to-business faxes are in the public interest.

As stated previously, as a general business practice, mortgage lenders do not send via facsimile unsolicited advertisements to consumers. Yet it is these so-called "junk" faxes, generally impermissible under current law, that appears to have prompted the Commission to change course. In the mortgage industry, facsimiles are used as a convenience to borrowers in order to speed up rate locks and mortgage origination process and closings and to ensure compliance with settlement dates imposed by home sales contracts or desired by borrowers to keep closing costs down (loans that close on the last day of the month have less interest costs at closing). In these cases and others like them, the reality is the borrower does have an established business relationship with the lender or mortgage broker and an expectation of good customer service. Failure to deliver on those expectations will cause considerable customer dissatisfaction

³ Report & Order at ¶¶ 185-86.

and missed opportunities. The need for an established business relation exception is, therefore, not limited to business-to-business facsimiles.

B. The Commission Should Craft an EBR Exception That Fits the Fax Context

The new definition of EBR, as it applies in connection with the do-not-fax rule, will have the most significant impact on business-to-business faxes within the financial services industry. The new definition limits how long a company is deemed to have consent from the fax recipient. The new definition reads:

a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three (3) months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

While the Coalition applauds the Commission for granting a stay of the do-not-fax rules, the new EBR definition will have a dramatic impact on lenders and mortgage brokers during the stay and thereafter. Wholesale lenders, for example, will be unable or unwilling to track whether the last transaction consummated with the broker or last inquiry made by a correspondent complied with the timelines. To reduce liability and compliance costs, wholesale lenders and mortgage brokers will be forced to obtain express consent rather than rely on the EBR exception. As a result, the EBR may be of limited value. The Coalition, therefore, seeks a bifurcated definition of the EBR rule: the Commission should apply the new EBR definition to

business-to-consumers faxed advertisements and maintain the existing EBR⁴ definition for business-to-business faxed advertisements.

This bifurcated approach is important because of the different needs of businesses and consumers. In the mortgage industry context, time limitations on the EBR exception will harm commercial entities that generally receive information about business opportunities regardless of whether they act on the information. The nature of the broker and wholesaler relationship, for example, is such that a broker does not necessarily deliver a consistent flow of mortgage products to each wholesale lender with which it does business. Brokers seek out the best price and products from hundreds of wholesale lenders. Therefore, it is common for a broker not to deliver a loan to a specific wholesale lender for over a year if that lender's prices or products are not competitive. However, that same wholesale lender two years later may lower rates below market to attract new customers or meet Community Reinvestment Act (CRA) demands, causing a rush of business. The new EBR definition would create obstacles for that wholesale lender to receive express consent to send out rate sheets or announcements of CRA products to brokers it did business with over 18 months ago, which would significantly, and unnecessarily, stifle the flow of important information and products. The Coalition requests that the Commission consider retaining the current established business relationship definition for business-to-business faxed advertisements.⁵

⁴ The former EBR rule provides: "a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party."

⁵ Removal of the reference to "residential subscriber" would remove a source of considerable confusion in the business-to-business fax content.

IV. THE COMMISSION SHOULD RECONSIDER AND CLARIFY ITS NEW EXPRESS CONSENT REQUIREMENT

A. The Commission Should Reconsider and Clarify What Constitutes Express Consent.

The new requirement in the do-not-fax rules that express consent be manifested by written, signed consent with the recipient's facsimile number is apparently premised on the idea that the recipient should have to make an affirmative indication of consent. But affirmative consent should not have to be in the form of a signed, written document. Imposing such a burdensome requirement will add significant costs and inefficiencies to the mortgage financing community, but does not yield much in public interest benefit. The record-keeping required of large and small businesses to keep track of consents for specific facsimile numbers is unwieldy and the benefits to consumers is speculative at best.

In passing the TCPA, Congress weighed the relative benefits of requiring express consent to be in written form and determined that there was no "compelling need" because such formalities "unreasonably restrict the subscriber's rights to accept solicitations of interest and unfairly expose businesses to unwarranted risk." H.R. Rep. 102-317, at 13. The Senate version of the legislation originally required the consent to be written, but that language was removed from the version of the bill that was reported out of Committee. *See* S. Rep. 102-178, at 5. While the House and Senate Reports were considering the do-not-call portion of the TCPA, it is evident that Congress's general conclusion was that any advantages gained from requiring written consent were outweighed by the economic and societal costs it imposes.

The Commission's goal of reducing unwanted facsimile advertisements by requiring express consent can be effectuated in a manner that is both consistent with Congressional objectives and not as devastating to small businesses as a written requirement.

The Financial Services Coalition requests the Commission reconsider the definition of express consent as follows:

- First, the do-not-fax rules should authorize verbal consent. As discussed above, it is clear that Congress believed written consent was an unnecessary burden to impose in obtaining and granting consent. Given the way the financial service industry operates, permitting consent to be given verbally would allow the industry to work efficiently while preventing facsimiles from being received by individuals who had not requested the information.
- Second, consent through email or a click-through system on an Internet site should be permissible. The requirement of an electronic signature in the Report & Order is overly formalistic and impractical given the capabilities of small businesses and consumers that deal in the financial services industry. Both email consent and a click-through, Web-based system require the recipient of an email to take an affirmative action to express consent, and are, therefore, consistent with the policy behind the Commission's new do-not-fax rules.
- Third, technology that inherently evidences consent, such as fax-on-demand, whereby the recipient specifically requests a facsimile to be sent to a specific number, should be deemed consent. A contrary determination would either end the fax-on-demand option for consumers, or permit individuals to order facsimiles through the system and then turn around and sue the provider of the information requested for \$500 a facsimile. Either result is untenable.

B. Other Issues for Reconsideration.

In addition to revising how consent can be obtained, the Commission also should address on reconsideration other aspects of its do-not-fax rules. These changes are consistent with the Commission's goal to protect consumers and balance that interest with the practical necessities of how businesses operate.

Consent should not require phone numbers. The Commission should not define express consent by requiring that one, unalterable facsimile number be included in the consent. Given the large number of small businesses that move each year, such a requirement would not only cause burdensome recordkeeping obligations on small businesses, but it would create

serious compliance problems as businesses move, expand to new offices, and get additional facsimile machines.

De Minimis advertising material. The Commission should also include a *de minimis* exception in the do-not-fax rules. Under such an exception, facsimiles not sent for the purpose of advertising, and that contain a *de minimis* amount of “advertising” information, would not be covered by the rules. To illustrate: lenders frequently include in small type at the bottom of statements information about a new loan product, but this *de minimis* advertising language should not trigger the need to get written consent where it otherwise would not be required.

Recipient must give timely notice. Recipients of unwanted faxes should have an obligation to notify the sender within a prescribed amount of time that the facsimile is unsolicited. Otherwise a recipient would be able to collect, and possibly encourage, unwanted faxes to increase the potential collection of statutory penalties.

Transaction documents are not “advertising.” The Commission should clarify that facsimiles sent as part of an agreed upon transaction, such as an invoice, or as part of negotiating terms, are not unsolicited advertisements.⁶ Facsimile is a viable means of communication, especially when signatures are required on documentation, during the mortgage origination process. If these types of facsimiles were to fall under the do-not-fax rules, it would create a major stumbling block in originating mortgage loans and significantly harm the industry.

⁶ Similarly, the Coalition seeks a clarification that Good Faith Estimates, Truth in Lending Disclosures, and other documents, whether or not required under state or Federal law, that flow from a mortgage transaction, application, preapproval or prequalification letter issued by the lender or mortgage broker to the borrower, would not be unsolicited advertisements. This should include any disclosure that contains pricing, interest rates, products or related fees.

The broad manner in which the Commission's rules are written could leave it open to this interpretation.

"Rate sheets" should not be considered unsolicited advertisements. The Coalition asks that the Commission consider providing an exemption for "rate sheets" due to the profound impact this rule would have on financial institutions. In order to conduct business in this wholesale market, the broker or intermediary needs accurate and timely information about product offerings. Lenders and insurers cannot reach the borrower or consumer community unless they are able to communicate quickly and conveniently with brokers and intermediaries. Facsimile transmissions are the single most effective way for lenders and insurers to communicate with brokers and intermediaries and for those brokers and intermediaries to provide information to their clients. As a result, lenders, insurers, loan brokers, and intermediaries do business on the basis of information communicated in rate sheets. The rate sheets contain the interest rates, fees, premiums, qualifications and terms for the loans or products the lender or insurer offers as well as information on which loan or insurance product types may have been changed or improved.

Faxed consent. The Commission should determine that a facsimile sent for the purposes of obtaining express, written consent, if that is required, would not be an unsolicited advertisement. The suggestion in the Report & Order that a faxed consent request is not permissible creates a "Catch-22" situation—a sender cannot send a faxed written consent request, but in many instances the only contact information the sender will have is the fax number. Thus, without some change in the Commission's rules the system will come to a crash because in many cases the only available means to obtain consent will not be available.

Tax-exempt organizations. The Coalition supports the Petition for Emergency Clarification filed by the American Society of Association Executives (“ASAE Petition”). The ASAE Petition requests a clarification that the do-not-fax rules do not apply to nonprofit associations acting pursuant to their tax exempt nonprofit purpose.

CONCLUSION

For the reasons stated herein, the Commission on reconsideration should revise its do-not-fax rules as proposed herein.

MORTGAGE BANKERS ASSOCIATION OF AMERICA
NATIONAL ASSOCIATION OF MORTGAGE BROKERS
CONSUMER MORTGAGE COALITION
AMERICAN FINANCIAL SERVICES ASSOCIATION
AMERICAN BANKERS ASSOCIATION
AMERICA’S COMMUNITY BANKERS
CONSUMER BANKERS ASSOCIATION
FINANCIAL SERVICES ROUNDTABLE’S
HOUSING POLICY COUNCIL

“FINANCIAL SERVICES COALITION”

By: 
Gerard J. Waldron
Aaron Cooper
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-6000

Its Counsel

August 25, 2003

SERVICE

Courtesy copies of the foregoing Financial Services Coalition Petition For
Reconsideration And Clarification were caused to be delivered this 25th day of August, 2003, as
follows.

By hand:

Christopher Libertelli
Marsha MacBride
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Matthew Brill
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Daniel Gonzalez
Office of Commissioner Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jessica Rosenworcel
Office of Commissioner Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Scott Bergmann
Office of Commissioner Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

K. Dane Snowden
Chief
Consumer and Governmental
Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Margaret Egler
Deputy Bureau Chief
Consumer and Governmental
Affairs Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jane Mago
Chief
Office of Strategic Planning
And Policy Analysis
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

John Rogovin
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Qualex International
Federal Communications Commission
Room CY-B402
445 12th Street, S.W.
Washington, D.C. 20554