

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

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

PETITION FOR RECONSIDERATION

1. Introduction and Summary

Wells Fargo & Company (“Wells Fargo”) respectfully requests that the Commission reconsider the proposed amendments to 47C.F.R. §64.1200 (a)(3)(i) (the “Rule”) regarding the conditions under which an advertisement may be sent to a telephone facsimile machine. Wells Fargo is a diversified financial holding company with over 30 subsidiary banks and several hundred additional subsidiaries that provide financial products and services to both consumers and business customers. Many of these companies utilize facsimile transmission to provide information to customers, prospects and those with whom they have various types of business arrangements. While we understand and indeed share the Commission's concern regarding unsolicited facsimile advertising, we believe the proposed change to the Rule—the elimination of the “established business relationship” exception combined with the adoption of a very restrictive definition of “express invitation or permission”—fails to consider the burdens that would be placed on consumers and businesses alike with respect to the transmission by facsimile of information that was, in fact, desired or even explicitly requested by the recipient.

2. Background

Wells Fargo's subsidiaries, like most financial service providers, utilize facsimile transmissions to provide information on a timely basis to customers, prospects and business associates. Two examples are as follows:

(a) Rate Sheets. Rates on both credit and deposit products may change frequently, even daily. In order to be in compliance with regulatory requirements such as Truth in Lending and Truth in Savings—not to mention sound basic business practices—financial institutions must promptly advise brokers, dealers and correspondents of changes in rates. Since not all of the users of this information have ready access to e-mail or software capable of reading and printing certain electronic document formats, facsimile is the most common method of transmitting such information. Wells Fargo's Auto Finance Group has a network of more than 8,000 automobile dealers, nationwide, to which it regularly faxes rate sheets. Likewise, Wells Fargo Home Mortgage has a network of more than 8,000 mortgage brokers and real estate agents to which it transmits rate information via facsimile. Other Wells Fargo subsidiaries have similar relationships with other types of correspondents with similar needs for prompt information regarding changes in rates and terms.

Because rate sheets announce the availability of a particular financial product or specific terms, they would appear to fall within the definition of “advertisement” [47C.F.R. §64.1200(f)(10)] but they are not “unsolicited” in the ordinary sense of that term if the information is an integral part of the business relationship between the sender and the recipient.

(b) Customer Statements. Like most financial institutions, Wells Fargo prints so-called “statement messages” on the periodic statements issued in connection with various financial products. These statement messages announce the availability and/or quality of financial products or services, and thus are presumably within the definition of “advertising.” Some customers—a small percentage—request that their statements routinely be delivered via facsimile. Many more customers make isolated requests that statements which were previously delivered by mail or electronically be resent by facsimile, often to

parties other than the account holder. For example, in a mortgage transaction, the lender may request that the borrower provide a copy of a bank statement to demonstrate the availability of funds for the down payment and non-financed closing costs. The required timeframe may be quite short to avoid jeopardizing a commitment or closing date. Thus facsimile may be the only satisfactory method of transmission. Either because the borrower doesn't have the statement, or because the borrower does not have easy access to a fax machine, the borrower often requests that the financial institution fax a copy of the statement, sometimes to the borrower, but more often to the new lender or its agent.

This situation poses two issues relative to the proposed amendment to the Rule. First, should the presence of a “statement message”—which, in and of itself would clearly be “advertising”—turn the faxing of the entire statement—of which the advertising message is only a small part—into an “unsolicited facsimile advertisement”? We respectfully suggest that it should not. It is clear to both sender and recipient that the advertising message is irrelevant to the transmission in question. The product or service being advertised in the statement message is most often a consumer product that would be inappropriate for the business that receives the fax. Even in the case of statements sent directly to customers, the statement message is often out of date.

Second, should our customer be precluded from requesting that we fax a statement bearing such a message to a third party such as another lender or its agent? Because of privacy considerations, the request to provide a copy of a statement must be made by the account holder, even though a third party is the intended recipient. When the recipient of the fax is our customer, simply restoring the “established business relationship” exception would solve the problem. However, even where the recipient of the fax is a third party that does not have a business relationship with the institution sending the fax, faxes which bear only incidental advertising should still be allowed without the necessity of obtaining formal written consent. This can be achieved by clarifying the definition “unsolicited advertisement” to specify that the

primary purpose of the message must be advertising, or that incidental “advertising” content does not trigger the need for formal consent.

The alternative—i.e. elimination of the “established business relationship” exception **and** restricting consent that will be recognized as sufficient to a formal written document with specified elements—would defeat the very purpose of the general ban on unsolicited facsimile advertising: to avoid the consumption of supplies and rendering facsimile machines unavailable for other service. The financial institution would be forced to tell the customer (or the third party recipient): “We can't fax the statement without a signed consent form.” The customer or third party would then say: “OK, send me a sample of such a form.” The institution would then send the consent form—presumably by fax, if there is any time pressure—to the customer or third party. The customer or third party would then return the signed consent—again, most likely by fax—and only then could the institution fax the statement that the customer and/or third party wanted all-along. What could have been done with one fax will instead require three.

3. Requested Relief

We believe that the proposed change to the Rule—the elimination of the “established business relationship” exception combined with the adoption of a very restrictive definition of “express invitation or permission”—would have the unintended effect of impeding the timely flow of information that is clearly needed and desired by those with whom we have business arrangements. It would also have the effect of making it extremely difficult to fax materials with only incidental “advertising” to customers and others who request that information and require it within a short period. We believe these burdens could be avoided—with little if any danger of increasing truly unwanted facsimile advertising—by making the following changes to the Rule before the new effective date:

- (A) Retain the “established business relationship” exception to the prohibition on transmitting advertising by facsimile, subject to the newly adopted restrictions on the definition and termination of an established business relationship.
- (B) Delete the requirement that “express invitation or permission” must be in writing, signed, include the covered fax number(s) and refer to “advertisements.” Asserting express invitation or permission is, for all practical purposes, an affirmative defense to a claim that an advertising fax was “unsolicited”; since the sender of the fax will bear the brunt of any failure of proof, senders should be free to determine what form of evidence they are comfortable with in this regard.
- (C) Include in the definition of “unsolicited advertisement” a clarifying statement to the effect that either (i) to be considered an “advertisement” the primary purpose of the material must be advertising, or (ii) that material which contains only incidental “advertising”—for example a bank statement with a “statement message”—will not be considered advertising.

For the reasons stated herein, Wells Fargo & Company asks the Commission to reconsider the Rule with respect to unsolicited facsimile advertising.

Respectfully submitted

Wells Fargo & Company



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